Industry codes of conduct in a multi-layered Dutch private law

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List of abbreviations

ABRvS	Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State)
AFM	Autoriteit Financiële Markten (Netherlands Authority for the Financial Markets)
AVMSD	Audiovisual Media Services Directive
B2B	Business-to-business
B2C	Business-to-consumer
CBb	College van Beroep voor het bedrijfsleven (Trade and Industry Appeals Tribunal)
CJEU	Court of Justice of the European Union
CSR	Corporate social responsibility
CTW	Commissie voor de Toetsing van Wetgevingsprojecten (Legislative Projects Review Committee)
DCC	Dutch Civil Code (Burgerlijk Wetboek)
DPA	Dutch Data Protection Authority (Autoriteit Persoonsgegevens)
EESC	European Economic and Social Committee
EU	European Union
GHF	Gedragscode Hypothecaire Financieringen (Code of Conduct for Mortgage Loans)
GPO	Gedragscode Persoonlijk Onderzoek (Code of Conduct on Personal Inquiry)
HR	Hoge Raad (Supreme Court of the Netherlands)
IFPL	Integrated Framework for Policy Analysis and Legislation (Integraal Afwegingskader beleid en regelgeving)
IIA 2003	Interinstitutional Agreement on Better Law-Making 2003
IIA 2016	Interinstitutional Agreement on Better Law-Making 2016
LDI	Legislative Drafting Instructions (Aanwijzingen voor de Regelgeving)
NGOs	Non-governmental organizations
NVB	Nederlandse Vereniging van Banken (Dutch Banking Association)
Rb.	Rechtbank (district court)
REFIT	Regulatory Fitness and Performance Programme
RO	Wet op de Rechterlijke Organisatie (Judiciary Organization Act)

TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCPD	Unfair Commercial Practices Directive
VFN	Vereniging van Financieringsondernemingen in Nederland (Dutch Finance Houses' Association)
Wbp	Wet bescherming persoonsgegevens (Personal Data Protection Act)
Wft	Wet op het Financieel Toezicht (Financial Supervision Act)

1 Introduction

"De rechtsorde kan niet optimaal functioneren, tenzij zij zowel inwendig, tussen de onderscheiden nationale en internationale normstelsels, als uitwendig, ten opzichte van àndere normstelsels haar positie juist bepaalt."[1]

1.1 Introduction

Private actors such as trade associations, multinational corporations and non-governmental organizations (NGOs) on the global, the European and the national level increasingly engage in regulatory activities across fields of law, including private law.[2] European and national legislators also play their part in this respect by relying upon private regulators in pursuing policy objectives and by introducing references to private regulation in private law legislation.[3] One result of this interaction is a large and varied number of industry codes of conduct – and it is this type of private regulation that is the object of study of this doctoral thesis.[4] Industry codes of conduct cover a wide array of topics (e.g., advertising, data protection, e-commerce, direct selling, consumer credit, mortgage lending, food safety, professional ethics, competition and corporate social responsibility) and regulate business-to-business (B2B) as well as business-to-consumer (B2C) relationships. Strikingly, however, the general private law debate in the Netherlands has failed to keep pace with these developments. A few exceptions apart,[5] Dutch private law scholars appear to show little interest in the topic: they generally tend to disregard the phenomenon of private regulation.[6] Nor have the Dutch legislator and the Dutch judiciary engaged extensively (or at least unequivocally) with private regulation.[7] As a result, the legal relevance of private regulation in Dutch private law is still surrounded by ambiguities.

This doctoral thesis picks up the gauntlet by addressing the legal relevance of industry codes of conduct in Dutch private law. The current chapter outlines how it will do so. The

[1] Enschedé 1984, p. 140. Own translation: "The legal order cannot function in the best possible way, unless it finds its proper place among *other* systems of norms, both internally, among the different national and international systems of norms, and externally".
[2] See, e.g., Büthe & Mattli 2011; Cafaggi 2011a and 2011b; Calliess & Zumbansen 2010; Vogel 2010; Dilling, Herberg & Winter 2008; Giesen 2007, pp. 17-34; Haufler 2001; pp. 8-30.
[3] Chapter 4 discusses how this practice takes shape in European and Dutch private law with regard to codes of conduct. See also Menting & Vranken 2014, pp. 11-24.
[4] Working definitions will be provided in section 1.5.
[5] Prominently among them, Vytopil 2015; Akkermans 2011; Kristic, Van Tilburg & Verbruggen 2009; Giesen 2008 and 2007; Vranken 2005; Van Driel 1989.
[6] Cf. Menting & Vranken 2014, p. 7. Far from being exceptional, Beckers suggests, this lack of attention in Dutch general private law debates characterizes the general private law debate as a whole (Beckers 2016, p. 1).
[7] See section 1.2.1.

scene will be set by taking a closer look at the state of affairs in Dutch private law as regards private regulation and by discussing the need for more research into the relation between private regulation (industry codes of conduct) and Dutch private law (section 1.2). Next, the relevance of the research will be clarified (section 1.3). Subsequently, the research question will be introduced and the methodology used in the research will be explained (section 1.4). Working definitions of 'private regulation' and 'industry code of conduct' are provided in section 1.5. The final section (1.6) lays out the structure of the book.

1.2 Private regulation and Dutch private law

1.2.1 The state of affairs according to Dutch private law literature: A synopsis

With the caveat that the Dutch private law literature referred to here dates from several years ago, the picture that emerges from this literature on the legal relevance of industry codes of conduct (and other forms of private regulation) is one of hesitancy and ambiguity.

In civil case law, this ambiguity springs from the diversity of judicial response in court cases that involve private regulation. Dutch private law literature touching upon the use of private regulation in civil case law shows that in some of these cases private rules are assigned legal relevance, but that they are denied such relevance in others.[8] Giesen submits that the Dutch Supreme Court takes a more open approach in this respect than do the lower courts (district courts and courts of appeal). However, the Court has thus far failed to direct the lower courts at this point.[9] The result of these diverging approaches is a lack of clarity on the legal relevance of private regulation, which is compounded by the absence of clear, detailed substantiation, and of clear assessment criteria in those cases that do assign legal relevance to private regulation.[10]

> The ambiguous approach of the Dutch judiciary can be illustrated by two frequently cited judgments of the Supreme Court: *Kouwenberg/Rabo* and *Trombose*.[11] The central issue in the *Kouwenberg/Rabo* case was whether a bank had breached its duty of care towards a client involved in option trading. One set of rules applicable to this case were the Rules concerning trade on the options exchange (*Reglement voor de handel op de optiebeurs,* hereafter: RHO). The RHO, drawn up by private actors, address the relation between the options exchange and the securities houses trading at the exchange. These rules included a specification of the duty of care of banks towards clients wishing to engage in option trading. Even though this duty of care was at the heart of the legal dispute, the Supreme Court refrained from applying the RHO, simply referring to the private, non-legal nature of the rules. In the final analysis, the Supreme Court

[8] Giesen 2008; Giesen 2007; Vranken 2005; Kristic, Van Tilburg & Verbruggen 2009. Chapter 6 surveys the state of play in Dutch civil case law.
[9] As Giesen observed in 2008 on the basis of a case law analysis. See Giesen 2008, pp. 790-792.
[10] Kristic, Van Tilburg & Verbruggen 2009, pp. 119-203; Giesen 2008. Cf. Vranken 2005, pp. 91-94.
[11] HR 11 July 2003, ECLI:NL:HR:2003:AF7419, *NJ* 2005/103 (*Kouwenberg/Rabo*) and HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*), para 3.3.3. Both judgments are analyzed in greater detail in Chapter 6 (sections 6.4.2.2.4 and 6.4.2.2.3, respectively). On these judgments, see also Vranken 2005, pp. 88-93; Giesen 2007, pp. 47-48, 78-81; Kristic, Van Tilburg & Verbruggen 2009, pp. 202-203. The brief description of the two judgments in this section is based on the English explanation provided by Vranken 2006, pp. 71-73.

regarded the RHO as only one of the elements relevant to determining the duty of care of the bank.[12] In the *Trombose* case, by contrast, the Supreme Court did apply private rules directly. The Court held the accused physician liable for not complying with a hospital protocol (as a consequence of which a patient developed thrombosis), because the standards included in the protocol were based on consensus between the hospital and its physicians about proper medical care and because physicians may be expected to comply with these standards.[13] Although the Court could have reasoned as it would later do in *Kouwenberg/Rabo*, it nonetheless based its decision directly on the protocol, without even referring to its private nature. This sharp contrast with the first case exemplifies the ambiguity that surrounds the position of private regulation in Dutch private law.

Existing studies suggest that the Dutch legislator takes a fairly reticent attitude when it comes to using alternative regulatory instruments. That is to say that the legislator only very occasionally considers the use of regulatory alternatives in *ex ante* evaluations of proposed legislation,[14] even though the use of such alternatives is one of the cornerstones of Dutch legislative policy.[15]

Some light is thrown on the matter by the few Dutch private law scholars that have addressed the binding force and permeability (*doorwerking*) of private regulation in Dutch private law. The prevailing opinion among these scholars is that private regulation can have legal relevance in Dutch private law.[16] Even so, questions remain as to the exact legal, law-developing status of private regulation and the need to introduce criteria that regulate the use of private regulation.

1.2.2 Broader perspectives

Going by the picture outlined by Dutch private law literature, it can be said that despite having assigned legal relevance to private regulation, the actors that shape and apply Dutch private law – i.e., the legislator, civil courts and legal scholars – do not always seem particularly inclined to engage with the phenomenon. At first blush, this might not come as a surprise. After all, as Vranken argues, thinking in Dutch private law is firmly rooted in the exclusive "framework of legislation and adjudication".[17] It is implicitly assumed that legislation and case law are the only sources of law on which private law builds. In this

[12] HR 11 July 2003, ECLI:NL:HR:2003:AF7419, *NJ* 2005/103 (*Kouwenberg/Rabo*), paras 3.5.3 and 3.6.3. Yet, as Vranken points out, the decision eventually reached by the Court on the basis of a list of viewpoints could have been reached more easily if the Court had applied the RHO directly. See Vranken 2005, p. 91.
[13] HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*), para 3.3.3.
[14] Van Gestel & Menting 2011. See also Chapter 4, section 4.3.2.3.3 and, anticipating the findings presented in Chapter 4, Menting & Vranken 2014, pp. 21-23.
[15] See Instructions 6, 7 and 8 of the Legislative Drafting Instructions (*Aanwijzingen voor de regelgeving*), as published in the Bulletin of Acts and Decrees (*Staatsblad*) 1992, 230 and subsequently amended. The latest version (ninth amendment) dates from 2011 (Bulletin of Acts and Decrees 2011, 6602). The approach of the Dutch legislator to private regulation (and industry codes of conduct in particular) is investigated more closely in Chapter 4 of this doctoral thesis.
[16] Particularly Akkermans 2011; Kristic, Van Tilburg & Verbruggen 2009; Giesen 2007; Vranken 2005; Van Driel 1989. See also Vytopil 2015. Hartlief (2007) is critical of the phenomenon of private regulation.
[17] Vranken 2006, p. 66.

conceptual framework, private regulation cannot acquire legal binding force on its own merits, due to its private origins. It can only gain such force when conferred upon by either the legislator (directly or through legislation) or the courts.[18] Private regulation lacking a clear, self-standing legal status might be one of the reasons why Dutch private law actors at times still exercise restraint when the legal relevance of rules drawn up by private regulators is at issue. However, when we look beyond this conceptual paradigm, the observations made in the previous section do become striking in several respects.

First of all, these observations do not correspond with the role private regulation could be presumed to play given the nature of Dutch private law. That nature, after all, is one of openness: Dutch private law abounds in open-ended legal standards and such standards are pre-eminently fit to facilitate the legal relevance of private rules. For example, private rules could be used to give substance to the general duties of care under private law or they could be considered to embody the prevailing juridical views in the Netherlands (Article 3:12 of the Dutch Civil Code – hereafter: DCC).[19] In other words, Dutch private law would appear to be well-suited to accommodate a legal role for private regulation, at least to a larger extent than it has done so far.

Secondly, the state of play in Dutch private law contrasts with developments in European private law,[20] where private regulation seems to be making more headway. Both the European legislator and the Court of Justice of the European Union (CJEU) have addressed the issue of private regulation with some regularity. Several European private law directives, for instance, refer to or stimulate the use of industry codes of conduct,[21] and the CJEU has subjected private regulatory arrangements to judicial scrutiny under both free movement law and competition law.[22] As a result of the strong interrelatedness of the European and the Dutch legal orders (cf. the multi-layered nature of Dutch private law),[23] the course taken by the European legislator and the CJEU in respect of private regulation inevitably impacts on (the role and relevance of private regulation in) Dutch private law.

[18] Vranken 2005, pp. 79, 82, 99, 101. For an English version of this contribution, see Vranken 2006, pp. 64-81.
[19] Giesen 2007, pp. 68-75.
[20] As Smits indicates, there is no clear definition of the concept of European private law, nor a common understanding of the scope of this field of law. Broadly understood, it can be described as "providing rules with relevance for private actors" (Smits 2012, p. 84).
[21] A case in point is the Unfair Commercial Practices Directive (2005/29/EC, *OJ* 2005, L 149/22), which, on conditions, marks non-compliance with a code of conduct under certain circumstances as an unfair commercial practice. More examples can be found in Chapter 4, section 4.4.1.1.
[22] For a detailed discussion, see, e.g., Mataija 2016. See also Chapter 5 of this doctoral thesis. Admittedly, the rules on free movement and some rules on competition are of a public law rather than a private law nature. However, it is private law relationships that are central to the judgments of the CJEU at this point. Hence, it can be argued that the rules do have private law relevance. For more detailed reflections, see Chapter 5, section 5.2.
[23] For an account of the influence of EU law on national private law in general, see Hartkamp et al. 2014a, and on Dutch private law in particular, see Hartkamp et al. 2014b. Cf. Van Schagen 2013 on the role of European and national State and non-state actors and their interdependence in the development of European private law. On the multi-layered nature of national private law, see, e.g., Van Gerven & Lierman 2010, pp. 21-27; Vranken 2006, pp. 94-95. The multilevel character of EU private law is discussed by Van Schagen 2013.

Private regulation has also been the subject of European scholarly debates in the field of private law, albeit to a modest extent when compared to the public law debates on the issue.[24] These public law debates address various issues, such as the complementary nature of the relation between public and private regulation,[25] the legitimacy and accountability of private regulators,[26] and the role of private rules in European legal integration[27].

Thirdly, following on from the observations made in the introductory section of this chapter, the marginal legal role of private regulation in Dutch private law does not square with the practical regulatory relevance it has to B2B and B2C relationships. Private regulation has so far shown itself to be anything but a fad. Rather to the contrary, in fact: in a world strongly influenced and shaped by processes of globalization, the traditional regulatory landscape is changing with the emergence of various private regulatory regimes at the global, the European and the national level.[28] These developments warrant the assertion that rule-making by private actors has become a fact of life in both the European and the national legal order.[29]

Viewed in this light, the 'Dutch state of affairs' that is apparent from Dutch private law literature is not merely striking, but can also be considered problematic, particularly in view of the latter two developments. As a result of the pervasive presence of private regulation in Dutch private law practice and the developments at the European level, (new) confrontations between private regulation and Dutch private law are inevitable. This is why it is a matter of some urgency that the legislator, civil courts and legal scholars further address the relationship between private regulation and Dutch private law and that these actors clarify the legal relevance of this type of regulation.[30] This doctoral thesis has been written in response to that urgency.

1.3 Relevance of the research: New perspectives

This thesis seeks to ascertain the legal relevance of a particular type of private regulation, namely industry codes of conduct, in Dutch private law. As follows on from section 1.2.1, it is not the first to do so: other private law scholars have paved part of the way. However, the value of their pioneering research notwithstanding, the scope of the existing scholarly contributions to the debate is limited in three respects. First of all, these contributions mainly

[24] Most contributions to the debate are sourced from Cafaggi (see the references to his work throughout this doctoral thesis). For a discussion of the topic from a European private law (related) perspective, see, e.g., the different contributions in Cafaggi 2006a; Verbruggen 2014a; Janczuk-Gorywoda 2012; Schiek 2007; Huyse & Parmentier 1990.
[25] E.g., Cafaggi 2006c, pp. 29-33; Cafaggi 2011b, pp. 91-26.
[26] See for instance Cafaggi 2006c, pp. 29-33; Cafaggi 2011b; Schiek 2007.
[27] Cafaggi & Janczuk 2010; Cafaggi 2010. See also Janczuk-Gorywoda 2012.
[28] See the literature referred to in n 2.
[29] Hartlief (2007) differs, arguing that private regulation is a fashion fad that will disappear as soon as the legislator changes course and stops using this type of regulation as part of its legislative policy. It can be argued, however, that this interpretation of the phenomenon is too narrow: in practice, private regulatory activities also take place outside the confines of governmental policy and the relevance of the phenomenon therefore does not depend entirely on the course pursued by the legislator.
[30] As early as 1984, Enschedé appealed for a clear positioning of the Dutch legal order vis-à-vis other systems of norms. See Enschedé 1984, p. 140 (quoted *supra* n 1).

approach the legal relevance of private regulation from the perspective of the judiciary: the perspectives of private regulators and of the legislator are not taken into account systematically.[31] Secondly, as Dutch private law scholars tend to focus almost exclusively on national private law, they usually do not consider European developments relevant to the topic.[32] Thirdly, the Dutch private law debate on the legal relevance of private regulation is of a predominantly theoretical nature. What it generally lacks is empirical data, for instance on the actual use of private regulation in B2B and B2C relationships, in spite of the fact that an empirical perspective may well bring to the fore new insights as to the legal relevance of private regulatory schemes.

The fact that the scope of the Dutch private law debate on the legal relevance of private regulation has thus far remained limited implies there is room to take some steps ahead, the more so because the latest contributions to the debate date back several years. This doctoral thesis seeks to take these steps by adopting a more comprehensive approach than the ones hitherto taken in Dutch private law literature. In doing so, it will introduce four new perspectives on the topic.[33]

The empirical study presented in this thesis into the functions of industry codes of conduct captures two of these new perspectives. As noted above, the Dutch debate is usually conducted from a theoretical perspective. The **empirical** study aims to add some practical insights to this debate. The **functions** of industry codes, in turn, are equally unknown to Dutch private law research: they are not prominently brought to the fore, if at all discussed. Arguably, however, these functions not only reflect the role and relevance of industry codes of conduct in practice, but also constitute the basis for a better understanding of the possible relationships between these codes and private law. With the picture outlined by Dutch private law literature suggesting that nothing much is to be expected from either the legislator or the judiciary at this point, other reference points are needed to provide the necessary clarity as regards the legal relevance of industry codes. Therefore, this doctoral thesis envisages using the functions as a stepping-stone for considerations on the private law relevance of these codes (see section 1.4.1).

The third new perspective to be introduced in this thesis is that of the **legislator** (the regulatory perspective). At first sight, this perspective may appear somewhat peculiar. After all, previous studies have shown that the Dutch legislator rarely considers using alternative regulatory instruments in *ex ante* evaluations, despite the formal embedding of such use in general legislative policy.[34] However, policymaking also occurs outside the confines of the legislative process. This might have resulted in governmental reliance on industry codes of conduct in the field of private law. Moreover, the European legislator has shown willing to use codes of conduct in pursuing its policy objectives in European private law.[35] As the use of industry codes by the legislator can have consequences for the legal relevance of these codes,

[31] Van Driel's doctoral thesis is an exception in this regard. See Van Driel 1989, pp. 42-82 in particular. This is partly different in the European private law debates, which often do seek to link up with EU legislative policy.
[32] Again, Van Driel 1989 is the exception.
[33] The next section describes how these perspectives will be given concrete shape.
[34] See Van Gestel & Menting 2011 and the brief discussion in section 1.2.1 above.
[35] See section 1.2.2.

it is only fitting that the approach of the European and Dutch legislators to industry codes of conduct be investigated – as this thesis will do.

Finally, as already follows from the foregoing, the fourth new perspective is the **European** one. Following the strong interrelatedness of the European and the Dutch legal order, the way in which industry codes are dealt with in European legislative policy, private law legislation and case law will inevitably affect the relationship between these codes and domestic private law. That being so, it stands to reason to analyze both the European and the Dutch legislative and judicial approaches to industry codes of conduct.[36]

1.4 Research questions and methodology

1.4.1 Research questions

This doctoral thesis seeks to answer the following central research question:

What is the legal relevance of industry codes of conduct in a multi-layered Dutch private law?

This central research question is broken down into the following three sub-questions:

1) What are the functions of European and Dutch industry codes of conduct from an empirical perspective?
2) How do the European and the Dutch legislators approach industry codes of conduct in European and Dutch private law and what legal relevance do these actors assign to these codes?
3) How do the Court of Justice of the European Union and the Dutch civil courts approach industry codes of conduct and what legal relevance do these actors assign to these codes?

Accordingly, the doctoral thesis rests on three pillars, which reflect the four perspectives outlined in the previous section: i) the functions of European and Dutch industry codes of conduct; ii) the approach of the European and Dutch legislators to these codes; and iii) the approach of the CJEU and the Dutch civil courts to these codes.

Pillar I – Functions (sub-question 1)

The functions of industry codes of conduct constitute the first pillar. These functions will be identified by using a purpose-built framework to analyze a large number of industry codes relevant to (private law) B2B and B2C relationships. Given the comparative element of the research, both European and Dutch industry codes will be studied.[37] The functions yielded by the empirical study will be compared and contrasted with the functions other research has

[36] See section 1.4.2.
[37] Chapter 2 details the design of the empirical study and the research methods used.

ascribed to private regulation in general and to industry codes of conduct in particular. Thus, it is sought to gain a better, empirically founded understanding of the role of industry codes of conduct in B2B and B2C relationships, as a run-up to the answering of the central research question in which the functions are also envisaged to play a role (see below).

Pillars II and III - Approach of the European and Dutch legislators and judiciaries (sub-questions 2 and 3)

Under the second and the third pillars, the focus will shift to the role of industry codes of conduct in private law practice, that is to say, in European and Dutch legislative policies, private law legislation and civil case law. The approach of the European and Dutch legislators constitutes the second pillar. The research under this pillar comprises an analysis of how these legislators use industry codes of conduct as part of their respective general legislative policies and in private law legislation. The third pillar concerns judicial approaches to industry codes of conduct and comprises an analysis of the case law of the CJEU and the Dutch civil courts. For both pillar II and III, it will be asked how industry codes are approached and what legal relevance is assigned to these codes. These questions will be answered on the basis of a study of legislative policy, private law legislation, case law and literature. In view of the comparative element of the research, particular attention will be paid to the influence of the European approach to industry codes of conduct on the legal relevance of these codes in Dutch private law. In this way, the research under the second and third pillars aims to present the main elements of the *current* state of affairs as regards the legal relevance of industry codes of conduct in Dutch private law.

Central research question

The findings under these three pillars will jointly lead to an answer to the central research question. In answering this question, account will first of all be taken of the findings documented for the second and third pillars. Have the Dutch legislator and the Dutch judiciary changed course, assigning greater relevance to industry codes of conduct, or has their attitude remained much the same, thus effectively maintaining the status quo? What are the implications of the European and the Dutch legislative and judicial approaches for the legal relevance of industry codes of conduct in Dutch private law? Attention will also be paid to differences between the European and the Dutch approaches and the European influence on the legal relevance of industry codes of conduct in Dutch private law. Following this discussion, the functions of these codes (pillar I) will be brought into play. These functions are envisaged to play a role as reference points and building blocks in determining the legal relevance of industry codes of conduct in Dutch private law.[38]

[38] See also section 1.3.

The broader perspective of Chapter 7, section 7.4

Although the central research question sets the parameters for the research conducted in this doctoral thesis, it does not cover section 7.4 of Chapter 7, in which the findings and conclusions of the research will be put into a broader perspective. More specifically, section 7.4 will - in an exploratory fashion - shed some light on a recurrent issue within Dutch private law literature: the need to regulate the use of codes of conduct. In thus adding a new element to this thesis, section 7.4 in fact goes beyond the scope of the central research question. It should be noted, however, that I do not seek to provide an exhaustive answer to the question of the need for regulation of industry codes. Rather, my aim is to explore the implications of the research findings for this issue. As such, section 7.4 in fact remains closely linked to the central research question: on the one hand, it builds on the research findings 'generated' under this question while, on the other hand, it takes these findings one step further by using them as a basis to address the 'regulation issue' in an exploratory way.

1.4.2 Methodology: An empirical and a comparative element

The methodological framework of this research comprises an empirical and a comparative element. The study into the functions of European and Dutch industry codes of conduct is the empirical element. The comparative element is reflected in the fact that account will be taken of both European and Dutch developments. In the empirical part of the research, this comparative element will be given shape by studying both European and Dutch industry codes. Do the functions of these codes differ depending on the level at which they have been drawn up?[39] In the discussion of the legislative and judicial approaches to industry codes, the comparative element is reflected in the comparison of the European and Dutch approaches and in the assessment of the influence of the European developments on the national level.

As a result of the different institutional contexts, it is difficult to facilitate a true comparison between the European Union and the Netherlands.[40] However, as might already have become apparent from the foregoing, this thesis does not seek to provide a full-fledged comparison. Rather, the main aim of the comparison is to ascertain the (inevitable) European influence on Dutch private law in respect of industry codes of conduct and the consequences that this has for the legal relevance of these codes. Additionally, the approaches of the European legislator and the CJEU to such codes might serve as a source of inspiration for the ways in which these codes can be dealt with in Dutch private law. In other words, the word 'comparative' is used with the caveat that it does not refer to comparison as it is usually understood in comparative law methodology.

[39] With a view to answering this question as accurately as possible, available Dutch equivalents of European codes of conduct were, included in the empirical study so as to better facilitate a comparison between the codes. For more details, see Chapter 2, section 2.3.2.

[40] Eijlander for example observes that comparing the use of private regulation in European and in national legislative policies is not an easy task, because EU legislation and national legislation have different functions. See Eijlander 2005, p. 7.

1.5 Working definitions

The scope of this doctoral thesis is limited to private regulation by means of industry codes of conduct. This section provides working definitions of both private regulation and industry codes of conduct, without the aspiration of engaging in the lengthy, inconclusive definitional debates that the phenomenon of private rule-making has given rise to.

1.5.1 Private regulation

Scholars use different terms to refer to the phenomenon of private rule-making, with self-regulation and co-regulation being the prevailing ones in legal discourse.[41] This doctoral thesis, however, prefers the notion of private regulation, for two reasons.

First of all, the notion allows for capturing the various relationships that can exist between public and private regulation. Many private regulatory schemes are, to a greater or lesser extent, subject to some form of governmental input.[42] This implies that private regulation and state regulation are rigidly opposed concepts only in their purest form. In this sense, they are two extremes of a continuum on which one can find different private regulatory schemes that are influenced by the state to varying degrees.[43] Unlike self-regulation and co-regulation, the notion of private regulation has a neutral connotation in terms of state involvement and as such it can adequately cover the different manifestations of private rule-making that result from interaction with the state.

Secondly, the term private regulation reflects the fact that in practice, private regulatory schemes mostly do not function in complete isolation from such external actors as consumers, NGOs and competitors. The regulatory effects of these schemes often affect these external actors and in some instances, these actors have a say in the regulatory process.[44] It is through this external input that private regulation distinguishes itself from self-regulation, which is referred to as a single-stakeholder model in which the regulators and the regulated coincide.[45] Industry codes of conduct, on the other hand, are said to constitute prime examples of self-regulation.[46] Nonetheless, the regulatory effects of industry codes are most often not limited to the group of regulated actors: they can also affect third parties, either positively (when codes grant 'rights' to third parties) or negatively (when codes create obligations for third

[41] Janczuk-Gorywoda 2012, pp. 19-20. Verdoodt 2007, p. 3 offers an impression of the different terminologies used.
[42] For a discussion of the different forms of interaction that can take place between public and private regulation, see, e.g., Buck-Heeb & Dieckmann 2010, pp. 35-41; Verdoodt 2007, pp. 51-69; Cafaggi 2006c, pp. 21-35; Gunningham & Rees 1997, pp. 364-366; Black 1996, pp. 27-28; Huyse & Parmentier 1990, pp. 260-266; Geelhoed 1993, pp. 49-51. See also the literature referred to in n 43.
[43] See, e.g., Ogus & Carbonara 2011, p. 229; Bartle & Vass 2007, pp. 888-890; Verdoodt 2007, pp. 15-16; Sinclair 1997; Ogus 1995, pp. 99-100. Cf. also the literature referred to in n 42.
[44] Mataija 2016, p. 9; Janczuk-Gorywoda 2012, p. 20.
[45] On the analytical distinction between private regulation and self-regulation, see, e.g., Cafaggi 2006c, pp. 18-19; Verbruggen 2013, pp. 4-5; Janczuk-Gorywoda 2012, p. 20.
[46] Verbruggen 2013, p. 4. See also Cafaggi 2011a, pp. 32-34.

parties).[47] Hence, arguably, industry codes of conduct can also be perceived as a form of private regulation.

For these reasons, this doctoral thesis uses the term 'private regulation'. Following Verdoodt's approach, it was opted for a working definition that starts from the idea of private regulation as a graded concept (*gradueel concept*) so as to fully capture the possible relationships of interaction between public and private regulation, as well as between private regulation and external actors. In consequence, the private origins of the rules are the starting point and 'governmental influence' the variable that makes private regulation move along the regulatory continuum, the far ends of which are formed by purely private regulation and state regulation.[48] In formulating the working definition, account was also taken of the fact that private regulators often operate in which Scott has called 'complete' regimes: not only do private regulators engage in rule-making activities, they also often implement and enforce their own rules.[49] This has resulted in the following broad working definition of private regulation:

> Non-state rules set by the regulated private actors or their representatives, in cooperation with other actors or in any other way, which are implemented and/or enforced entirely or in part by the private regulators themselves.[50]

This doctoral thesis focuses on the rule-making capacity of private regulators: their monitoring and enforcement activities fall outside the scope this research.[51]

1.5.2 Industry code of conduct

In general terms, codes of conduct can be described as "written documents that lay down standards which communicate what behaviors are (morally) required"[52] that can be drawn up by both private and public actors. The content of these codes can vary between general rules of conduct, which can be both of an ethical or more concrete nature, and (ethical or concrete) rules concerning the activities performed by the regulated actors, such as the provision of

[47] Cf. Cafaggi 2011b, pp. 96-97. Cafaggi indicates that self-regulation can equally pursue the interests of external actors. The main difference, so Cafaggi asserts, between private regulation and self-regulation lies in the fact that the former concept denotes multi-stakeholder models in which the regulated as well as other stakeholders participate, while the latter concept refers to single-stakeholder models. See Cafaggi 2006c, p. 19. Still, this doctoral thesis uses the term private regulation, because that term is deemed to more adequately reflect both the possible impact of the private rules on external actors and the possible links between public and private regulation.

[48] Verdoodt 2007, pp. 15-18. Cf. Page 1986, p. 144: "Self-regulation is a matter of degree".

[49] Scott 2002, p. 58: Private regulators "may set standards, monitor for compliance and carry out enforcement without the need for intervention from others such as government departments and courts". See also Scott 2006, pp. 132-133.

[50] This definition is based on Van Driel's definition of self-regulation: "*Niet-statelijke regels die al dan niet in samenwerking met anderen worden vastgesteld door degenen voor wie de regels bestemd zijn respectievelijk hun vertegenwoordigers, en waarbij toezicht op de naleving mede door deze groepen wordt uitgeoefend*" (Van Driel 1989, p. 2). Enforcement is to be understood in a broad sense, i.e., as encompassing monitoring, dispute resolution and/or sanctioning.

[51] On the enforcement of transnational private regulation, see, e.g., Verbruggen 2014a; Cafaggi 2012a.

[52] Oude Vrielink, Van Montfort & Bokhorst 2011, p. 486 with further references.

SMS services,[53] or specific topics (e.g., the processing of personal data[54]). Building on the working definition of private regulation provided in the previous section and focusing on codes drawn up by *private* actors, a code of conduct can be defined as:[55]

> A set of rules drawn up by the regulated private actors or their representatives, in cooperation with other actors or in any other way, which lay down standards of behavior for the regulated private actors towards their stakeholders, and which are implemented and/or enforced entirely or in part by the private regulators themselves.[56]

Different types of codes of conduct exist. One can for instance classify codes of conduct according to the nature of the private regulator (e.g., trade associations, professional bodies, (multinational) corporations, NGOs, public actors),[57] the foundations of a code (organizational or contractual)[58] or the level on which the code has been drawn up (industry-level or company-level)[59]. Given the empirical element of this doctoral thesis, it studying all different types of codes was unfeasible. Therefore, it was decided to limit the scope of this doctoral thesis to one particular type of code of conduct. In doing so, the third classification (level) was taken as a starting point, as this classification in effect covers, at least in part, the other two classifications. Thus, a choice had to be made between focusing on industry-level codes or on company-level codes. Existing research, legal or otherwise, mainly focuses on the latter type of codes: codes of conduct drawn up by (multinational) corporations have already been the subject of various studies (including private law research), most notably in relation to the topic of corporate social responsibility.[60] Industry-level codes, by contrast, have

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[53] See the Dutch SMS Service Provision Code of Conduct (available at <www.payinfo.nl/gedragscodes>, accessed 1 July 2016).

[54] See, e.g., the different privacy codes of conduct approved by the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*), which can be found at <https://autoriteitpersoonsgegevens.nl/nl/zelf-doen/gedragscodes> (accessed 1 July 2016).

[55] Cf. the definition of code of conduct in Article 2(f) of the Unfair Commercial Practices Directive (2005/29/EC, *OJ* 2005, L 149/22): "an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors".

[56] It should be noted that regulatory instruments that meet this working definition are not always called codes of conduct. Both in practice and in legal literature, a variety of terms is used (e.g., code of practice, code of ethics, rules of practice, rules of ethics, guidelines, code of honor) to designate what is in essence one and the same phenomenon, i.e., a set of rules of conduct. See Oude Vrielink, Van Montfort & Bokhorst 2011, p. 487. See also Baarsma et al. 2003, p. 28 (indicating that historical traditions and strategic arguments play a role in the decision how to name a regulatory instrument). This implies that it is the content of a regulatory instrument rather than its name that will be decisive in assessing whether it meets the working definition.

[57] See, e.g., Mamic 2004, pp. 43-33 (company codes, multi-stakeholder initiatives, intergovernmental codes and framework agreements), Jenkins 2001, p. 20 (company codes, trade association codes, multi-stakeholder codes, model codes and inter-governmental codes); Kolk, Van Tulder & Welters 1999, pp. 152-153 (governments or international organizations, social interest groups, firms, business support groups). Cf. Cafaggi 2011a, pp. 31-38 (an industry-driven model, a primarily organizational model led by NGOs, an expert-led model and a multi-stakeholder model).

[58] Cafaggi 2007, pp. 171-178.

[59] Van der Heijden 2011, p. 5.

[60] The overviews compiled by Kaptein & Schwartz 2008 and Helin & Sandström 2007 reveal that empirical studies of corporate codes often focus on issues such as effectiveness, implementation and compliance. Corporate codes have only recently started to attract the attention of private law scholars. See, e.g., Beckers 2016; Beckers 2015; Peterkova-Mitkidis 2015; Vytopil 2015; Van der Heijden 2012; Enneking 2012.

received relatively little academic attention. For that reason, this thesis focuses on codes of conduct drawn up at the industry level.[61] More specifically, given the European and Dutch private law setting of this doctoral thesis, the research is concerned with European and Dutch industry codes of conduct that are relevant to private law B2B and B2C relationships.

1.6 Outline

This doctoral thesis is structured as follows.

Chapters 2 and 3 center on the empirical study into the functions of European and Dutch industry codes of conduct. Chapter 2 sets out the design of this study and explains the methodology used to identify those functions. The findings of the empirical study, the functions, are presented in Chapter 3. The first part of this Chapter is concerned with defining and categorizing the functions. In the second part, the functions identified on the basis of the empirical study are compared with the functions mentioned in the literature.

Chapter 4 investigates how the European and Dutch legislators use industry codes of conduct in private law. To this end, it first assesses the developments concerning the place of alternatives to legislation in the general legislative policies of the EU and the Netherlands. Secondly, it takes a closer look at European and Dutch private law legislation in which it is referred to industry codes and it examines several cases outside legislation where the European and Dutch legislators rely on industry codes. Thirdly, it discusses the criteria for using alternatives to legislation in European and Dutch legislative policies.

Chapters 5 and 6 analyze the European and the Dutch judicial approaches to industry codes of conduct. Chapter 5 focuses on how the CJEU deals with industry codes, while Chapter 6 examines how in civil suits Dutch lower courts (district courts and courts of appeal) and the Dutch Supreme Court deal with industry codes.

Chapter 7, the final chapter, presents the main findings of the research and provides an answer to the central research question on the legal relevance of industry codes of conduct in a multi-layered Dutch private law. The chapter subsequently takes these findings and conclusions one step further by discussing their broader implications and - going beyond the scope of the central research question in section 7.4 - by using them to take a closer, exploratory look at the issue as to whether there is a need to formulate a (legal) framework for the use of industry codes of conduct. The Chapter closes with an outlook.

The research was closed on 1 July 2016.

[61] These codes are mainly authored by trade associations or professional organizations, either in cooperation with other organizations (e.g., consumer organizations) or in any other way.

2 The empirical study: Research design and methodology

2.1 Introduction

The first part of this doctoral thesis is devoted to the functions of European and Dutch industry codes of conduct, which were identified on the basis of an empirical study. In a nutshell, this study consisted of a textual analysis of a selected number of industry codes, conducted on the basis of a purpose-built framework of analysis. In this way, I sought to identify the *possible* functions of European and Dutch industry codes as completely and specifically as possible.[62] This chapter will describe the research design of the empirical study and the methodology applied to arrive at the identification of the functions, starting with some notes on the added value of the empirical study.[63] The design of the study was finalized in December 2011. The information and data presented in this chapter reflect things as they stood at that date. The empirical study was conducted in the first half of 2012.

2.2 Added value of an empirical study into the functions of industry codes of conduct

The choice to conduct an empirical study was motivated by the theoretical nature of the European and Dutch private law debates on private regulation: generally, empirical insights into the actual practice of private regulation are not taken into account. Hence, an empirical study into the functions can be expected to add new perspectives to the existing debate. The choice to opt for my own, *new*, study might at first blush appear a bit odd, however. Considering that the functions of both corporate codes and industry codes have already been discussed by legal scholars as well as scholars from other disciplines, most notably the disciplines of business ethics and professional ethics,[64] why not draw on the existing (empirical) studies into the functions, motives and objectives of codes of conduct to establish the functions of European and Dutch industry codes? Since a new empirical study was

[62] Thus, it was not aimed to provide an exhaustive overview of *the* functions of European and Dutch industry codes of conduct.
[63] The research design and methodology set out in this chapter are based on the exploratory empirical study into the functions of European and Dutch industry codes that I conducted as part of my Master's thesis (Menting 2011). The empirical inquiry carried out in the course of this doctoral thesis is a continuation of that study.
[64] See the literature referred to in Chapter 3, section 3.4.

expected to provide added value for the purposes of this thesis in several respects, I did not elect to link up with these studies, at least not as a basis on which to identify said functions.

First of all, the literature touching upon the functions, motives and objectives of private regulation has either a very general focus, i.e., on private regulation in general, or a fairly specific focus, i.e., on corporate codes or on codes of a specific industry, or a specific profession. Accordingly, the scope of existing studies differs from that of this doctoral thesis, which focuses instead on European and Dutch industry codes of conduct. This necessitated an empirical inquiry of my own. Secondly, literature tends to focus on global, European *or* national codes of conduct. This thesis, by contrast, takes a European *and* a Dutch perspective. Thirdly, conducting my own, new, empirical study on the basis of a comprehensive framework of analysis has the important advantage that the initial results will display more than just the functions. That is to say that the results[65] will also provide insights into, for instance, the binding force of the codes, the nature of the private rules and the availability of private enforcement mechanisms. These insights can also be considered relevant with a view to the envisaged role of the functions as a stepping-stone towards addressing the central research question on the legal relevance of industry codes in Dutch private law.

2.3 Research design: Composing the sample

This section describes how the sample of European and Dutch industry codes of conduct was composed. As mentioned at the outset of this chapter, the aim of the study was to provide a general overview of the possible functions of these codes. This implies that the sample of European and Dutch industry codes had to be relatively large and diverse. The process towards obtaining this sample involved two moments of selection: a selection of industry sectors (section 2.3.1) and a selection of industry codes (section 2.3.2).

2.3.1 Selection of the sectors

2.3.1.1 Broad or limited sample?

The selection of the sectors from which the European and Dutch industry codes were eventually to be drawn first of all involved a choice between using a broad sample, consisting of a small number of codes within each sector, or a limited sample, consisting of a large(r) number of codes within a few sectors. Both options have advantages as well as disadvantages. The option of using a broad sample allows for a broad overview of the functions of industry codes across the different sectors, making it a suitable option for composing a cross-section of functions. Furthermore, this option has the advantage of involving all industry sectors. This would rule out the danger of selection bias. Nevertheless, this method of sampling also has an important drawback. When the time and means for an empirical study are limited, as was the case with the study conducted for this doctoral thesis, opting for this approach would imply

[65] Which had to be interpreted and transformed into criteria in order to define the functions, see Chapter 3.

that for each sector, only a few codes of conduct could be studied. This would probably lead to less detailed conclusions, simply because the range of codes studied would be too diverse. Furthermore, the size of the sample would allow for neither generalized statements nor generalized conclusions. With a view to the aim of the empirical study, composing a comprehensive overview of the possible functions, and the comparative element of this research, this loss of detail was deemed undesirable. Therefore, though this first option might have allowed for a very broad overview of the functions, it was decided to opt for a limited sample comprising a sufficient number of codes within several sectors.

Within the context of this doctoral thesis, using a limited sample composed of a more 'homogenous' set of industry codes of conduct has the important advantage that it allows for drawing more general conclusions. As such, it can better facilitate a comparison between the functions of European and Dutch industry codes. This option was therefore deemed most suitable to reach the goals of the empirical study. The arguments in favor of using a limited sample are sufficiently strong to outweigh the disadvantage that not all sectors will be covered and that, as a consequence, no definite conclusions can be drawn as to *the* functions of industry codes of conduct. The latter, after all, is not the aim of the empirical study; it is not ruled out that industry codes have more or other functions than the ones identified on the basis of the empirical study. Furthermore, by diversifying the selected sectors, the empirical study can still lead to a modest cross-section of the functions. Therefore, it was opted for a limited sample.

2.3.1.2 Selection of the sectors

The starting point in the selection of the sectors was the Dutch reference classification of economic activities: the 2008 Standard Industrial Classifications (*Standaard Bedrijfsindeling 2008*, hereafter: SBI 2008), version of July 2008.[66] The SBI 2008 is based on and corresponds with the international reference classification of the United Nations, the International Standard Industrial Classification of All Economic Activities, Rev. 4 (2008) (ISIC Rev. 4),[67] and the European classification, the Nomenclature statistique des activités économiques dans la Communauté Européenne, Rev. 2 (2008) (NACE Rev. 2)[68].[69] These reference classifications, which are used as a tool for economic statistical analysis, comprise a

[66] The July 2008 online version of the SBI 2008 used for the empirical study is no longer available. However, the SBI has only been slightly altered, i.e., made more detailed, over the years; the main categories have remained the same. For an overview of the changes that were made, see <www.cbs.nl/nl-nl/onze-diensten/methoden/classificaties/activiteiten/standaard-bedrijfsindeling--sbi--/sbi-2008-standaard-bedrijfsindeling-2008> (accessed 1 July 2016). Here, one can also find later versions of the SBI 2008, starting with a 2012 version.

[67] Available at <http://unstats.un.org/unsd/cr/registry/isic-4.asp> (accessed 1 July 2016).

[68] Available at <http://ec.europa.eu/eurostat/ramon/index.cfm?TargetUrl=DSP_PUB_WELC> (accessed 1 July 2016).

[69] These reference classifications are linked by a hierarchical structure. The ISIC constitutes the 'basic' classification. The NACE is the European specification of the ISIC. The SBI, in turn, is a more detailed, Dutch version of the NACE. For an explanation of the relations between the three systems, see the scheme on <www.cbs.nl/nl-nl/onze-diensten/methoden/classificaties/algemeen/relaties-tussen--inter--nationale-standaardclassificaties> Cf. also the correspondence table between ISIC Rev. 4 and NACE Rev. 2 at <http://unstats.un.org/unsd/cr/registry/isic-4.asp> (websites accessed 1 July 2016).

hierarchical, layered division of economic activities. The usefulness of these classifications in designing the empirical study lies in the fact that they in effect provide an overview of the existing sectors: the main, highest-level groups of economic activities can be viewed as industry sectors.[70] Hence, the classifications were taken as a starting point for the selection of the sectors. As will be explained below, one of the selection criteria pertains to the number of industry codes within a sector. With a view to this criterion, it was decided to base the selection of the sectors on the SBI 2008 (version July 2008):[71] in being the most detailed reference classification, the SBI generates most queries for the search for industry codes (see below under 2 and section 2.3.2).

The SBI 2008 (version July 2008), like the ISIC and the NACE, comprises twenty-one main groups or sectors, coded with a letter:

A) Agriculture, forestry and fishing
B) Mining and quarrying
C) Manufacturing
D) Electricity, gas, steam and air conditioning supply
E) Water supply; sewerage, waste management and remediation activities
F) Construction
G) Wholesale and retail trade; repair of motor vehicles and motorcycles
H) Transportation and storage
I) Accommodation and food services
J) Information and communication
K) Financial institutions
L) Renting, buying and selling of real estate
M) Consultancy, research and other specialized business services
N) Renting and leasing of tangible goods and other business support services
O) Public administration, public services and compulsory social security
P) Education
Q) Human health and social work activities
R) Sports, culture and recreation
S) Other service activities
T) Activities of households as employers; undifferentiated goods- and service-producing activities of households for own use
U) Activities of extraterritorial organizations and bodies

The sectors that were to be included in the empirical study were selected on the basis of three criteria: (1) specificity of the sector, (2) number of codes within a sector and (3) the turnover of each sector.[72] Thus, it was sought to select those sectors in which industry codes are presumably of particular societal and regulatory importance for private law B2B and B2C relationships.

1) Specificity of the sector

As a first step in the process of selecting the sectors, sectors that did not fit the private law scope of this doctoral thesis or were deemed of a too specific nature were excluded from the

[70] As Statistics Netherlands (*Centraal Bureau voor de Statistiek*) for instance does in its statistical information on enterprises.

[71] As the outlines of three classification systems correspond (see *supra* n 69), the connection with the international and the European classification was maintained.

[72] The industry sectors were not selected not at random, because important sectors might be missed using that method.

list of sectors. This led to the exclusion of four sectors: 'Public administration, public services, compulsory social security' (O), 'Human health and social work activities' (Q), 'Sports, culture and recreation' (R) and 'Activities of extraterritorial organizations and bodies' (U). The public administration sector was left out because this thesis focuses on industry codes drawn up by private actors. Extraterritorial organizations and bodies were excluded for a similar reason. The health sector, in turn, was excluded with a view to the fact that the private regulatory 'system' in place in this sector has a rather specific and quite complex nature, due to its embedding in legislation and regulations. It is a regulatory system in its own, as it were. The culture, sports and recreation sector, finally, was not selected as the codes within this sector (at least in sports) were expected to be predominantly focused on the relation between an association and its members, and not so much on the B2B and B2C private law relationships on which this thesis focuses. This places codes of conduct in this sector in a somewhat different context.

2) Number of codes

The number of industry codes within each of the remaining seventeen sectors was taken as a second criterion, for two reasons. First of all, the number of codes within a sector might be an indication of the importance of private regulation by industry codes in that sector.[73] Secondly (and more pragmatically), a sufficient number of European *and* Dutch codes of conduct had to be present in a sector in order to meet the objective of establishing the functions of European and Dutch codes.

The subsequent exercise of compiling a list of European and Dutch industry codes was not all plain sailing: there are no comprehensive lists that provide an overview of the industry codes within a sector. Literature and existing empirical studies proved of only little help at this point, as most research focuses on a selection of industry codes within a specific policy area or sector.[74] This necessitated an own quick scan in order to roughly[75] determine the number of European and Dutch industry codes within each of the remaining sectors.

Quick scan

The quick scan was limited to industry codes that were published online. Although the main focus of the scan laid on codes drawn up by European and Dutch trade associations, I also took on the board industry-level codes drawn up by other European or Dutch private actors (e.g., NGOs) or as a joint effort of different industry actors (multi-stakeholder initiatives) that I came across during the quick scan. Thus, no selection was made on the basis of the nature of the authors of the codes, with the exception of (public) codes drawn up unilaterally by the government or (inter)governmental organizations. The only criterion that was applied in this respect was that the actors originated and acted at the European or Dutch industry level.

[73] A large number of codes might also increase the chance that either consumers or businesses in that sector are confronted with codes of conduct in private law B2B or B2C relationships.
[74] The European and Dutch industry codes of conduct referred to in the literature were added to the list compiled for this study.
[75] Thus, it was not aimed to compile a comprehensive list of existing codes.

Likewise, the name of a private regulatory initiative was not regarded as decisive.[76] Initiatives that were not named code of conduct, but, after a very brief inspection, did appear to meet the working definition of 'industry code of conduct' provided in Chapter 1 were put on the list.

The quick scan was conducted on the basis of the following method. The Self- and Co-regulation Database of the European Economic and Social Committee (EESC database)[77] provided a first handle for my search for *European* codes of conduct. This database contains a large number of European self-regulatory and co-regulatory initiatives. A second handle was provided by the Social Dialogue texts database, which contains regulatory initiatives that result from the European Social Dialogue.[78] However, not all European private regulatory initiatives are included in these databases. Moreover, the EESC database was not up-to-date at the time the quick scan was conducted.[79] Therefore, I conducted an additional search for European industry codes, using the search engine Google. In conducting this search, I systematically used the search query 'European code of conduct' and synonyms of that query (listed in Figure 2.1). If needed, these search queries were refined by adding the [name of the industry sector or economic activity].[80] In addition, the websites of a large number of European trade associations were searched for codes of conduct. On the *Dutch* level, no database with national private regulatory initiatives exists. Consequently, the quick scan at this point only consisted of a systematic Google search, using the composed search term [one of the queries listed below] + [name of the industry sector/economic activity][81] and a search on the websites of various Dutch trade associations.[82]

Figure 2.1 – Overview search queries

Search queries EU		**Search queries NL**
English query	*Dutch query*	
European code(s) of conduct	Europese gedragscode(s)	Gedragscode(s)
European code(s) of ethics	Europese ethische gedragscode(s)	Ethische gedragscode(s)
European code(s) of practice	-	
European rules of conduct	Europese gedragsregels	Gedragsregels
European rules of ethics	Europese ethische gedragsregels	Ethische gedragsregels

[76] Cf. Chapter 1, n 56.
[77] The database can be found at <www.eesc.europa.eu/?i=portal.en.self-and-co-regulation> (accessed 1 July 2016).
[78] The database can be found at <http://ec.europa.eu/social/main.jsp?catId=521> (accessed 1 July 2016).
[79] For this research, the content of the databases as it stood in November 2011 was used.
[80] E.g., [European code of conduct] [advertising] or, in Dutch, [*Europese gedragscode*] [*reclame*].
[81] E.g., [*gedragscode*] [*makelaars*] (in English: [code of conduct] [realtors]).
[82] The names and website of these trade associations were collected from *Branchewijzer*, a database containing an overview of the trade associations per sector. At the time the search was conducted, this database was available on the website of the Dutch Chamber of Commerce (*Kamer van Koophandel*): <www.kvk.nl/ondernemen/brancheinformatie/branchewijzer/informatie-over-uw-branche/> (last accessed 11 December 2012). At present, the database can be found at <www.ondernemersplein.nl/brancheinformatie/> (accessed 1 July 2016).

This quick scan revealed that the sectors encompassing the most European *and* Dutch industry codes of conduct by the end of 2011 were: Manufacturing (C), Wholesale and retail trade (G), Information and Communication (J), Financial institutions (K), Consultancy, research and other specialized activities (M), and Renting and leasing of tangible goods and other business support services (N).

3) Additional criterion: Turnover

As mentioned before, it was sought to select those sectors in which industry codes of conduct are of particular societal and regulatory importance for B2B and B2C private law relationships. The number of codes within a sector was taken as an indication for the societal and regulatory importance. However, this criterion might not be very accurate in all cases. After all, this number might also depend on the number of trade associations present within a sector: jointly, multiple trade associations are likely to produce more codes of conduct than a single trade association covering an entire sector. Sectors that are less 'Europeanized' are also less likely to have European codes of conduct. Furthermore, the quick scan could have missed certain codes of conduct, for there are many. Therefore, an additional criterion was used to determine the expected economic and societal impact of a certain sector: the turnover of each sector.[83] Based on the figures of Eurostat and Statistics Netherlands (*Centraal Bureau voor de Statistiek*) available in December 2011, leaving out those sectors that had not been selected on the basis of the criteria discussed earlier, the following ranking was made. This ranking in large part corresponds with the number of codes in each sector:

[83] This criterion was based on one used in empirical studies on codes of multinational companies (MNCs). In some of these studies, the sample of MNCs codes is composed following international rankings of MNCs based on their revenue. See, e.g., Peterková Mitkidis 2015, pp. 61-64; Bondy, Matten & Moon 2008.

Figure 2.2 – Turnover per industry sector in the European Union (2008)

	Turnover	Value added	Invest-ment
	(EUR million)		
Non-finanical business economy	24 915 339	6 155 686	:
Mining & quarrying	250 000	100 000	21 000
Manufacturing	7 136 428	1 669 537	240 078
Network energy supply	1 100 000	199 849	:
Water supply, sewerage, waste & recycling	218 103	:	32 426
Construction	1 907 138	604 362	97 287
Distributive trades	9 117 514	1 153 272	132 683
Transportation & storage	1 305 077	476 619	126 012
Accommodation & food services	461 343	194 131	29 112
Information & communication	1 141 269	502 495	57 279
Real estate activities	420 000	220 000	140 000
Professional, scientific & technical activities	1 168 753	573 128	42 594
Administrative & support services	810 000	390 000	70 000
Repair: computers, personal & h'hold goods	26 227	10 569	:

Source: Eurostat, *Key figures on European business*, Eurostat Pocket Books 2011, p. 34[84]

Figure 2.3 – Turnover per industry sector in the Netherlands (2009)

	Subjects	Operating revenues		
		Total	Net turnover	Other revenues
Sector/branches (SIC 2008)	Periods	x mln euro		
016 Support activities for agriculture	2009	3 466	3 359	107
B Mining and quarrying	2009	38 444	37 986	458
C Manufacturing	2009	263 162	256 031	7 131
D Electricity and gas supply	2009	47 065	45 278	1 788
E Water supply and waste management	2009	8 473	8 249	224
F Construction	2009	99 001	96 903	2 098
45 Sale and repair of motor vehicles	2009	57 001	56 850	150
46 Wholesale trade (no motor vehicles)	2009	355 096	352 422	2 673
47 Retail trade (not in motor vehicles)	2009	104 715	104 032	683
H Transportation and storage	2009	69 484	65 986	3 498
I Accommodation and food serving	2009	18 919	18 559	361
J Information and communication	2009	55 743	55 047	697
N Renting and other business support	2009	52 357	51 757	599
95 Repair computers and consumer goods	2009	804	776	28
© Statistics Netherlands, Den Haag/Heerlen 17-12-2011				

Source: CBS Statline[85]

[84] Available at <http://ec.europa.eu/eurostat/documents/3930297/5967534/KS-ET-11-001-EN.PDF> (accessed 1 July 2016).

[85] In December 2011, when the research design was finalized, the data *as they stood at the time* could be found at <www.cbs.nl/nl-NL/menu/themas/bedrijven/cijfers/default.htm> >> 'Bedrijfsleven; arbeids- en financiële gegevens, per branche, SBI 2008' (in Dutch) and in English at <http://statline.cbs.nl/StatWeb/?LA=en> >> Theme >> Enterprises >> Trade and industry; employment and finance per sector, SIC 2008 (accessibility of these websites last checked 12 December 2012). However, this website has been changed. With the caveat that the time span is different, the data can now be retrieved in Dutch at <http://statline.cbs.nl> >> Zoeken op thema >> Bedrijven >> Financiële gegevens >> Bedrijfsleven; financiën, SBI 2008 (select: *Onderwerpen* > Bedrijfsopbrengsten – *Bedrijfstakken/Branches (SBI 2008)* > Bedrijfstakken 1e digit (SBI 2008) >

Of the sectors that were found to encompass the most European and Dutch industry codes of conduct, all but two are included in this table: the financial sector is missing in both the European and the Dutch table, while the administrative and supportive activities are missing in the Dutch table. This implies that turnover could not fully function as a criterion with regard to these sectors. However, with the administrative and supportive activities included in the European table and the financial sector being important in daily economic life for both companies and consumers, this was not considered particularly problematic.

On the basis of this layered selection, the following industry sectors were eventually selected:[86] (1) Manufacturing,[87] (2) Wholesale and retail trade,[88] (3) Information and communication,[89] (4) Financial institutions,[90] (5) Consultancy, research and other specialized business services,[91] and (6) Renting and leasing of tangible goods and other business support services[92]. Following the selection criteria applied, these sectors can be considered as covering B2B and B2C relations that are most relevant or frequent in an everyday private law context. It is within these sectors that the European and Dutch industry codes were selected.

2.3.2 Selection of industry codes of conduct

The next step in the sampling process involved the selection of the European and Dutch industry codes of conduct within 'the framework' of the selected sectors. This step was broken down into three sub-steps: 1) compiling the 'full' list of industry codes, 2) determining the sample size, and 3) composing the final sample.

Bedrijfstakken 1e digit – *Perioden* > 2009) and in English via <http://statline.cbs.nl/Statweb/?LA=en> >> Search by theme >> Enterprises >> Financial figures >> Trade and industry; finance, SIC 2008 (select: *Topics* > Operating returns – *Sector/Branches (SIC 2008)* > Branches 1st digit (SIC 2008) > Main groups 1st digit – *Periods* > 2009) (accessed 1 July 2016).

[86] As descriptions of the sectors are lacking in the SBI 2008, the descriptions in the following footnotes have been derived from NACE Rev. 2 (2008).

[87] NACE Rev. 2 (2008): "the physical or chemical transformation of materials, substances, or components into new products, although this cannot be used as the single universal criterion for defining manufacturing (see remark on processing of waste below). The materials, substances, or components transformed are raw materials that are products of agriculture, forestry, fishing, mining or quarrying as well as products of other manufacturing activities. Substantial alteration, renovation or reconstruction of goods is generally considered to be manufacturing".

[88] NACE Rev. 2 (2008): "wholesale and retail sale (i.e. sale without transformation) of any type of goods, and rendering services incidental to the sale of merchandise. Wholesaling and retailing are the final steps in the distribution of merchandise. Also included in this section are the repair of motor vehicles and motorcycles."

[89] NACE REV. 2 (2008): "the production and distribution of information and cultural products, the provision of the means to transmit or distribute these products, as well as data or communications, information technology activities and the processing of data and other information service activities".

[90] NACE REV. 2 (2008): "financial service activities, including insurance, reinsurance and pension funding activities and activities to support financial services" as well as "the activities of holding assets, such as activities of holding companies and the activities of trusts, funds and similar financial entities".

[91] NACE REV. 2 (2008): "specialised professional, scientific and technical activities. These activities require a high degree of training, and make specialised knowledge and skills available to users."

[92] NACE REV. 2 (2008): "a variety of activities that support general business operations. These activities differ from those in section M, since their primary purpose is not the transfer of specialised knowledge".

1) Compiling the 'full' list of European and Dutch industry codes

Although the quick scan already yielded a list of codes long enough to necessitate a selection, the first step towards the final selection involved an additional search for European and Dutch industry codes within each sector, so as to find as many codes of conduct as possible. The starting point for this search was the method used to conduct the quick scan. Accordingly, the additional search was focused on published industry-level codes of conduct meeting the working definition formulated in Chapter 1. Furthermore, in order to ensure that the objective and private law scope of the empirical study would be best met, three additional criteria were applied to the codes already on the list as well as to the codes found based on the additional search.[93]

(i) Working definition of 'industry code of conduct'

Neither during the quick scan nor during the additional search, was a selection made based on the name of a private regulatory scheme. In order to be included on the list, the only criterion to be met by each scheme was its congruence with the working definition of 'industry code of conduct' applied in this thesis. At this point in the selection process, however, the codes were subjected to a closer inspection. If an initiative did not prove to meet the working definition after all, it was removed from or not included on the list.

(ii) 'Technical' codes

Given the focus of this doctoral thesis on industry codes in private law B2B and B2C relationships, industry codes solely concerned with technical issues or technical standards (e.g., the product labeling) were not added to the list.

(iii) Certain types of professional codes

During the additional search, it was decide to exclude codes of conduct drawn up by Dutch professional organizations that are designated as a regulatory authority drawn from the profession (*publiekrechtelijke beroepsorganisaties*) as well as their European equivalents. After the quick scan, Dutch codes of this type and their European equivalents already on the list were removed. This choice was motivated by the embedding of these codes in public law and the specific public regulatory authority that the professional body acting as a private regulator has in these cases, which sets them apart from other industry codes.[94]

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[93] Which is not to say that the list of codes compiled for the purposes of this research does not include codes that would have met these criteria. Some codes might have initially slipped the cracks.

[94] At present, the following professional organizations have been designated as a regulatory authority drawn from the profession: the Netherlands Bar Association (*Nederlandse Orde van Advocaten*), the Netherlands Institute of Chartered Accountants (*Nederlandse Beroepsorganisatie van Accountants*), the Dutch Maritime Pilot's Association (*Nederlandse Loodsencorporatie*), the Royal Dutch Association of Civil-law Notaries (*Koninklijke Notariële Beroepsorganisatie*) and the Royal Professional Organizaton of Judicial Officers (*Koninklijke Beroepsorganisatie van Gerechtsdeurwaarders*).
See <www.erfgoedinspectie.nl/toezichtvelden/archieven/inhoud/geinspecteerde-instellingen/pbo> (accessed 1 July 2016).

Finally, it should be noted that as some of the codes found through the quick scan (conducted fall/winter 2011) were no longer publicly accessible at the time the additional search was conducted (early 2012). These codes were removed from the list as well.

2) Determining the sample size

All this resulted in a list containing a total of 217 industry codes of conduct (91 European codes and 126 Dutch codes).

> It is by no means purported that all relevant codes within the selected industry sectors were eventually found using this method. For reasons of feasibility it was for instance not possible to screen all search results yielded by Google. In addition, not all relevant information is available online. Furthermore, it is possible that a trade association applied more codes of conduct in addition to the one(s) published on its website. These codes were, as already noted above, however not part of the research, not only because the amount of published codes was already large enough to compose a sample suitable for the purpose of the empirical study, but also because it would have taken too much time to trace these (internal) codes as well.

The sample composed for the empirical study eventually came to comprise 80 industry codes of conduct.[95] I used the method of proportional sampling to determine the total number of European and Dutch codes within that sample as well as the number of European and Dutch codes to be studied within each sector.[96] This means, firstly, that the number of European and Dutch codes, respectively, was determined in proportion to their share in the total number of industry codes. Following this method, the sample came to include 34 European codes and 46 Dutch codes.[97] The number of codes to be studied within an industry sector was determined in a similar fashion by comparing the number of codes within each sector to the total number of 217 codes on a pro-rata basis.[98] Finally, the number of European and Dutch codes to be studied within each industry sector was determined in proportion to the number of codes selected within each sector.[99] This method led to the following numbers of European and Dutch codes selected within each industry sector:

[95] An overview of these 80 codes can be found in Annex 1.

[96] I opted for a proportional method of sampling in order to avoid the risk of composing a one-sided sample consisting of many codes from only a few industry sectors. Such a one-sided sample might endanger the aim of comprising a comprehensive overview of the functions since the functions might differ depending on the sector in question.

[97] The 91 European codes formed 41,94% of the total sample of 217 codes (91/217), the 126 Dutch codes 58,08% (126/217). Within a sample of 80 codes, this leads to a number of 34 European codes (41,94% * 80) and 46 Dutch codes (58,08% * 80).

[98] For example, 46 codes of conduct were found within the manufacturing sector, meaning that this sector holds a share of 21,20% in the total sample of 217 codes (46/217). Accordingly, 17 codes from the manufacturing sector were included in the sample (21,20% * 80).

[99] To stick with the example of the manufacturing sector (*supra* n 98); the search yielded 24 European codes and 22 Dutch codes, making up 52,17% (24/46) and 48,83% (24/46), respectively, of the total number of 46 codes within that sector. As set out in footnote 97, 17 codes of conduct were to be studied within the manufacturing sector. Proceeding by the rates just calculated, this implied that 9 European (52,17% * 17) and 8 Dutch (48,83% * 17) codes of conduct were to be selected.

Figure 2.4 – Proportional sampling scheme

Industry sector	Number of industry codes	
	Total (EU/NL)	*Selected (EU/NL)*
Total number of industry codes	217 (91 / 126)	80 (34 / 46)
Wholesale and retail trade; repair of motor vehicles and motorcycles	21 (13 / 8)	8 (5 / 3)
Information and communication	18 (7 / 11)	7 (3 / 4)
Financial institutions	49 (12 / 37)	18 (4 / 14)
Consultancy, research and other specialized business services	54 (25 / 29)	20 (9 / 11)
Renting and leasing of tangible goods and other business support services	28 (10 / 18)	10 (4 / 6)

3) Composing the final sample

The final selection of 34 European and 46 Dutch industry codes to be studied was made at random and in a steered way. The steering element in this respect entailed the inclusion of industry codes studied in a previous empirical study and the selection of national equivalents. The inclusion of *previously studied industry codes* was motivated by the fact that the present empirical study is a continuation of the exploratory empirical study into the functions of European and Dutch industry codes that I conducted as part of my Master's thesis.[100] More specifically, as the present study was conducted on the basis of a more detailed version of the framework of analysis (see section 2.4.1), it was decided to include 44 of these codes in the current sample so as to check and, if needed, refine the results of the previous study.[101] These 'pre-selected' codes of conduct were supplemented by 36 'newly' selected codes.[102] The new codes were drawn from the final list of codes at random. At this point, the second steering element, the *selection of national equivalents* came into play (it also applied to the pre-selected codes). This element implied that when the selected European codes of conduct turned out to have a Dutch equivalent, this national code was included in the sample.[103] This led to the inclusion of four national equivalents.[104] The aim of including these equivalents was to gain a grasp of the interaction between European and Dutch industry codes and to better facilitate a comparison between the functions on both different levels. Finally, some changes in the final selection were necessitated by the fact that a few codes on the list, which was compiled during fall/winter 2011 and early 2012, were no longer valid or publicly accessible in the first half of 2012 when the empirical study was conducted. If this proved to be the case, the place of the initially selected code was taken by another code selected at random.

[100] In this study (Menting 2011), I studied 46 Dutch and 20 European codes from different industry sectors, using the same method as applied in the empirical study conducted in this research. See below, section 2.4.
[101] A selection was made to prevent this empirical study from becoming a complete repetition of the previous one.
[102] It is indicated on the list in Annex 1 to which 'category' a code belongs.
[103] Provided that the two criteria set out above were met.
[104] The codes concerned are marked in Annex 1.

2.4 Framework of analysis

2.4.1 The framework

The selected European and Dutch industry codes of conduct were studied on the basis of a framework of analysis that was developed with the purpose of determining the functions of these codes. The origins of this framework lie in my Master's thesis, where I carried out a more limited, exploratory empirical study into the functions of European and Dutch industry codes.[105] In drafting the framework of analysis for that research project, I first of all drew up an overview of elements that I considered of possible importance for research on the functions of industry codes in private law. These elements were outlined in the first draft of the framework and, thereafter, set out in more concrete terms by means of several sub-elements and questions relating to the element concerned. In the course of the empirical study, it became evident that other elements, not included in the first version of the framework, were equally important for the identification of the functions. Hence, these elements were added. This eventually resulted in a framework consisting of seven core elements: drafters and target group, reason, aim, type, nature and binding force of the norms, enforcement, influence of the government, and accessibility.[106]

The version of the framework of analysis applied in my Master's thesis formed the basis for the framework of analysis used in this doctoral thesis. The seven core elements were maintained, though some were made more detailed by breaking them down into more sub-elements. This revised version of the framework was compared with similar empirical research frameworks applied by other scholars in empirically assessing codes of conduct. These frameworks not only served as a source of inspiration for a further refinement of the core elements of my own framework, but also as an *a posteriori* check that no important elements were missed.[107] Finally, during the early stages of the empirical study, the framework thus developed was slightly adjusted a few times. This development process eventually resulted in the following framework of analysis:

[105] Menting 2011.
[106] Menting 2011, p. 23.
[107] The frameworks developed by De Groot-Van Leeuwen & De Groot 1998, Van Tulder & Kolk 2001 (pp. 273-274) Tambini, Leonardi & Marsden 2008 (pp. 59-62, with reference to M.E. Price & S.G. Verhulst, *Self-Regulation and the Internet*, The Hague: Kluwer Law International 2005) and Van der Zeijden & Van der Horst 2008 (pp. 63-65) were studied to this end.

Figure 2.5 – Framework of analysis[108]

Element	Question
General	
Drafters	1. Who has drawn up the code of conduct?
Target groups	2. Who is the target group?
Scope	3. What is the scope of the code of conduct?
Reason	4. What were the reasons for drawing up (and, if applicable, revising) the code of conduct?
Aim	5. What is the aim of the code of conduct?
Rules	
Type	6. What types of rules does the code of conduct contain? a. Rules of a concrete, substantive nature, or b. Rules of a moral/ethical nature, expressing aspirations
Nature	7. What is the nature of these rules (specific or general)?
Binding force	8. Does the code of conduct have binding force?
Enforcement	
General	9. Does the code of conduct contain rules with respect to monitoring, compliance and enforcement?
Monitoring actor	10. Is there a monitoring actor and, if so, is this actor independent?
Complaint handling	11. Is there a system in place to handle complaints?
Sanctions	12. In case of non-compliance, does the code of conduct provide for the possibility of imposing sanctions? 13. Does the code provide an enforcement mechanism?
Code, legislator and legislation	
Code - legislator	14. Has the European and/or the Dutch legislator influenced or been involved in drawing up and developing the code of conduct, i.e., what is/was the interaction between the legislator and the private actors?
Code - legislation	15. Is there a relation/interaction between the code of conduct and European and/or Dutch legislation and regulations and, if so, what is the nature of said relation?
Accessibility	16. Are explanatory notes provided, does the code contain provisions for review and amendment, is the code reviewed and revised on a regular basis and, if so, why, and can third parties easily access the code (e.g., for readability)?

The questions included in the framework were answered on the basis of an analysis of both the content of the selected industry codes of conduct and 'secondary' information about these codes.[109] Read together, the answers constituted the criteria for defining and assigning the functions (see Chapter 3).

[108] This version of the framework has already been published (in Dutch) in Menting & Vranken 2014 (pp. 49-50), together with a very brief summary of the way in which the framework was applied.
[109] For a more detailed account of the sources used, see below section 2.5.

2.4.2 Explanatory notes to the framework[110]

General (drafters, target groups and scope) and accessibility (questions 1, 2, 3, 16)

The framework starts with three general questions about the drafters, target groups and scope of an industry code of conduct and ends with questions related to the accessibility of the code. In essence, these questions touch upon such issues as representativeness, level of support and transparency. As such, they are arguably not the most important questions when it comes to defining the functions of an industry code. Rather, these elements might be important factors as regards the extent to which codes of conduct can play a legally relevant role in private law. Therefore, they have not served as criteria in the definition of the functions, with the exception of the element of 'accessibility'.[111] Nevertheless, these elements were included in the framework of analysis for the sake of completeness, since I envisage the answers to the questions accompanying these elements playing a role in the later stages of this research when the question of the legal relevance of industry codes of conduct in Dutch private law comes up for discussion. The foregoing implies that the core of the framework is constituted by the elements of 'reason', 'aim', 'rules', 'enforcement', and 'code, legislator and legislation'.

Reason (question 4)

The reason for drawing up an industry code of conduct is a first core element that plays a role in defining the functions of an industry code. A code that has been drawn up as a response to societal pressure, for instance, is likely to have a different function than a code that is created to fill a regulatory gap in the absence of public regulation.

Aim (question 5)

In reflecting the objectives that the authors of an industry code are trying to attain, the aim of a code seems almost synonymous with its function. The question about the aim of a code therefore constitutes an important element of the framework. This is particularly so when the authors explicitly mention the objectives of their code, as my first exploratory study showed. If that is the case, the aim often represents one of the code's functions.[112] However, this implies that matters might become more complicated when the aim of an industry code is not explicitly stated. More specifically, if this aim has to be derived from secondary sources, an element of interpretation might be involved. In these cases, other elements of the framework will come to the fore more prominently.

Rules (questions 6-8)

Questions 6-8 concern the type, nature and binding force of the rules incorporated in a code.

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[110] These notes build on the explanatory notes to the first version of the framework applied in my Master's thesis. See Menting 2011, pp. 24-28.

[111] The accessibility of a code plays a role in relation to the protective function. See Chapter 3, section 3.3.1 under 10.

[112] See Menting 2011.

Type of rules

In general, two types of rules can be found in European and Dutch industry codes.[113] Codes can contain a mix of both types. The first type that can be distinguished are rules of a concrete, substantive nature, i.e., rules that do not solely concern the conduct of the regulated actors towards other actors, such as the private regulator, fellow-regulated, competitors and consumers, but instead concern specific topics or activities, such as advertising and consumer information.

> An example of these types of rules can be found in the Dutch Code of Conduct for Consumers and Energy Suppliers (*Gedragscode Consument en Energieleverancier*). Article 2.3 of this Code provides that sales talks must be held between 9 am and 9 pm on weekdays and between 10 am and 4 pm on Saturdays. Sales talks outside these hours are not allowed, unless an appointment has been made at the consumer's own initiative.[114]

The second type concerns norms that are of an ethical, more aspirational nature. These norms set standards for behavior in accordance with what is considered appropriate from a moral, ethical perspective and usually include phrases such as 'will strive for' or 'best endeavors'.[115]

> Article 3 under c of the IVBN Code of Ethics is an example of a provision that holds rules of an ethical nature. It states that "IVBN members must undertake to act professionally in their dealings with third parties, such as property managers, subcontractors, suppliers and other firms and organisations with whom they have a business relationship. As far as possible, members must ascertain that the companies they engage to carry out work are bona fide (sincere, reliable) and competent".[116]

Nature of the rules

The question on the nature of the rules, which is often closely linked with the question on the type of rules, in effect pertains to the wordings of a code: are these rules formulated in general terms, leaving room for interpretation, or are the rules of a specific, more detailed nature?[117] Although the nature of the rules is closely linked with the issues that are dealt with in a code - some issues are easier to capture in specific rules and wordings than others - this element does play a relevant role when identifying the functions. If, for example, the wordings of a code are very general, while a more specific formulation would have been possible, the general nature

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[113] See also Koelemeijer 2004, pp. 12-13. Koelemeijer draws a distinction between broadly worded *streefcodes* (aspirational codes) that name certain values and ambitions of the organization, without giving content to these values and ambitions, and *normerende codes* (prescriptive codes) that lay down norms that have binding force upon the target group.

[114] The Code (version 2015), authored by the Dutch trade association for energy companies active on the Dutch market (*Energie-Nederland*) can be found at <http://www.energie-nederland.nl/gedragscode-consument-en-energieleverancier/> (accessed 15 May 2016). The translation is my own.

[115] See Keirsbilck 2011, p. 328.

[116] The Dutch version of the Code (2008), drawn up by the Association of Institutional Property Investors in The Netherlands (IVBN), can be found at <www.ivbn.nl/publicaties-detail/ivbn-code-of-ethics-versie-juni-2008>. The translation has been taken from the English version of the Code (2004), which can be found at <www.ivbn.nl/viewer/file.a. spx?FileInfoID=185> (websites accessed 1 July 2016).

[117] Cf. Kolk, Van Tulder & Welters 1999, p. 162.

of the rules might give rise to doubts as to the intention of the drafters. Is the code designed for actual implementation or is it a mere instance of window-dressing?[118]

Binding force

As regards the binding force of industry codes of conduct, the main distinction drawn was simply between industry codes that had binding force and industry codes that lacked such force. In the latter case, industry codes serve as non-binding guidelines for the target group. Within the category of codes having binding force upon the target group, some further differentiation was possible. The results of the empirical study show that the binding force of industry codes can follow from membership of a European or Dutch trade association that acts as a private regulator (the most common way when industry codes are concerned), from a contractual subscription to a code, or from governmental interference. In the *internal* relation between the private regulator and the regulated industry actor, binding force in these cases denotes legal binding force, resulting from the law of associations, contract law or the government conferring legally binding force.[119] The binding force of an industry code can entail an obligation to comply with the code, but can also concern a duty to implement the European code into a national code or a national industry-level code in a corporate code. When establishing whether the rules had binding force, account was taken of the text of the code, the charter and bylaws of the industry association, the existence of a monitoring system and/or a system for resolving disputes and whether sanctions can be imposed in case of non-compliance.[120]

Enforcement (questions 9-13)

Industry codes of conduct can include rules relating to its enforcement, such as rules establishing independent monitoring, setting up a procedure to settle complaints and disputes or imposing sanctions on violations of the code.[121] Such enforcement mechanisms are often linked to a code of conduct, as is for instance the case with the Dutch Advertising Code, which has its own scheme for handling complaints and its own monitoring bodies (the

[118] At this point, the element of 'Enforcement' comes into play (see below).

[119] See Cafaggi 2012b, p. 3; Menting 2017 (forthcoming). Of the industry codes analyzed in the empirical study, the Privacy Code of Conduct of the private investigation agencies sector (*Privacygedragscode sector particuliere onderzoeksbureaus*) had legal binding force on the basis of Article 23a of the Private Security Organizations and Detective Agencies Regulations (*Regeling Particuliere beveiligingsorganisaties en recherchebureaus*), which obliges private investigation companies to draw up a code of conduct identical to this Privacy code. The codes of conduct for consumer credit of the Dutch Banking Association (NVB), the Dutch Finance Houses' Association (VFN) and the Dutch Home Shopping Organization (NTO), are examples of codes that have *de facto* legal binding force: the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*) has designated these codes as minimum elaborations of the open norm of responsible lending laid down in Article 4:34(2) of the Dutch Financial Supervision Act (*Wet op het Financieel Toezicht*). See <www.afm.nl/nl-nl/professionals/doelgroepen/kredietaanbieders/normen> (accessed 1 July 2016).

[120] It has to be noted that codes of conduct can also gain (legal) binding force by 'external' actions, such as their incorporation into a contract or in general terms and conditions. See, e.g., Peterková Mitkidis 2015, pp. 153-163; Beckers 2015, pp. 47-58. As this binding force does not follow directly from the code itself, it was not taken into account in the empirical part of this doctoral thesis.

[121] Cf. Menting 2011.

Advertising Code Committee and the Board of Appeal).[122] In some cases, however, enforcement mechanisms are to be found 'outside' an industry code, for instance in the guise of an independent complaints body that is also concerned with the enforcement of certain industry codes.[123] The presence of enforcement mechanisms as well as the comprehensiveness of these mechanisms plays an important role in determining the functions of an industry code. Codes with strong and clear enforcement mechanisms can be said to have a stronger regulatory function than codes without any provisions in this respect, at least on paper.[124]

Code, legislator & legislation (questions 14 and 15)

The sixth element of the framework concerns the possible relation and interaction between industry codes of conduct (private actors) and the legislator, and between industry codes and legislation. The legal literature is witness to the fact that in some cases there is a multifaceted interplay between industry codes on the one hand and the legislator and legislation on the other. Industry codes can for instance be used by private parties to fend off European or national legislation, or as instruments to complement existing legislation. The legislator, in turn, can leave room in its policy for private parties to draw up codes of conduct or use the 'threat of legislative interference' to stimulate the development of private rules. Either way, the legislator actively and deliberately contributes to the development of codes of conduct.[125]

Accordingly, it can be expected that the nature of a possible interplay between private parties, the legislator and legislation likewise will define the functions of a code of conduct. As regards the relation code of conduct – legislation, it has to be noted that industry codes often operate against the backdrop of a general legal framework covering the topics included in the code. However, in answering the question on this relation, it was with a view to the time available for the empirical study only focused on the direct, specific relations between codes and legislation that followed from the sources consulted. The relation with the general legal framework was thus not 'actively' researched.

2.5 Sources

The starting point for the application of the framework of analysis was the content of the industry codes of conduct. That is to say that the text of the codes was used as a main source

[122] See Dutch Advertising Code, Working Procedures of the Advertising Code Committee & the Board of Appeal. The document is available at <www.reclamecode.nl/nrc/>. The English version of the Code can be accessed at <www.reclamecode.nl> >> English (accessed 1 July 2016).

[123] E.g., the Netherlands Financial Services Complaints Tribunal for the financial sector (*Klachteninstituut Financiële Dienstverlening*). See <www.kifid.nl> (accessed 1 July 2016).

[124] As enforcement often seems to be related to the binding force of a code, this element is more or less a 'continuation' of the element 'norms – binding force' (cf. Menting 2011). At the same time, however, enforcement is a separate element as not all codes of conduct with binding force contain enforcement mechanisms. Moreover, differences might exist with regard to the way in which enforcement mechanisms are implemented, as already follows from the three main sub-elements that the element 'enforcement' has in the framework of analysis: monitoring actor, complaint handling system and sanctions.

[125] On the relation between private regulation, and the legislator and legislation, see for instance Verdoodt 2007, pp. 36-41; Gunningham & Rees 1997, pp. 365-366; Black 1996, pp. 26-28; Huyse & Parmentier 1990, pp. 262-263. Cf. also Geelhoed 1993, pp. 49-50.

in answering the questions of the framework. However, studying only the content of the code proved to be insufficient to fully answer these questions. Therefore, additional information was used. This information was derived from the website of the private regulator, often a trade association, and from reports issued by the actors involved in drawing up the code at issue. Where necessary and available, information from 'third parties' and relevant literature were also included.[126] Only publicly available information was used. In searching and studying this 'secondary' information, the method of 'snowballing' was used in addition to the search strategy just outlined. As some industry codes are better documented than others, this method in some cases led to inequalities in information available on the codes, which resulted in the functions of some codes being more 'firmly' established than others.

2.6 Limitations

The empirical study comprises an intensive look at a significant number of European and Dutch industry codes of conduct and is aimed at making a cross-section of their possible functions. Although this research method can be deemed appropriate to achieve such an objective, the method nevertheless entails some limitations. First of all, the framework set out in section 2.4 had to be slightly revised during the empirical research as some sub-elements were missing or had to be reformulated. Regarding these revisions, it could be that there are still other elements, not included in the framework, that determine the functions of codes of conduct. Secondly, as the analysis is limited to the text of the industry codes of conduct and written information following on from secondary sources, the research design does not allow for insight into the effectiveness and sustainability of the codes of conduct in practice or into the actual objectives of these codes. The reality on paper may differ from the actual implementation and application of the code, the more so since textual analysis can involve an element of interpretation. Or, in the words of Jenkins, there might be a "contrast between rhetoric and reality"[127] which cannot be discovered on the basis of desk research.[128] Therefore, the actual functions of an industry code of conduct might eventually turn out to be different than those assigned to it on the basis of the empirical study. Nonetheless, within these limitations, the empirical study can provide some valuable insights as to the functions that European and Dutch industry codes of conduct can have (at least in theory), which are new to the Dutch private law debate.

[126] For the importance of contextualizing the content of the code by additional research, see Tambini, Leonardi & Marsden 2008, pp. 50-51.
[127] Jenkins 2001, p. 26.
[128] See also Tambini, Leonardi & Marsden 2008, p. 51 who use a comparable research method. They point at the following limitations: "Code analysis cannot ascertain the effectiveness of the code, though it can identify cases in which a code does not contain provisions for its enforcement or is not in fact justiciable and therefore likely to be less effective. Even these inferences are of limited reliability, as trust, mutual observation, participation in a network of colleagues and/or a sense of obligation can be key mechanisms in the process of self-regulation. Nor can code analysis offer information about the sustainability of self-regulatory mechanisms".

3 The functions of European and Dutch industry codes of conduct

3.1 Introduction

This chapter will discuss the functions of European and Dutch industry codes of conduct identified on the basis of the empirical study.[129] It will start out by explaining the method used to identify and define these functions (section 3.2). Next, the different functions and the criteria used to assign a function to an industry code will be described. The ensuing general picture is transformed into a categorized overview of the functions, which reflects the interconnectedness of the functions (section 3.3). Subsequently, the overview will be compared with the functions, motives and objectives of industry-level private regulation mentioned by other scholars (section 3.4). An overview of the functions per industry code of conduct can be found in Annex 2.[130]

3.2 How the functions were identified: A quick scan and the role of the framework of analysis

3.2.1 Preliminary stage: A two-step quick scan

Given the fact that existing research, empirical or otherwise, already touches upon possible motives for, and objectives and functions of private regulation (including industry codes of conduct), it would have been possible to compile a list of functions on the basis of a review of this research. However, as set out in the previous chapter (section 2.1), preference was nonetheless given to conducting a new empirical study. Furthermore, it was decided not to review the existing body of research beforehand for the following three reasons. Firstly, some of the existing research is conducted from a rather specific angle. This makes it less straightforward to use the results of this research in my empirical study, which is more general in nature. Secondly, the approach of not studying the existing research beforehand offered me the possibility to examine the selected industry codes with an open mind, i.e.,

[129] Part of section 3.3.1 of this chapter has, in an earlier version, already been published (in Dutch) in Menting & Vranken 2014, pp. 24-30.

[130] The empirical data used to identify the functions, i.e., the answers to the questions included in the framework of analysis, are on file with the author and are available in digital form on request.

without my view being, unconsciously or otherwise, narrowed to or influenced by the functions of private regulation identified by others. Thirdly, this approach allows for a comparison between the functions identified in the empirical study and the functions mentioned in the literature. This comparison can tell us whether new functions have been discovered or whether functions have been missed.

Even so, the empirical study needed a starting point in the sense of some ideas as to what functions industry codes of conduct could have. In my Master's thesis, I used two 'sources of inspiration' to this end: (1) the functions of legislation and (2) my own inventory of possible functions. At this point, as the research I conducted in my Master's thesis constituted the basis for the empirical study carried out as part of this doctoral thesis, I will briefly outline how I went about it.[131]

1) The functions of legislation

The functions of legislation served as a first source of inspiration. Veerman, De Kok and Clement provide a particularly comprehensive overview of these functions, which is not restricted to the main functions or the functions usually mentioned in the literature. Rather, it comprises a wide range of functions, each of which is clearly defined and exemplified by the authors. Their overview includes:

- The organizing function (*ordenende functie*),
- The protective function (*beschermingsfunctie*),
- The communicative function (*communicatieve functie*),
- The consolidating function (*consoliderende functie*),
- The function of reallocating a problem (*probleemverplaatsende functie*),
- The function of legislation as the visible result of political decisiveness (*epaterende functie*),
- The symbolic function (*symbolische function*),
- The emancipatory function (*emancipatoire functie)*, and
- The value-expressive function (*waarden-expressieve functie*).[132]

It is precisely the comprehensiveness of this overview that makes it a suitable reference point for the empirical study. Admittedly, however, legislation and industry codes of conduct differ in several respects. One could therefore rightly question whether the functions of legislation can be transposed directly to industry codes. Yet, on further consideration, the differences between the two might be nuanced by tracing them back to the most fundamental conceptual difference: the nature of the rule-setter. The fact that both forms of regulation differ primarily has to do with the fundamentally different nature of their respective drafters. Whereas legislation is enacted by the legislator, industry codes are adopted by private actors. When one sees through this difference, it could be argued that both legislation and industry codes are in

[131] The following description is an adapted version of the one I provided in my Master's thesis. See Menting 2011, pp. 30-31.
[132] Veerman, De Kok & Clement 2012, pp. 145-172. The English translations of the functions are my own.

essence 'regulation'.[133] Viewed from this perspective, the functions of legislation and those of industry codes might show some similarities after all. The essence of the functions of legislation might well apply to industry codes, though the specifics of the functions might differ. Therefore, the functions of Veerman, De Kok and Clement, complemented with the safeguarding function (*waarborgfunctie*) and the instrumental function (*instrumentele functie*) distinguished by other scholars,[134] served as a first source of inspiration, which is to say that the content of these functions served as a point of reference during the empirical study. Eventually, however, the role of these functions was in most cases limited to name borrowing. The majority of name-wise corresponding functions were given their own content on the basis of the empirical study.[135]

2) My own inventory

My own inventory of possible functions, drawn up on the basis of a brainstorm session, formed the second source of inspiration. Together with the framework of analysis and the functions of legislation, this inventory served as a helpful tool in the final identification of the functions of industry codes.

As a final note, it should be re-emphasized that the functions following on from this 'two-part quick scan' were not decisive as such when analyzing the results of the empirical study. Rather, they served as a source of inspiration when, with an open mind, I defined the possible functions of industry codes of conduct, detached initially from the elements making up the framework of analysis. Hence, the functions listed in section 3.3.1 all followed on from the empirical study, even though some of the functions that came to the fore in the quick scan were retained, whether name-wise or content-wise.

3.2.2 Role of the framework of analysis

The functions of the selected industry codes of conduct were identified and assigned based on the answers to the questions jointly constituting the framework of analysis (see Chapter 2, section 2.4). The process of transforming these answers into a specific function was as follows. As a first step, taking the framework as a basis, I analyzed the text of a code and relevant information about the code derived from secondary sources. This analysis resulted in an overview of the characteristics of each code, linked to the different elements of the framework. The second step involved a closer analysis of these characteristics with the aim of identifying similarities and patterns from which a common denominator could be inferred (e.g., the objective of protecting consumers, a role of the code as an alternative to legislation).

[133] Witteveen 2007, p. 25 (on the relation between legislation and private regulation). The nature of the regulator determines whether we speak of legislation or private regulation. See also Witteveen 2007, pp. 25-42 on the concepts of regulation, non-regulation, self-regulation and alternative regulation.
[134] See for example Eijlander & Voermans 1999, pp. 18-19, with further references. Veerman, De Kok and Clement do not refer to these functions.
[135] In so far as relevant, all this will be referred to and discussed in the footnotes to the description of the function concerned.

As a third step, this common denominator was subsequently turned into a specific function, e.g., the protective function, the function as an alternative to public regulation. Thus, the different elements of the framework of analysis formed the criteria for both the definition of the functions and, as a corollary, for assigning a particular function to an industry code.

3.3 Overview of the functions: Pillars, layers and connections

3.3.1 General overview

This section describes the different functions identified on the basis of the empirical study and the criteria used to assign each function.[136] As will become clear from this description, there are areas of overlap between the functions, which is the result of the interconnectedness of some elements of the framework of analysis. How this overlap leads to a further categorization of the functions will be explained in section 3.3.2. In the current section, the related functions are put together, but - given the demonstrable differences that exist between them, in spite of the aforementioned overlap - discussed individually.

Figure 3.1 – General overview of the functions

General overview functions	
1. Corporate governance function	9. Compliance function
2. Harmonization function	10. Safeguarding function
3. Framework function	11. Signaling function
4. Code of conduct as standard contract term	12. Image-building function
5. Policy instrument function	13. Quality control function
6. Alternative to public regulation	14. Quality mark function
7. Preventive function	15. CSR function
8. Complementary function	

Source: Own empirical study

The findings of the empirical study show that none of these functions is exclusively reserved for European industry codes or for Dutch industry codes. In theory, an industry code can have any of these functions, regardless of their European or Dutch origins. Put differently, the functions of a code are as such not dependent on the level on which the code has been drawn up. As a result, it was possible to compile one general list of functions, without the need to differentiate between the functions of European and Dutch industry codes of conduct.

Before elaborating on the functions, it should be noted that – with the adoption of codes of conduct always, in one way or another, involving an element of self-interest of the industry and

[136] An earlier version of the description of several of these functions (nos. 1-6, 9-11 in Figure 3.1) has already been published (in Dutch) in Menting & Vranken 2014, pp. 24-30.

given the signaling, communicative quality of industry codes (cf. the signaling function) – an industry code of conduct could be adopted for the purposes of mere window-dressing. However, as the empirical study consisted of a textual analysis of the codes (and secondary sources), the results do not tell us whether in practice an industry code constitutes a true regulatory effort or whether it is used as a mere tool for window-dressing.[137] Nonetheless, what can be noted is a lack of effective enforcement mechanisms might be indicative of the code embodying an element of window-dressing.

1. Corporate governance function

Codes of conduct have a corporate governance function where, with a view to them containing principles of good governance, they concern how associations and corporations are governed. The principles included in these codes generally cover topics such as the organizational structure of a company, the composition and tasks of the supervisory board and the executive board, and remuneration.

Criteria

The corporate governance function was assigned once it had followed on from the framework elements of 'reason' and 'aim', and the content of a code that the code rules concerned the organization and governance of the regulated actors.

2. Harmonization function

Industry-level codes of conduct entail rules that, generally speaking, have to be applied 'industry-wide' or 'profession-wide', i.e., within the group of industry actors that has undertaken to abide by the code. Viewed from this perspective, every industry code can have, to a greater or lesser extent, a standardizing or harmonizing effect, particularly when the code has binding force upon the regulated actors. Hence, the mere fact that an industry code introduces 'industry standards' is in itself not distinctive enough to function as a criterion for assigning the harmonization function to the code. Therefore, it was decided to build on two aspects of harmonization that can enhance the distinctive character of the harmonization function, namely the direction and type of harmonization.[138] Before turning to a more detailed discussion of these aspects, it should be noted that the harmonization function was assigned to an industry code when this function 'visibly' followed from the text of the code or from the secondary sources consulted (see below, under 'criteria'). However, the harmonizing effect of an industry code does not always result from a deliberate strategy of the private regulator; it can also be an unintended effect of an industry code with other main objectives.[139] This unintended effect has not been taken into account when assigning the function.

[137] Cf. the limitations of the empirical study mentioned in Chapter 2, section 2.6.

[138] Although these aspects are presented as being distinct from one another, combinations are possible, i.e., maximum – vertical, maximum – horizontal, minimum – vertical, minimum – horizontal.

[139] As Cafaggi and Janczuk point out with regard to private regulation in general (Cafaggi & Jancuzk 2010, p. 20).

Starting with the **direction** of harmonization, it can be observed that harmonization can work horizontally as well as vertically.[140] In its basic, most common form, horizontal harmonization occurs within the group of regulated actors. The horizontal harmonizing effect of an industry code can, however, also be stretched beyond this group to industry peers or other actors, for instance when the legislator steps in and declares the code universally binding or when codes are used as a standard contract term (see below, under 4). Broadly speaking, vertical harmonization occurs when the rules of an industry code take effect at a lower level, i.e., a level that is geographically or organizationally below the level at which the code has been drawn up. 'Geographical vertical harmonization' for instance takes place when a European code has to be implemented at the national level or, conversely, when a national private regulator links up with a European code in drafting a national code. 'Organizational vertical harmonization', in turn, occurs during further elaboration of industry-level codes into corporate codes at the company level. Additionally, in case of supply-chain responsibility (*ketenverantwoordelijkheid*), industry codes can lead to vertical harmonization, in both geographical and organizational terms. In such cases, the private regulator uses contractual mechanisms, like perpetual clauses, to spread private rules downwards through the supply chain, not only to first-tier suppliers but also to second-tier suppliers and beyond.[141] A similar effect occurs, though on a more modest scale, when a company that applies an industry code demands its employees or representatives abide by the code. In both cases, it is generally the higher-ranked actor that is under an obligation to ensure subordinates comply with the code.

When it comes to the **type** of harmonization, a distinction can be drawn between minimum and maximum harmonization. Minimum harmonization implies that the regulated actors are allowed to regulate, e.g., through their own national code or corporate code, in a stricter fashion than the European or national 'umbrella code'. In these cases, the umbrella code thus imposes minimum rules, binding or otherwise, on the regulated actors. In case of maximum harmonization, by contrast, the regulated actors are not allowed to deviate in any way from the rules imposed by the umbrella code.[142] Both types of harmonization could result in a certain degree of convergence of the rules within an industry and thus create a minimum level playing field for the affiliated private actors.[143]

Criteria

The question on the binding force of the code played an important role when establishing whether an industry code had a harmonizing function. After all, with this question in essence touching upon the 'obligations' of the regulated actors, the answer to it will teach us whether these actors are under a duty to implement the code at the national level or at the company level. Additionally, I took account of the reason for and the aim of the code. These elements can for instance indicate that there was a need for or desire to impose uniform standards, to

[140] See also Cafaggi 2010, p. 218.
[141] Verbruggen 2014b, p. 89. See also Vytopil 2015, pp. 117-140; McBarnet & Kurkchiyan 2007.
[142] Cf. also Cafaggi 2011b, pp. 101-102 on the relation between minimum and maximum harmonization in European legislation and private regulation.
[143] Cf. the different ways in which private regulation contributes to European legal integration discussed by Janczuk-Goryworda 2012 and Cafaggi & Janczuk 2010.

create a level playing field or to introduce guidelines for national codes or corporate codes. Whether the envisaged harmonizing effect of an industry code actually materializes, depends on the binding nature of the umbrella code, the quality of the implementation of this code and the extent to which the rules are complied with in practice.[144]

3. Framework function

The empirical study showed that industry codes of conduct can function as a framework for 'lower level' codes. European codes of conduct can function as a template for national codes, obliging or allowing the national industry actors to implement the European rules in their national code of conduct. National codes, in turn, can function as a blueprint for corporate codes. The 'lower-level' national or corporate code of conduct thus fleshes out respectively the 'higher level' European or national code. This can lead to vertical harmonization (see above, under 2).

Criteria

The framework function was assigned to industry codes obliging or allowing the regulated actors to detail the code at the national level or at the company level. Whether this was the case frequently depended on the answer to the question concerning the binding force of the industry code.

4. Code of conduct as standard contract term

Some industry codes require that compliance with the code is made part of any B2B contracts the regulated actors conclude. That is to say that such contracts have to include a clause or a reference to the industry code which obliges the other party to the contract to comply with the code as well. In effect, the code thus functions as a standard contract term, which results in the code taking regulatory effect over third parties.[145] As such, the code can apply to a single contracting party, as well as to multiple parties throughout the contracting chain (cf. supply chain responsibility).

Criteria

This function was assigned once it had been explicitly stated, either in the code itself or in other applicable documents, that 'third party compliance' with the code was to be included as a condition in the contracts concluded by the regulated actor.

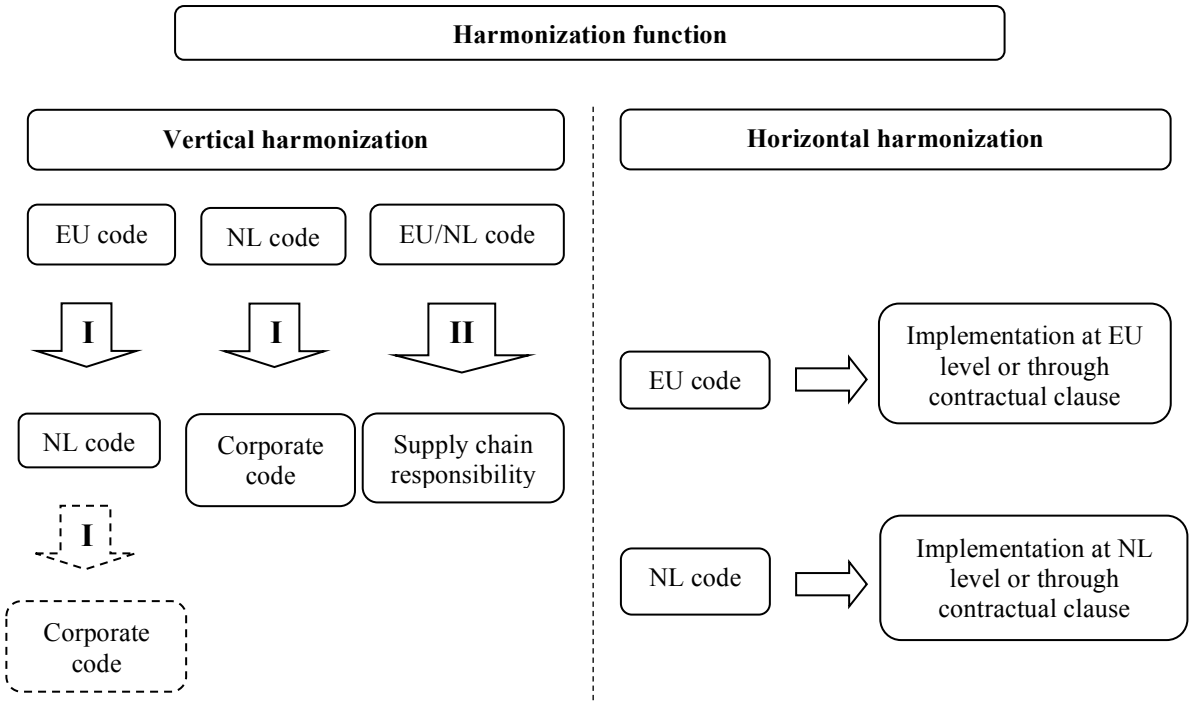
[144] I have not inquired into the actual effects of industry codes. As the harmonization function denotes the harmonizing potential of industry codes, based on different characteristics of these codes (cf. the criteria set out above), the function does not indicate whether the rules actually lead to harmonization.

[145] On this practice, which is discussed in legal literature under the heading 'governance by contract', see, e.g., Verbruggen 2014b; Cafaggi 2013; McBarnet & Kurkchiyan 2007; Zumbansen 2007.

Relation between the harmonization function, the framework function and the function of codes as standard contract term

The harmonization function, the framework function and the standard contract term function are interconnected, as the cross-references in their respective descriptions already suggest. This interconnectedness can be visualized as follows:

Figure 3.2 – Relation between the harmonization function, the framework function, the function of codes as standard contract term



Related functions
I – Framework function
II – Codes of conduct as standard contract term

Related function
Codes of conduct as standard contract term

5. Policy instrument function (Code of conduct as a policy instrument)

The use of private regulation as a regulatory alternative is one of the cornerstones of legislative policy in both the European Union and the Netherlands.[146] Thus, the European and the Dutch legislator can use industry codes, as well as other forms of private regulation, as a policy instrument to attain certain policy objectives. There are different ways in which the legislator can proceed in this respect. Firstly, the legislator can deliberately leave room in legislation and regulations for the drawing up of codes of conduct that implement, supplement or elaborate the relevant legal provisions. Secondly, under certain, strict condictions, codes can be used to implement European directives at the national level.[147] Thirdly, the legislator can opt for leaving regulation of a certain issue entirely or partially to private actors. It can in

[146] In the context of European and Dutch private law, for instance, this policy has resulted in the employment of industry codes of conduct as an alternative or complement to private law legislation. See Chapter 4 of this thesis.
[147] See Chapter 4, section 4.5.1.1 under 5.

this respect, for example, link up with an existing, well-functioning, industry code, put direct pressure on these actors to draw up a code of conduct, facilitate the self-regulatory process (e.g., by organizing a dialogue between the private actors involved), or, more indirectly, use the threat of legislative intervention to move the industry towards picking up the regulatory glove itself. Thus, from the perspective of the legislator,[148] industry codes that have been drawn up under direct or indirect governmental 'pressure' can be said to have a policy instrument function.[149] As such, industry codes can serve as an alternative to or complement public regulation (see below, under 6 and 7).

Criteria

Whether or not a certain code did indeed serve as a policy instrument was determined on the basis of an analysis of the answers to the questions captured in the framework under the heading 'Code, legislator and legislation', either in combination with the reason for and the aim of the code concerned, or otherwise. More specifically, the function was assigned when it followed on from these elements that:

(1) There had been clear interaction between the legislator and private parties, such as pressure or dialogue, resulting in the drawing up of a code of conduct; and/or
(2) European or national public regulation explicitly referred to the possibility of drawing up codes of conduct and the code in question was a response to this; and/or
(3) The code of conduct was used as an instrument to transpose a European directive.

In other words: when an industry code of conduct was drawn up at the instigation of the European or the Dutch legislator, the code was considered to function as a policy instrument. The ways in which the legislator deploys codes as a policy instrument are reflected in the following functions (6-9), which express the nature of the possible relations between industry codes as a policy instrument and legislation.[150]

6. Alternative to public regulation

Industry codes of conduct can be deployed instead of public regulation. Depending on whether one adopts the perspective of the industry actors or that of the legislator, the relation between public regulation and private regulation can be qualified as either 'preventive' (industry actors) or 'alternative' (legislator). Viewed from the perspective of the legislator, industry codes can function as an alternative to public regulation. These codes are often drawn up in response to governmental influence or pressure. This implies that the legislator

[148] The role of perspective in the definition of the functions will be discussed in section 3.3.2 of this chapter.
[149] Eijlander & Voermans 1999, p. 18 refer to the instrumental function of legislation, which entails that laws are seen as an instrument for policy. Veerman, De Kok & Clement 2012, pp. 147-150, by contrast, do not mention this function separately. Rather, they indicate that legislation in its organizing function (*ordenende functie*) is a means or instrument of policy.
[150] On the relation between private regulation and legislation, see, e.g., Verdoodt 2007, pp. 36-41; Gunningham & Rees 1997, pp. 365-366; Black 1996, pp. 26-28; Geelhoed 1993, pp. 49-50. Cf. also Cafaggi & Renda 2012, pp. 5-9. In the European private law context, see, e.g., Huyse & Parmentier 1990, pp. 262-263; Cafaggi & Janczuk 2010, pp. 21-26.

considers codes of conduct an adequate instrument to attain the policy objectives it has set. Thus, the function 'alternative to public regulation' can be seen as a specification of the policy instrument function.

Criteria

As follows on from the name of this function, the relation between legislation and a code of conduct formed an important element for labeling an industry code of conduct as a regulatory alternative. The presence of interaction between the legislator and the private parties concerned was also an important lead in this respect (cf. the relation of this function with the policy instrument function), as were the reason for and the aim of the code of conduct. As regards the latter two elements, whether the code was drawn up instead of further public regulatory measures, was crucial.

7. Preventive function

In their function as regulatory alternative, industry codes of conduct serve as a tool used by the legislator to 'avoid' public regulatory interference. Such a preventive element also reveals itself when we assume the perspective of the private actors. However, in this case 'prevent' is not understood in the sense of an 'alternative', but rather it has a less neutral connotation in the sense that it is aimed at keeping the legislator at a distance. The objective of codes with a preventive function is to fence off the enactment of legislation or any other form of state interference. As such, this function constitutes the private counterpart of the 'public' function alternative to legislation. The preventive function can be put into practice in different ways. An industry can for instance seek to pre-empt legislative interference as an independent instrument, though it can also be used to complement existing public rules so as to avoid further interference by the legislator (cf. the complementary function discussed below).

Criteria

The preventive function followed on from the reason for and/or aim of an industry code of conduct, either in combination with the element 'Code, legislator and legislation' or in some other way.[151]

8. Complementary function

Industry codes can also be employed as a means to complement existing legislation and regulations. This complementary function shows for instance when industry actors use a code of conduct to fill the regulatory gaps left by the legislator. Furthermore, industry codes function as a complement when they are used by private actors to specify general statutory provisions, usually by means of sector-specific rules.[152] Additionally, one can conceive of a

[151] In some cases, the preamble to a code explicitly stated that the code was aimed at fencing off legislative interference.

[152] Private actors can do so at their own initiative, but can also respond to an 'invite' of the legislator in this regard. A prime example of such an invite can be found in the regulatory regime on the protection of personal data, as established by the Data Protection Directive (95/46/EC, *OJ* 1995, L 281/31, to be replaced by the General Data Protection Regulation (2016/679, *OJ* 2016, L 119/1) which will enter into force on 25 May 2018)

scenario in which the legislator takes up only part of the regulatory task, deliberately leaving it up to the industry to regulate some issues.

Criteria

Whether an industry code functioned as a complement to public regulation was determined by combining three elements of the framework for analysis, namely 'reason', 'aim' and the nature of the interaction between the industry code and European or Dutch legislation.

9. Compliance function

The assessment of the relationship between industry codes of conduct and legislation (question 14 of the framework of analysis) showed that the content of some of the selected industry codes bears a close resemblance to the legal rules on the subject matter covered by the code, or even quotes some of the applicable legal rules.

> As the relation between industry codes and the applicable general legal framework was not actively researched during the empirical study conducted in the context of this doctoral thesis (see Chapter 2, section 2.4.2, under 'Code, legislator and legislation'), no conclusions can be drawn as to the scale on which this occurs. However, in this respect it can be pointed at the findings of an empirical inquiry that I conducted with a colleague of the position of the vulnerable consumer in Dutch industry codes in the field of online shopping, IT and telecom, consumer finance and advertising. Some of the codes researched for that study closely mirrored the legal rules on the subject matter or even copied them verbatim. As we pointed out in the conclusions following on from that study, this seemingly superfluous practice might advantage consumers. When such codes include a compliant handling procedure, they provide an additional 'private' opportunity for obtaining redress in case legal rules are violated, the threshold for which will often be lower that the threshold for starting legal proceedings.[153]

Other industry codes entailed a clause obliging the regulated actors to comply with existing legislation and regulations, either in general or with regard to a specific set of legal rules. These practices at first blush seem superfluous, as the law has to be complied with anyway. However, they can also be interpreted as creating additional awareness of the legal rules, as a safeguard or incentive for compliance, or perhaps even as some sort of exemption clause intended to cover against liability for violations of the legal rules concerned. It could thus be said that one of the objectives or perhaps even the main objective of these codes is to ensure that statutory rules are complied with. So, I was able to assign the codes concerned a compliance function.

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and the implementing rules in the Dutch Personal Data Protection Act (*Wet bescherming Persoonsgegevens*). This regime formally allows for and encourages the detailing of the statutory provisions with sector-specific rule on personal data protection, laid down in codes of conduct. The regime also makes provision for the public approval of such codes. For a more detailed account of references to codes of conduct in EU and Dutch data protection regulation, see Chapter 4, section 4.4.1.1.3, under i.

[153] J.J.A. Braspenning & M. Menting 'Consumer protection and industry codes of conduct. An exploratory empirical study from the perspective of consumer vulnerability', Paper for the 15th International Conference on Consumer Law, Amsterdam 2015, pp. 26-29 (on file with the authors).

Criteria

The compliance function was assigned to industry codes quoting the applicable statutory rules or entailing a 'compliance clause'. Whether this function effectively materializes in practice arguably depends on the availability of enforcement mechanisms. If such mechanisms are lacking, statements that the legal rules are to be complied with might be a mere exercise in window-dressing, at least in the context of the industry code concerned.

10. Safeguarding function

Interests are central to the safeguarding function. That is to say that industry codes that have this function seek to protect certain interests.[154] The protected interests can be those of the private regulator and the regulated actors themselves, but a code can also aim to protect the interests of third parties, i.e., others than the industry actors themselves, such as consumers. Accordingly, the safeguarding function is in fact an umbrella function that houses two distinct, but related functions: (1) the consolidating function or *internal* safeguarding function and (2) the protective function or *external* safeguarding function. Whether the function has an internal or an external scope depends on the type of interests a code seeks to safeguard.

(1) 'Consolidating' function (internal safeguarding function)

The consolidating function or internal safeguarding function was assigned to codes that served as a tool to maintain the status quo, or sought to secure a certain way of doing business or the future of the industry. In other words, it was assigned to codes that had the industry's own interest as their focal point and sought to consolidate these internal interests. Such codes can have positive as well as negative effects. They can, for instance, establish a well-functioning self-regulatory framework setting out high standards, or they can create entry barriers to the market or constitute anti-competitive agreements.

Criteria

Since safeguarding intentions were sometimes explicitly mentioned in these contexts, I took particular account of the reason for and objective of an industry code when assigning the consolidating function. The relation between the code, the legislator and legislation also proved to be a relevant factor, since it could follow on from this relation that the industry preferred to take self-regulatory measures rather than await legislative interference (cf. the preventive function).

(2) Protective function (external safeguarding function)

Industry codes of conduct can also be aimed at protecting the interest of third parties. In itself, this is not a particularly distinguishing feature: most codes, if not all, will offer – to a greater or lesser extent – certain safeguards, e.g., safeguards for ethical behavior or against

[154] Eijlander & Voermans 1999, p. 18 ascribe a similar function (*waarborgfunctie*) to legislation, which has a safeguarding aspect in that it protects citizens against the government. As such, the function seems the equivalent of the protective function (*beschermingsfunctie*) of Veerman, De Kok and Clement, which also denotes protection against the government (Veerman, De Kok & Clement 2012, pp. 150-151).

misleading consumer practices. Some industry codes, however, are specifically aimed at the protection of third parties, most often consumers.[155] This group of industry codes was considered to have a protective or external safeguarding function.

Criteria

Whether the authors of an industry code have made the protection of third party interests into one of the prime goals of their code is, not surprisingly, likely to follow on from the objectives of and reason for the code, either in combination with its contents or otherwise. It should be noted, however, that these elements in effect only constitute a mere indication for the presence of the protective function. After all, in order for the protective function to take full effect in practice, the code must be enforceable. This implies that the availability of enforcement mechanisms as well as the possibility to impose sanctions are also relevant in the context of the protective function. Whether actual protection or just mere window-dressing takes place, likely depends on the availability and effectiveness of such mechanisms as well as the accessibility of the code.

Perspective

In the foregoing, the safeguarding function was discussed from the perspective of the private regulators. However, both the internal and the external aspect of the function can also be approached from a governmental perspective. As regards the external aspect or the protective function, this becomes apparent when considering that industry codes might be employed as a policy tool to implement or elaborate public policy concerning the protection of certain groups or interests, such as consumer policy. In these cases, the code has a protective function from a governmental perspective as well.[156] Likewise, public policy can touch upon the internal aspect of the safeguarding function (the consolidating function) of industry codes. This is the case when industry codes are used in the context of European policy concerning the internal market, competition law or harmonization. Here, use can be made of the positive effects of the consolidating function.

11. Signaling function

As its name already indicates, the signaling function was assigned to industry codes that give a signal to the regulated actors (internal signaling function) or to third parties, such as stakeholders, consumers, the legislator or the society at large (external signaling function). In its **internal** signaling function, a code raises the awareness of the regulated actors about certain issues or topics. A code with an **external** signaling function serves as a tool to position the industry in a certain way, e.g., as reliable, honorable or socially responsible. A code might thus serve as the 'business-card' of an industry, profession or company.[157] Likewise, codes of conduct can be used as a means to improve the image of the industry, thus raising the trust in and profile of the regulated actors.

[155] On the safeguarding function of legislation, see Veerman, De Kok & Clement 2012, p. 151.
[156] Examples of this practice can be found in Chapter 4, section 4.4.
[157] See Bos, Dekkers & Homborg 2007, p. 64; Kaptein, Klamer & Wieringa 2003, p. 19.

Criteria

Several elements of the framework of analysis played a role in determining whether a code of conduct had a signaling function. The elements 'reason' and 'aim' constituted the most important criteria in this respect. At this point, the wording of a code was not always of overriding importance for assigning the signaling function. In this respect, the context in which the code was drawn up also proved a relevant factor. The empirical study showed that industry codes are often, but not necessarily, drawn up following external incidents affecting the image of the industry sector or profession, or in response to political or social pressure. However, codes of conduct can also be drawn up for more neutral reasons and with a more neutral aim, such as setting out norms for reliable and professional behavior or raising the quality of the services provided. These codes also transmit a signal to the outside world; they have the industry or profession assume a certain, positive image. Following on from that, a code can also communicate a message to the legislator in the sense that it signals that the private actors are well capable of regulating themselves and that legislative interference may thus be dispensed with, provided of course that the code functions well.

The signaling function as umbrella function

The description of the signaling function provided above already suggests that this function can take different shapes. Depending on the signal that an industry codes sends, the following related, yet distinct functions can be brought under the umbrella of the signaling function: the image-building function, the quality control function, the quality mark function and the CSR function.

12. Image-building function

An industry code of of conduct can be used as a tool for establishing or enhancing the reputation of an industry sector or profession. The drawing up of a code can, for instance, be motivated by the desire or necessity to raise the quality of the services provided, to introduce rules for ethical behavior or to further professionalize the industry or profession. In other words, an industry body or professional organization can have an interest in distinguishing itself from its competitors, for example by documenting from a social, political or competitive point of view desirable core values, norms and rules in an industry code of conduct. In this way, the industry or profession tries to attribute a certain image to the regulated actors or to enhance the already existing image, with the code functioning as a stage for presenting these actors in the desired way.

Private actors can also be forced to call upon the reputational effects of industry codes. This is the case when the introduction of a code (or a revision of an already existing code for that matter) is a response to incidents that damaged the image of and trust in the industry sector or profession. Codes then also serve as a tool to build the image of the industry, yet in these cases the image-building function has a less neutral connotation than in the scenarios sketched above.[158]

[158] There are areas of overlap with the quality control function, the quality mark function and CSR function discussed below. A trade association or professional body can for example present itself *by* linking a quality

Criteria

The image-building function was assigned to a code when it followed on from the reason for or aim of the code, in combination with the code's content, that the code was developed to introduce, maintain, enhance or improve reputation-related issues, such as social responsibility, integrity, professionalism, quality and image. As mentioned above, the context in which an industry code was drawn up is also relevant in this respect, particularly when it was drawn up as a result of damage incurred to reputation of the industry or the profession. After all, given the fact that 'image-building' can also create negative associations, it is perhaps not surprising that most codes do not explicitly indicate that they serve to improve the image of the industry sector or profession concerned. Nevertheless, it is plausible that codes introduced in response to external pressure and reputation damage directly or indirectly function as an image-building tool. Some codes explicitly stated that the conduct of the regulated actors should not be detrimental to the image of the industry or profession.

13. Quality control function

Codes of conduct can also function as a means to safeguard or raise the quality of the products or services offered by the regulated actors. This use of codes as an instrument for quality control can be closely linked to the aforementioned image-building function, particularly when compliance with the code is made visible through a logo, label or quality mark (see below, under 14).

Criteria

The quality control function followed on from the reason for and the objectives of a code. It was assigned when one or both elements explicitly referred to the code as a contribution to the control or enhancement of the quality of a product or service.

14. Quality mark function

Sometimes the image-building function and the quality control function were visually reinforced: parties acting in compliance with the code concerned were allowed to carry a logo or a label. Codes thus become a visual quality mark for a certain product or service,[159] or for the behavior of the parties bound by the code.[160] The fact that the code is complied with is seen as a distinctive mark of quality.[161]

Criteria

The wording of the code and related documents combined with the reason for it and its aim were relevant criteria in assigning the quality mark function. More specifically, the function

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mark to the code of conduct ('quality mark function') or *by* raising the quality of its products or services ('quality control function'). The reputation function can also be related to issues of corporate social responsibility ('CSR function').

[159] Baarsma et al. 2003, p. 105.

[160] Endorsing a code of conduct can also be one of the conditions for obtaining a trade-mark. These cases are not covered by the quality mark function as the code as such is not the distinctive feature.

[161] Cf. Baarsma et al. 2003, p. 32.

was assigned when this combination of elements suggested that there was a link between the code and the quality mark related to the code, in the sense that compliance with the code gives the right to carry the quality mark. The actual relevance and value of the quality mark can be determined by the availability and effectiveness of enforcement mechanisms and possible sanctions.

15. CSR function

Codes of conduct can, either as part of an industry's corporate governance strategy or otherwise, include norms that concern the social responsibility of the regulated actors. Examples are codes of conduct that stipulate that human rights should be respected, that determine what norms ought to be applied with regard to responsible working conditions or that set out the norms for environmentally aware behavior. In doing so, codes often refer to the applicable international standards, such as the ILO Conventions that set out the fundamental principles and rights at work.[162] Codes of conduct that explicitly document norms for corporate social responsibility (CSR) were assigned the CSR function.

Criteria

The CSR function of an industry code usually followed on from the interplay between the reason for drawing up a code, its objectives and its content.

3.3.2 The role of perspective

The previous section already hinted at the important role that 'perspective' played in the identification of the functions. Perspective proved equally important in the following step of listing and categorizing the functions on the basis of their interconnectedness: like the outcomes of the process of identifying the functions, the eventual results of this exercise depend on whose perspective one takes. Hence, before turning to the categorization of the functions (section 3.3.3), this section will briefly go into the role of perspective.

The importance of perspective particularly comes to the fore when the legislator has been involved with an industry code. Which functions can eventually be assigned to such a code depends on whether the code is viewed through the eyes of the private regulator or through those of the legislator. Or, following on from the terminology used by Oude Vrielink, Van Montfort and Bokhorst, whether one adopts an organizational perspective or a governance perspective.[163] From the first perspective, industry codes are not only a regulatory tool, but also a tool to communicate to the regulated actors and external stakeholders what rules govern

[162] For an overview of the ILO conventions, see <www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 1 July 2016).

[163] Oude Vrielink, Van Montfort & Bokhorst 2011. It should be noted, however, that the use of the notions 'organizational' and 'governance' does not entirely concur. For the purposes of this section, both notions pertain to the actor, whether private regulator or legislator, whose perspective is taken. Oude Vrielink, Van Montfort and Bokhorst seem to use the notions to denote different strands of literature in which codes are dealt with, namely business ethics literature and governance literature. Nonetheless, as will become apparent from the discussion below, the ensuing perception of industry codes is useful for clarifying the role of perspective.

the behavior of the regulated actors.[164] From the second perspective, by contrast, codes are a specific type of regulation that can be used to attain policy objectives, either as an alternative, or as a complement, to public regulation.[165]

> Illustrative in this respect are the divergent views on the functions of codes of conduct on the protection of personal data under the Dutch Data Protection Act (the forerunner of the Dutch Personal Data Protection Act (*Wet Bescherming Persoonsgegevens*). The legal regime of this Act, in short, entailed the possibility for industry actors to draw up an industry-level code to substantiate the statutory provisions and to seek its approval by the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*).[166] As Overkleeft-Verburg points out, the Data Protection Authority perceived the industry codes drawn up in the context of the Data Protection Act as a regulatory tool, primarily having a safeguarding function, while the private regulators mainly considered their codes as external commercial communication strategies and as internal steering instruments.[167]

When the organizational perspective and the governance perspective are accordingly applied to industry codes of conduct that, in one way or another, are related to the legislator or public regulation, the following overview of functions emerges:

Figure 3.3 – Functions from an organizational and a governance perspective

Organizational perspective	Governance perspective
- Preventive function - Complementary function - Compliance function - Harmonization function - Safeguarding function - Other functions (not necessarily arising from the interaction code - legislator/legislation)	- Policy instrument function - Alternative to public regulation - Complementary function - Harmonization function - Safeguarding function

3.3.3 Categorization

The discussion in the previous sections has left us with a general overview of the functions and two closely related recurrent themes, namely the interconnectedness of the functions and the role of perspective. Building on these themes, this section will develop this general overview into a categorized, layered one. The purpose of this exercise is to construct an

[164] Cf. Oude Vrielink, Van Montfort & Bokhorst 2011, pp. 486-488.
[165] Cf. Oude Vrielink, Van Montfort & Bokhorst 2011, pp. 487, 490-491.
[166] This possibility has continued to exist under the Personal Data Protection Act and is also reflected in the European legal regime on the protection of personal data. See Chapter 4, section 4.4.1.1.3, under i.
[167] Overkleeft-Verburg 1995, pp. 264-265.

overview that not only conforms to the findings of the empirical study, but can also serve as a building block for the second part of this thesis, in which I investigate the legal relevance of industry codes in European and Dutch legislative policies, legislation and case law.

3.3.3.1 A two-way classification: Regulatory and communicative functions

In my Master's thesis, I already categorized the functions then identified, drawing a broad distinction between two categories of functions: regulatory functions and communicative functions.[168] The first category includes functions that can be classified as 'regulatory', meaning that they relate to the rule-setting nature of industry codes of conduct. This category reflects the potential of such codes to address certain issues by means of regulatory standards, either in combination with public regulation or otherwise.[169] The second category encompasses functions that relate to the communicative features of industry codes of conduct. Industry codes are not only used for regulatory purposes, but can also be employed as a means to communicate to internal and external stakeholders what rules and values guide the behavior of the regulated actors and, broadly speaking, what the industry or profession stands for. A categorization of the functions listed in section 3.3.1 on the basis of this two-way classification leads to the following overview.

Figure 3.4 – Regulatory and communicative functions

I Regulatory functions	II Communicative functions
1. Corporate governance function	11. Signaling function
2. Harmonization function	12. Image-building function
3. Framework function	13. Quality mark function
4. Codes as standard contract term	---
5. Preventive function	14. Quality control function*
6. Complementary function	15. CSR function*
7. Compliance function	
8. Safeguarding function	** These functions are in effect situated at the interface of regulation and communication.*
9. Policy instrument function	
10. Alternative to public regulation	

Although a distinction can be drawn between the regulatory and communicative features of an industry code, it already followed from the exploratory empirical study carried out as part of my Master's thesis that these features are most often two sides of the same coin: the vast majority of industry codes studied had both regulatory and communicative functions.

[168] See Menting 2011, pp. 32-45.
[169] Cf. the regulatory function of private law as described by Cafaggi & Muir Watt 2008, p. 2: "By regulatory functions of private law we mean the ability of private law instruments, in particular contract, torts and property to address market failures". From an organizational perspective, the notion 'regulatory' can be said to denote the steering of behavior. If one takes a governance perspective, the notion is more likely to encompass a policy element ('oriented towards public goals' or 'policy-oriented').

Although insightful, the divide between regulatory and communicative functions cannot be but a first outline for two reasons. First of all, this two-way classification does not adequately reflect the organizational perspective and the governance perspective. As argued above, it is vital to take account of these perspectives as they can lead to different functions. With regard to the regulatory functions, more specifically, these perspectives lead to a more nuanced categorization. If one considers the category of regulatory functions from a governance perspective, the policy instrument function will come to the fore most prominently, while other functions are pushed to the background or even disappear out of sight (e.g., the preventive function and the compliance function). By the same token, when we look at it from the organizational perspective, the policy instrument function disappears. Thus, the two perspectives lead to a differentiation within the category of regulatory functions that is not captured by the regulatory-communicative divide. Secondly, a closer analysis of the connections between the functions suggested that this divide was inadequate to reflect the interconnectedness of the different functions, which demands their further categorization. Therefore, taking into account the role of perspective and the interconnectedness of the functions, I decided to abandon the initial regulatory-communicative divide and to compile a different, more detailed overview of the functions.

3.3.3.2 Categorized overview of the functions: Pillars, layers and connections

This new overview was compiled by analyzing the functions from a meta-perspective, that is to say that the general overview of functions that resulted from the empirical study (cf. Figure 3.1) was detailed by further establishing the links between the different functions based on the insights gained through the empirical study (cf. the interconnectedness of the functions and the role of perspective).[170] It consists of three main functions or pillars: 1) the regulatory function, 2) the governance function and 3) the signaling function. The different functions discussed in section 3.3.1 can all be categorized under one of these pillars. The three main functions thus come to serve as umbrella functions, covering several related and overlapping, yet demonstrably different, 'sub-functions'. These functions are not mutually exclusive:[171] the industry codes studied all have two or more functions. All this leads to the following, multi-layered overview of the functions of European and Dutch industry codes:

[170] For that reason, the overview of the functions per industry code included in Annex 2 is not as detailed as the overview presented in Figure 3.5 below. See also the introductory remarks to this Annex.
[171] Cf. Tambini, Leonardi & Marsden 2008, p. 51.

Figure 3.5 – Multi-layered overview of the functions

Overview functions: pillars, layers and connections

1. **Regulatory function**
   - 1.1. Corporate governance function
   - 1.2. Harmonization function
   - 1.3. Framework function
   - 1.4. Code of conduct as standard contract term
   - 1.5. Preventive function[172]
     - Complementary function
     - Compliance function
   - 1.6. Complementary function
   - 1.7. Compliance function
   - 1.8. Safeguarding function
     - 'Consolidating' function (internal safeguarding function)
     - Protective function (external safeguarding function)

2. **Governance function**
   - 2.1. Policy instrument function
     - Alternative to public regulation
     - Complementary function
     - Harmonization function
     - Safeguarding function
       - 'Consolidating' function (internal safeguarding function)
       - Protective function (external safeguarding function)

3. **Signaling function**
   - 3.1. Image-building function
   - 3.2. Quality mark function
   - ---
   - 3.3. Quality control function*
   - 3.4. CSR function*

** Although these functions are in effect situated at the interface of regulation and communication, I have placed them under the signaling function, as rules relating to quality control and CSR are often drawn up in response to societal pressure.*

In terms of perspective, the first pillar, constituted by the regulatory function, covers the functions that can be assigned to an industry code from an organizational perspective. The second pillar, in turn, represents the governance perspective. From this perspective, industry codes of conduct relied upon by the legislator serve as a policy instrument, hence the designation of the policy instrument function as the overarching function. In the guise of a policy instrument, industry codes can be employed as an alternative or complement to public

[172] In functioning as a 'shield' against public regulatory interference, industry codes can complement public regulation or serve as a tool for (enhanced) compliance with public regulation, all with the objective of fencing off governmental interference with the industry.

regulation and as a means to implement public policy aimed at the protection of certain interests (the protective function). At the European level, industry codes can also have a harmonizing function when used by the European institutions to pursue European legal integration.[173] Finally, the third pillar brings the functions that relate to the communicative side of industry codes together under the heading of the signaling function.[174]

3.4 Functions, motives and objectives according to the literature

Several scholars, legal or otherwise, have discussed the functions and objectives of, and the motives for industry codes of conduct and other forms of private regulation. This section will investigate how the functions identified on the basis of the empirical study relate to these functions, motives and objectives. Has the empirical study uncovered new functions or have important functions been missed? Given the focus of this doctoral thesis on industry codes in private law, this comparison will be limited to general and private law literature touching upon industry codes of conduct and private regulation in general.[175]

3.4.1 Literature review

3.4.1.1 Functions

3.4.1.1.1 Private regulation

The functions of private regulation are mainly discussed against the background of the relation between private regulation, and the legislator and legislation. Ogus and Carbonara, for instance, refer to self-regulation "as a delegation of state-making powers" (cf. the policy instrument function) and "preemptive" self-regulation as an attempt by private actors to prevent the enactment of stricter public rules (cf. the preventive function).[176] The latter is also mentioned by Verdoodt, who additionally discusses the use of self-regulation as an alternative or complement to legislation.[177] Black, in turn, points out that the greater part of policy literature perceives self-regulation as "an optional strategy which governments can adopt, depending on the particular context".[178] This perspective on self-regulation corresponds with the governance perspective brought forward in section 3.3.2 and the policy instrumental functions that follow from it. It is also in line with the role that Black ascribes to self-regulatory associations (SRAs). In the words of Black, these associations exert "the

[173] Cafaggi & Janczuk 2010, p. 21. See also the European examples discussed in Chapter 4 of this doctoral thesis.
[174] Thus, the three pillars in effect still reflect the regulation – communication dichotomy: the regulatory function and the governance function represent the regulatory nature of industry codes, while the signaling function relates to the communicative side of these codes.
[175] In reviewing this literature, I follow the terminology used in the publications referred to.
[176] Ogus & Carbonara 2011, pp. 232-237.
[177] Verdoodt 2007, pp. 36-38.
[178] Black 2001, p. 114.

governmental function of regulation".[179] Black in this respect refers to political and socio-legal theory where SRAs are ascribed the role of intermediaries that act as "vital horizontal linkages between various sections of society"[180]. In particular, SRAs can play a role in the development, furthering and implementation of public policy.[181] This role reflects some of the functions residing under the umbrella of the regulatory function and the governance function, respectively (see section 3.3.3.2). It also links up with what Vranken has called the 'bridging function' (*brugfunctie)* that private regulation can have in private law: in relation to both case law and legislation "private regulation can act as a bridge between the knowledge, experience and insights of those directly involved in a certain branch, market or profession in society, and the rule that is supposed to cover that area", according to Vranken.[182]

3.4.1.1.2 Private regulation in the European context

Cafaggi discusses the functions of private regulation in the European (private law) context. In this context, Cafaggi notes, public regulation and private regulation generally function as complements rather than as substitutes. He defines the relationship between both types of regulation as one of 'institutional complementarity': public and private regulation do not function as alternatives but rather "complement each other in terms of goals, instruments and reinforce the overall accountability and effectiveness of the regulatory process".[183] This complementarity can occur vertically, i.e., when the public actor is European and the private actor is national or vice versa, or horizontally, i.e., when both actors are to be found at the European level.[184]

More specifically, Cafaggi indicates, in European contract law self-regulation can function as a complementary tool in the harmonization and regulation of EU contract law. In doing so, self-regulation can complement or substitute existing public regulatory measures with general or sector-specific private rules. Against this backdrop, Cafaggi draws a distinction between an institutional and substantive set of functions performed by self-regulation.[185] The institutional set is most relevant in the context of this chapter[186] and comprises the following:

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[179] Black 1996, p. 28.
[180] Black 1996, p. 28.
[181] Black 1996, p. 28, with reference to W. Streeck & P.C. Schmitter, 'Community, Market State – and Associations? The Prospective Contribution of Interest Governance to Social Order', in: W. Streeck & P.C. Schmitter (eds), *Private Interest Government: Beyond Market and State*, London: Sage 1985, pp. 17, 20.
[182] Vranken 2006, p. 78.
[183] Cafaggi 2011b, p. 100.
[184] Cafaggi 2011b, p. 101.
[185] Cafaggi 2007, pp. 164-165, 168.
[186] The substantive set of functions is of a more specific nature: "from a substantive perspective it can contribute to the creation of SCF [standard contract forms, MM] according to different models and to their correct administration, to produce codes of conduct that affect (1) the content of contract, (2) the bargaining procedures, ensuring compliance with EU legislation, and (3) more in general economic activities of the regulated". See Cafaggi 2007, p. 168.

"From an institutional perspective, SR [self-regulation, MM], can complement:

(1) Legislative functions by contributing to the definition of contractual terms, codes of conduct; framework contracts;
(2) Regulatory functions by defining (a) sector specific guidelines or, more specifically in the area of information regulation, (b) by introducing cognitive intermediaries;
(3) Interpretive functions by offering guidelines to individual firms when they contract with other firms or consumers;
(4) Monitoring functions of European Contract Law by verifying correct implementation of EU law at MS [Member State, MM] level;
(5) Enforcement by defining sanctions to their members in case of violations"[187]

Self-regulation can thus perform standard-setting as well as monitoring functions in EU contract law.[188] In its role as a standard-setting instrument, self-regulation can often be "an agent of harmonization", Cafaggi notes.[189] This observation links up with the integrating function of private regulation, coined by Cafaggi and Janczuk, which concerns the ability of private regulation to contribute to European legal integration.[190] This integrating function can be intentionally relied upon by private actors or European institutions seeking to establish (a higher level of) legal harmonization, but can also come up as a side-effect when private regulation seeks to achieve other aims.[191] The contribution of private regulation to European legal integration often occurs in a relationship of complementarity with public (regulatory) measures.[192]

3.4.1.1.3 Codes of conduct

Literature also discusses the functions of industry-level codes.[193] Huyse and Parmentier infer these functions from the three-fold relationship that codes of conduct can have with legislation. First of all, codes can function as a replacement of public regulation when existing legislation is withdrawn as a result of an active deregulation policy and codes take its place. Secondly, codes can substitute for legislation when they fill regulatory gaps that legislation

[187] Cafaggi 2007, p. 168.
[188] Cafaggi 2007, pp. 164-165, who adds that the role of self-regulation can differ depending on whether it concerns B2B or B2C relationships.
[189] Cafaggi 2007, p. 166.
[190] Cafaggi & Janczuk 2010, p. 4.
[191] Cafaggi & Janczuk 2010, pp. 4, 18-23.
[192] Cafaggi & Janczuk 2010, p. 4. See also Cafaggi 2011b, pp. 98-103 and Cafaggi 2010, pp. 201-205, 208-209. This suggests that the integrating function is intertwined with the complementary function, which echoes the multi-layered nature of the function-overview included in section 3.3.3.2 of this chapter. For an account of the ways in which legal integration through private regulation can occur, see Cafaggi & Janczuk 2010, pp. 23-26. Private regulation can however also lead to fragmentation and dis-integration. See Cafaggi 2011b, pp. 98-100; Cafaggi 2010, p. 201; Cafaggi & Janczuk 2010, pp. 26-27. Cf. Cafaggi 2011a, pp. 24-25 on transnational private regulation.
[193] As indicated at the outset of this section, the literature review is limited to industry codes of conduct. For an overview of the functions of corporate codes of conduct, see, e.g. Hoff 2006, pp. 95-102; Kaptein, Klamer & Wieringa 2003, pp. 18-19; Kaptein 1998, p. 170.

would otherwise have filled. Thirdly, codes can add to legislation when they are adopted to top existing legislation for the want of further legislative action in the short term.[194]

De Groot-Van Leeuwen and De Groot, building on the existing body of literature on the topic at the time (1998), draw a distinction between internal and external functions of codes of conduct. The former category comprises five functions. The first internal function that codes can perform is the collective function, meaning that codes serve as a tool to advance issues such as group cohesion, pride, corporate culture and shared values. Following on from this function codes can, secondly, contribute to the collective benefit of the regulated group of actors in that they prevent strong internal competition. The third internal function is the platform function; codes can serve as a platform for internal ethical discussion. Fourthly, the function of a code of conduct can lay in the identification of malpractices and in the sanctioning of these practices. The fifth and last internal function concerns the role that codes can play in guiding individual decisions.[195] De Groot-Van Leeuwen and De Groot also mention four external functions. The first of these four functions pertains to the capacity of codes to act as a 'bridge with society'. Codes can facilitate the interaction between the regulated actors and society in a more structured way. Secondly, codes can function as a tool to improve the prestige of the regulated actors. The third external function that can be performed by codes of conduct is that of fencing off regulatory intervention by the state and shielding the market against external competitors. Fourthly, the function of a code can be to protect external entities, such as clients, society and the environment.[196]

Similar functions are ascribed to professional codes of ethics, which were also included in the empirical study - with the exception of professional codes drawn up by regulatory authorities drawn from the profession, such as the Netherlands Bar Association. Frankel, for example, lists eight functions that can be performed by codes of professional ethics. These codes can function as: an enabling document (a moral compass); a source of public evaluation; professional socialization (enhance pride and professional identity); a tool to further the reputation of a profession and to increase public trust; a tool to preserve professional values; a tool to prevent unethical behavior; a means of support in shielding the profession against unwanted outside intrusions; and as a basis for adjudication.[197] Lindblom and Ruland submit that professional codes can have four general objectives. They can "provide a moral foundation for the profession; serve as a basis for self-policing of the profession; promote the self-interest of the profession; serve as public relation tools".[198] These objectives for a large part resemble the functions identified by Rhode, who mentions the function of "enhancing status and self-image", constraining internal and external competition, "reconciling client, colleague and institutional interests", and maintaining the profession's autonomy.[199]

[194] Huyse & Parmentier 1990, pp. 262-263.
[195] De Groot-Van Leeuwen & De Groot 1998, pp. 160, 164-165.
[196] De Groot-Van Leeuwen & De Groot 1998, pp. 160, 165-166.
[197] Frankel 1989, pp. 110-112.
[198] Lindblom & Ruland 1997, pp. 574-576.
[199] Rhode 1981.

3.4.1.2 Motives and objectives

The motives for and objectives of private regulation are also touched upon in the scholarly debates on the subject. Both issues are also included in the framework of analysis used in the empirical study and proved to be important criteria in defining the functions of industry codes. Therefore, it was considered worthwhile to take a closer look at the motives for and objectives of private regulation and industry-level codes mentioned in the literature.

3.4.1.2.1 Private regulation

A first list of possible motives for and objectives of private regulation can be found with Cafaggi and Renda. They mention the following causes and motivations for private governance schemes:

- "signaling and enhancing of legitimacy;
- controlling of the value chain;
- efficiency, inter-firm coordination and co-opetition;
- reducing transaction costs through standardization;
- complementing or pre-empting public regulation;
- quality and effectiveness;
- collusion (hide strategic anti-competitive objectives), and
- other incentives, including the broadening of the scope of regulatory activities and the achievement of competitive advantages".[200]

Stamhuis, in turn, points out that the motives for self-regulation can be discussed from the perspective of the private actors, i.e., a bottom-up perspective, or from the perspective of the government, i.e., a top-down perspective. From the former perspective, private interests such as the pre-emption of public regulation, the need to respond to demands of civil society organizations or commercial interests constitute the basis for self-regulation. Viewed through the eyes of the government, the use of self-regulation can for example be motivated by difficulties in aligning legislation and societal processes, the governmental strive for deregulation or enforcement and control issues.[201] Bressers, who discusses self-regulation in the context of environmental business care, draws a similar distinction between motives arising from governmental policy and motives that follow on from corporate policy. Governmental policy can trigger the adoption of self-regulation through, among other things, financial incentives, regulations, and policy specifically aimed at environmental business care. Self-regulation stemming from corporate policy is based on different motives, such as the internal and external image of the company, consumer preferences, the demands of

[200] Cafaggi & Renda 2012, pp. 5-9.
[201] Stamhuis 2003, pp. 6-8.

suppliers and customers, quality assurance and idealistic motives.[202] Williams also mentions the fact that drawing up self-regulation can be motivated by image-related issues and puts forward reputation as one of the three main incentives that motivate the introduction of self-regulatory regimes. Industry self-regulation can help control malpractices and communicate the intentions of the regulated actors to external stakeholders. The second motive Williams points to is what he terms 'legal and regulatory risks'. This motive pertains to the use of industry self-regulation to pre-empt public regulatory intervention or as a shield against possible liability claims. The first-mover advantages that self-regulation might bring (e.g., upgrade products and enhance an industry's competitiveness) forms the third motive.[203]

A more implicit account of possible objectives of industry self-regulation can be found with Gunningham and Rees. In defining the concept of self-regulation, they submit that a distinction has to be drawn between economic self-regulation and social self-regulation. Gunningham and Rees use the term economic self-regulation to denote rules that seek to control different aspects of economic life, such as markets. Social self-regulation has the objective of protecting other interests, such as the interests of consumers or environmental interests.[204] Hemphill indicates that self-regulation exists in case of regulatory gaps or where self-imposed rules can help in complying with or going beyond what is required by public regulation.[205] Finally, it can be pointed to an empirical study on self-regulatory practices in the policy areas of the Health and Consumer Protection Directorate General of the European Commission (SANCO), conducted by Van der Zeijden and Van der Horst. From this study it follows that self-regulation in consumer affairs is most often aimed at enhancing and ensuring consumer confidence and improving the image of the regulated actors. In the policy area of 'public health', self-regulation serves as a tool to support the use of certain quality standards and to improve the quality of products and services. The improvement of public health is the prime objective of self-regulation in this policy area. Self-regulation concerning food safety is used to improve the communication of nutrient information to consumers and to prevent, as far as possible, the imposition of far-reaching nutrition labeling requirements.[206]

3.4.1.2.2 Codes of conduct

An empirical study of the Oxford University Centre for Social-Legal Studies on *inter alia* the regulation of harmful content by the media industry across Europe sheds some light on the rationale behind the introduction of industry codes of conduct. More specifically, this study shows that when the media industry draws up codes it can be motivated by one or more of the following, not mutually-exclusive reasons:

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[202] Bressers 1995. Cf. Verdoodt's discussion of the internal (sense of responsibility, professionalization) and external motives (image-building and the pre-emption or postponement of legislation, or making legislation superfluous) for self-regulation (Verdoodt 2007, pp. 30-41).
[203] Williams 2004, pp. 12-13, with further references. Haufler 2001, pp. 3, 20-30, 106, refers to similar motives.
[204] Gunningham & Rees 1997, p. 365.
[205] Hemphill 1992, p. 915.
[206] Van der Zeijden & Van der Horst 2008, pp. 19, 23, 26.

- "As an alternative to direct statutory regulation;
- To prevent direct statutory regulation by the state;
- To build public trust, consumer confidence;
- To avoid legal or user-perceived liability;
- To protect children and other consumers;
- To exert moral pressure on those who otherwise behave in an 'unprofessional' or 'socially irresponsible way';
- To reinforce competitive advantages of a group of industry players, while potentially restricting market access for others;
- As a mark of professional status;
- To develop a set of common standards for services and products;
- To raise the public image of their industry."[207]

Kolk, Van Tulder and Welters touch upon the reasons for the introduction of international (including European) CSR codes, drawing a distinction between codes drawn up by social non-profit actors (governments, international organizations or social interest groups) and codes authored by firms or business support groups (e.g., trade associations). While the former types of actors use codes to influence the behavior of firms, the latter types of actors employ codes as a self-regulatory tool or as a tool to influence other actors. When used to influence other actors, codes can, more specifically, serve as a strategic instrument to control business partners or as public relations tools (e.g., for improving the image of the industry or the corporation). Additionally, in the relationship between the government and private actors, the objective of a code may be to anticipate or prevent public regulation, as Van Kolk, Tulders and Welters point out.[208]

3.4.2 Comparison

How do the functions, objectives and motives mentioned in the literature relate to the function overview put together in this chapter (hereafter: 'the empirical functions')? Three conclusions can be drawn.

First of all, it can be concluded that most of the empirical functions are referred to in the literature, where perspective also plays a role. Legal scholars frequently focus on the functions that result from the interaction between the private sphere and the public sphere. References are made to the policy instrument function,[209] the complementary function in its

[207] 'Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis', Oxford University Centre for Socio-Legal Studies, 2004, pp. 17-18 (available at <https://ec.europa.eu/digital-single-market/en/content/self-regulation-digital-media-converging-internet-industry-codes-conduct-sectoral-analysis>, accessed 1 July 2016); Tambini, Leonardi & Marsden 2008, p. 51 with reference to R. Baldwin & M. Cave, *Understanding Regulation: Theory, Strategy, and Practice*, Oxford: Oxford University Press 1999, pp. 125-137. See, in different contexts, for instance also Oude Vrielink, Van Monfort & Bokhorst 2011; Patterson & Van Buren III 2012. Cf. Bondy, Matten & Moon 2008, p. 298 on the reasons for adopting corporate codes of conduct on CSR issues.

[208] Kolk, Van Tulder & Welters 1999, pp. 151-152. Cf. in the context of corporate governance Aguilera & Cuervo-Cazurra 2004 and Zattoni & Cuomo 2008, who state that both efficiency and legitimacy pressures lead to the adoption of codes of good governance.

[209] Ogus & Carbonara 2011, pp. 232-237; Black 2001, pp. 114-115.

different guises,[210] and the role of codes as regulatory alternatives[211]. Also mentioned are the compliance function,[212] the preventive function,[213] and the protective function[214]. The signaling element of codes of conduct equally comes to the fore, particularly in the literature on professional codes[215] and in the guise of a motive or an objective[216]. The framework function was not mentioned as such in the literature I reviewed.[217]

Secondly, it can be inferred from the discussion in this section that the motives for and objectives of codes of conduct are indeed a strong indication of the functions a code can be said to perform. Many of the motives and objectives discussed bear close resemblance to the empirical functions. However, they are not necessarily synonymous with these functions.[218]

> The functions of the Dutch SMS Services Provision Code of Conduct (*Gedragscode SMS Dienstverlening*) are illustrative in this respect. This code was adopted in 2003 in response to an appeal made by three supervisory authorities after having received a large number of complaints from consumers about the obscure way in which SMS services were provided. Social and political pressure prompted revision and tightening of the Code on several occasions.[219] Regarding the reasons for adoption and revision, firstly, the Code can be said to have both a preventive function (avoid state interference, cf. political pressure) and a signaling function (response to external pressure). Since the aim of the Code is to safeguard legal certainty and transparency for End Users in the market for premium SMS Services,[220] it can also be attributed with a protective function. However, the Code arguably performs more functions than those that follow on from the reasons for its adoption and its objective. The content of the Code reveals that parties that conclude an agreement with one of the signatories of the Code will be contractually obliged to comply with the Code (function of code as standard contract term).[221] Furthermore, a closer look at the interaction between the legislator, legislation and the Code shows that on the one hand, the legislator gives leeway to the industry to self-regulate and to complement the general legislative

[210] Cafaggi 2011b, 2010 and 2007; Cafaggi & Janczuk 2010; Verdoodt 2007, pp. 36-38; Huyse & Parmentier 1990, pp. 262-263.
[211] Verdoodt 2007, pp. 36-38; Huyse & Parmentier 1990, pp. 262-263.
[212] Hemphill 1992, p. 915.
[213] Ogus & Carbonara 2011, pp. 232-237; Verdoodt 2007, pp. 36-38; De Groot-Van Leeuwen & De Groot 1998, p. 166. The preventive function of De Groot-Van Leeuwen and De Groot also covers codes that prevent external competitors from entering the market. This corresponds with the internal protective function.
[214] De Groot-Van Leeuwen & De Groot 1998, pp. 160; 163-166.
[215] De Groot-Van Leeuwen & De Groot 1998, pp. 160; 163-166 and in the context of professional codes: Rhode 1981; Frankel 1989, pp. 110-112; Lindblom & Ruland 1997, pp. 574-576.
[216] See *inter alia* Bressers 1995; Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis', Oxford University Centre for Socio-Legal Studies, 2004, pp. 17-18; Kolk, Van Tulder & Welters 1999, pp. 151-152.
[217] Although there is no mention made of the corporate governance function, the CSR function and the function of codes as standard contract term, all three are arguably reflected in the literature, albeit in a less explicit way. The former two functions are in effect reflected in discussions on codes in relation to corporate governance and CSR, respectively, while the latter function echoes through in the literature on governance by contract (see above, n 145).
[218] This already follows from the fact that the framework of analysis included more criteria besides reason and aim.
[219] See <www.acm.nl/nl/publicaties/publicatie/8346/Gedragscode-voor-SMS-diensten/5> and <www.rijksoverheid.nl/nieuws/2010/03/19/nieuwe-sms-gedragscode-voldoet-niet.html> (accessed 1 July 2016).
[220] SMS Services Provision Code of Conduct (old English version of 1 April 2014), p. 4 (available at <www.payinfo.nl/gedragscodes>, accessed 1 July 2016).
[221] See Article 2 of the SMS Code.

framework regulating SMS Service contracts, while on the other hand the private rules are also supported and complemented themselves by legal rules that tighten the existing regulatory framework.[222] This leads the Code to assume a complementary function (organizational perspective) and a policy instrument function (governance perspective). These functions are likely to be missed whenever account is taken of reasons and objectives alone.

Thirdly, it can be concluded from the literature review that some of the functions that are referred to by other scholars were not identified on the basis of the empirical study. The first difference that stands out in this respect is the distinction that De Groot–Van Leeuwen and De Groot have drawn between internal and external functions, something that does not come to the fore explicitly in my overview of the functions. The internal functions listed by these scholars and the external bridging function are not included in the overview.[223] The same goes for the integrating function defined by Cafaggi and Janczuk and the bridging function that Vranken refers to.[224] Finally, the overview does not as such refer to the fact that industry codes can function as a shield against liability or the unwanted intrusion of outsiders.[225]

Given the goal I had in my function overview, i.e., to serve as a stepping-stone in determining the legal relevance of industry codes in Dutch private law, it was however not deemed necessary to adapt the overview to reflect these differences. The internal functions mentioned by De Groot-Van Leeuwen and De Groot, are arguably less relevant when it comes to the legal relevance of an industry code and the bridging function that they refer to in fact only denotes the very general role of codes in structuring relationships. The integrating function is closely related to the harmonization function and the policy instrument function, which did result from the empirical study, and is as such already reflected in the overview. A similar observation applies to the function of industry codes as a shield against liability or outsider intrusion; these functions are reflected in the compliance function and the internal safeguarding function, i.e., consolidating function, respectively (cf. the descriptions of these functions in section 3.3.1). The bridging function put forward by Vranken was not added to the overview either. In signaling the role of private rules as a "concrete source of information for the legislator and the courts",[226] this function is already indicative of the possible legal relevance of codes and other forms of private regulation. Thus, its significance lies at a more 'advanced stage' than that of the empirical functions.

The brief literature review does not warrant the definite conclusion that the empirical study has uncovered new or other functions. However, it can be held that the study has led to an overview of functions that is more comprehensive than any found in the literature studied. Additionally, other scholars do not generally bring to the fore in their overviews the interconnectedness between the different functions. Viewed from this perspective, the function overview presented in this chapter can be deemed to constitute a solid building block

[222] *Parliamentary Papers II* 2009/10, 31 412, no. 16 and no. 21; Regulation of the Minister of Economic Affairs, Agriculture and Innovation of 23 February 2011, no. WJZ / 11026769, amending the *Regeling universele dienstverlening en eindgebruikersbelangen*, *Government Gazette* 2011, no. 3687.
[223] De Groot-Van Leeuwen & De Groot 1998, pp. 160; 163-166.
[224] Cafaggi & Janczuk 2010, p. 4; Vranken 2006, p. 78.
[225] Frankel 1989, pp. 110-112; Williams 2004, pp. 12-13.
[226] Vranken 2006, p. 78.

for the theoretical part of this doctoral thesis. I will return to this topic in Chapter 7 (section 7.2.1.1). In the next three chapters – which take a closer look at the legislative and judicial approaches to industry codes of conduct in European and Dutch private law – the functions will only play a very limited role; they will only briefly pass in review in section 4.4.3 of Chapter 4.

4 Industry codes of conduct in European and Dutch legislative policies

4.1 Introduction

Since the mid-1980s, the legislative policies of the European Union (hereafter: EU) and the Netherlands have developed and evolved along the lines of the concepts of 'better regulation' (EU) and 'quality of legislation' (NL).[227] The use of alternatives to traditional command-and-control regulation by the State, such as private regulation - including industry codes of conduct - forms an important pillar of both concepts. Accordingly, both the European and the Dutch legislators are under an obligation to examine whether the employment of such alternatives is a viable option, before deciding upon legislative intervention. In this chapter, I investigate how this element of European and Dutch legislative policies has played out in the field of private law. How do the European and the Dutch legislators employ industry codes of conduct in private law and what consequences does this have for the legal relevance of such codes?[228]

The chapter starts by defining the notions of 'self-regulation' and 'co-regulation' (section 4.2). This then sets the scene for the three-step-approach that is adopted to address the aforementioned question. The first step of this approach consists of an outline of the main features of the general legislative policies of the EU and the Netherlands, with emphasis on the role alternative regulatory instruments play (section 4.3). As a second step, it is explored how this policy has been put into practice in European and Dutch private law by discussing several examples of both legislative references to industry codes and instances in which regulation has been, wholly or partially, left to the industry (section 4.4).[229] The third step consists of a closer look at the criteria, conditions and recommendations respective legislators have formulated with respect to the use of alternative regulatory instruments (section 4.5). I then make a brief comparison between the European and the Dutch legislative approach to private regulation (section 4.6) and highlight the relationships between the spheres central to

[227] The Dutch debate thereby predates the European discussion, which only really took off in 2000. See Bokhorst 2014, p. 165.
[228] Part of this chapter (sections 4.4 and 4.5) has, in an earlier version, already been published (in Dutch) in Menting & Vranken 2014.
[229] For a discussion of some of the legislative references, see Menting & Vranken 2014, pp. 8-10, 11-24.

this chapter, i.e., the European, the Dutch, the public and the private sphere (section 4.7). I will tie the various strands together in section 4.8.

4.2 Definitional remarks

When referring to alternative regulatory instruments, European and Dutch policy documents generally use the terms 'self-regulation' and 'co-regulation'. In order to avoid conceptual mix-ups, sections 4.2, 4.3, 4.4 and 4.5 of the current chapter do not use the term 'private regulation', but instead follow the terminology of these policy documents. This necessitates a brief discussion of the way in which self-regulation and co-regulation are defined in the documents concerned.

4.2.1 EU definitions

Currently, EU descriptions of self-regulation and co-regulation can be found in the Better Regulation Toolbox 2015.[230] Until recently, definitions could also be found in the Interinstitutional Agreement on Better Law-Making of 2003 (IIA 2003),[231] which has been replaced by a new Interinstitutional Agreement on Better Law-Making (IIA 2016), which entered into force on 13 April 2016.[232] The definitions that the IIA 2003 provided differ from those included in the Better Regulation Toolbox. The IIA 2003 defined co-regulation as:

> "the mechanism whereby a Community legislative act entrusts the attainment of the objectives identified by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations or associations). The mechanism may be used on the basis of criteria defined in the legislative act […]".[233]

Self-regulation was described 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)".[234]

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[230] This Toolbox complements the 2015 Better Regulation Guidelines for the conduct of impact assessments. On these documents, which were adopted in May 2015 as part of the new Better Regulation Package, see section 4.3.1.5 below.
[231] Interinstitutional Agreement on better law-making, *OJ* 2003 C 321/01. For a more extensive discussion of the concepts of self-regulation and co-regulation in the EU, see, e.g., Svilpaite 2007a, pp. 7-16. A comparative synopsis of both concepts, drawn up by the European Economic and Social Committee, can be found at <www.eesc.europa.eu/?i=portal.en.self-and-co-regulation-comparative-synopsis> (accessed 1 July 2016).
[232] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, *OJ* 2016, L 123/1.
[233] IIA 2003 (*OJ* 2003, C 321/01), recital 18.
[234] IIA 2003 (*OJ* 2003, C 321/01), recital 22.

Both definitions have been met with criticism. Verbruggen, for instance, is critical of the fact that according to the EU definition, co-regulation is conceived of as a mere implementation mechanism in the European context. This narrow conception limits the regulatory capacity of private actors, Verbruggen notes.[235] Svilpaite, in turn, indicates that both definitions are Europeanized and communitarized, which limits the number of practices captured by the IIA 2003.[236] Senden and Meuwese add that self-regulation also has a fairly specific meaning in the EU context: the IIA 2003 adopts a rather top-down interpretation of the concept. They base this qualification on paragraph 23 of the IIA 2003, which follows the definition of self-regulation, that reads that the Commission must scrutinize self-regulation practices. This leads Senden and Meuwese to conclude that only those private arrangements that are monitored by the Commission, and not the purely self-regulatory ones, fall within the ambit of the IIA 2003.[237] Following on from that, the European conceptualization of self-regulation and co-regulation has been criticized for being too narrow, resulting in many private regulatory practices falling outside the scope of the IIA 2003.[238] Svilpaite, for instance, signals that the definitions "leave in a no-man's land" the private regulatory practices that follow on from government 'encouragement' other than legislative acts.[239] Technically, such practices would not fall under the IIA 2003 definition of co-regulation, as this definition refers to 'a Community legislative act'.[240]

Now that the IIA 2016 has replaced the IIA 2003, the different descriptions put forward by the Better Regulation Toolbox come to the fore. Regarding the notion of co-regulation, only subtle differences exist as between the definition provided by the IIA 2003 and the following description in the Toolbox:

> "a mechanism whereby the Union legislator entrusts the attainment of specific policy objectives set out in legislation or other policy documents to parties which are recognized in the field (such as economic operators, social partners, non-governmental organizations, or associations). Under this 'light' regulatory approach, the relevant policy initiatives establish the key deadlines and mechanisms for implementation, the methods of monitoring the application of the legislation and any sanctions".[241]

The description of self-regulation in the Better Regulation Toolbox, by contrast, differs markedly from the definition included in the IIA 2003:

> "self-regulation is where business or industry sectors formulate codes of conduct or operating constraints on their own initiative for which they are responsible for enforcing".[242]

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[235] Verbruggen 2009, p. 429. Similarly: Van Gestel 2005, p. 106.
[236] Svilpaite 2007a, pp. 11-13; Svilpaite 2007b, p. 4.
[237] Meuwese & Senden 2009, pp. 150, 153.
[238] Svilpaite 2007a, pp. 10-11, 25-26; Van den Hoogen & Nowak 2010, pp. 356-357.
[239] Svilpaite 2007a, p. 10.
[240] Svilpaite 2007a, pp. 10-11.
[241] Better Regulation Toolbox 2015, p. 88. The Toolbox can be found at <http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm> (accessed 1 July 2016).
[242] Better Regulation Toolbox 2015, p. 88.

In being broader than the definitions set out in the IIA 2003, these descriptions are able to withstand some of the criticism leveled against the IIA definitions, particularly where it pertains to their limited scope. Furthermore, the Toolbox does not take a top-down interpretation of self-regulation, though it adds "pure self-regulation is uncommon and at the EU level it generally involves the Commission in instigating or facilitating the drawing up of the voluntary agreement".[243]

4.2.2 Dutch definitions

Dutch legislative policy lacks equally 'formal' definitions of self-regulation and co-regulation. In the Integrated Framework for Policy Analysis and Legislation (*Integraal Afwegingskader beleid en regelgeving*), however, one can find some clues as to how the Dutch legislator understands these concepts. This Framework, which includes guidelines for the preparation of legislation and policy, speaks of self-regulation whenever a sector in society drafts its own norms. Co-regulation denotes a situation in which such rule drafting is a joint effort of the sector and the government.[244] We can find a further hint as to the meaning of co-regulation in the government report 'A view on legislation' (*Zicht op Wetgeving*). This report, more specifically, uses the term 'statutorily structured and conditioned self-regulation' (*wettelijk geconditioneerde zelfregulering*) to refer to situations in which the legislator limits its actions to setting the material or procedural framework and offering the possibility of *ex post* control. Within that framework, citizens and societal organizations are allowed to self-regulate.[245] This description suggests that the Dutch interpretation of co-regulation is broader than its European counterpart. Under both interpretations, co-regulation results from public and private actors working together. The difference between the interpretations lies in the nature of the relationship between these actors. By defining co-regulation as a mere implementation mechanism, the European interpretation leaves intact the traditional hierarchical relationship between public and private actors. The Dutch interpretation of co-regulation, by contrast, does not entail any such hierarchical element and places greater emphasis on the co-operative element of the concept.[246]

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[243] Better Regulation Toolbox 2015, p. 88.
[244] Integrated Framework for Policy Analysis and Legislation, under 6.1 (*Categorieën beleidsinstrumenten* > *Co-regulering en zelfregulering*) (available at <www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving>, accessed 1 July 2016). Bokhorst points out that the term 'co-regulation' is used in Dutch Parliamentary Papers only since 2000 and that it stems from the European debate. See Bokhorst 2014, p. 229.
[245] *Parliamentary Papers II* 1990/91, 21 800, no. 1-2, pp. 15, 26, indicating that whenever this form of regulation is concerned, it is key to "strike a balance between government regulation as the expression of government responsibility and self-regulation by citizens and societal organizations within that framework" (at p. 26, my own translation).
[246] Verbruggen 2009, p. 429; Eijlander 2005, p. 7.

4.3 General legislative policy

With the European and Dutch interpretations of self-regulation and co-regulation clarified, focus can now be shifted to the ways in which the European and the Dutch legislators have employed these instruments. This section serves as a starter in this regard and reviews how the general legislative policies of the EU and the Netherlands have evolved in respect of the use of self-regulation and co-regulation.

4.3.1 EU: Better Regulation

As Senden indicates, the legislative policy of the EU rests on two main pillars. In brief, the first pillar represents the EU's struggle to achieve deregulation and to improve the quality of European legislation. The second pillar embodies the search for a more diversified set of governance mechanisms, i.e., modes of governance other than legislation. Both pillars are founded on the principles of proportionality and subsidiarity as laid down in Article 5 of the Treaty on the European Union (TEU).[247] These principles determine both the competence of the EU, and the intensity and nature of its actions.[248] More specifically, prior to the EU taking any action they require that consideration be given to (1) the necessity of public action, (2) the appropriate level of action (EU or Member State) and (3) the proportionality of the action vis-à-vis its objective. [249] This also implies that consideration be given to the use of alternative regulatory approaches, as is reflected in the second pillar of EU legislative policy.[250] It is along the lines of this pillar that the use of alternative regulatory instruments, such as self-regulation and co-regulation, is promoted as part of the EU's Better Regulation Agenda.

4.3.1.1 White Paper on European Governance

The legislative policy of the European Union as it stands today has its roots in the mid-1980s, a period which Senden marks as "a turning point with regard to the way of thinking on

[247] Senden 2005, pp. 4-9. Both principles were initially codified in the Protocol on the application of the principles of subsidiarity and proportionality to the Amsterdam Treaty (*OJ* 1997, C 340), added to the then EC Treaty. This protocol was replaced by a new Protocol (No. 2) of the same name (*OJ* 2008, L 115/206) when the Lisbon Treaty came into force. Cf. Report from the Commission on subsidiarity and proportionality (17th report on Better Lawmaking covering the year 2009), COM(2010) 547 final, pp. 2-4; Craig & De Búrca 2015, pp. 168-169.

[248] European Council in Edinburgh 11-12 December 1992, Conclusions of the Presidency, p. 13; Senden 2005, p. 8.

[249] European Commission, European Governance. A White Paper, COM(2001) 428 final, pp. 10-11; European Council in Edinburgh 11-12 December 1992, Conclusions of the Presidency, p. 14.

[250] Senden 2005, pp. 8-9. The conclusions of the European Council of Edinburgh in this respect *inter alia* read that "the form of action should be as simple as possible, […]. The Community should legislate only to the extent necessary. […]. Consideration should also be given where appropriate to the use of voluntary codes of conduct". (European Council in Edinburgh 11-12 December 1992, Conclusions of the Presidency, p. 21). As Craig and De Búrca indicate, the EU's better regulation policy has its roots in the principles of proportionality and subsidiarity adopted by the Edinburgh Council, while addressing other and more specific issues. See Craig & De Búrca 2015, p. 174.

European legislation".[251] Driven by the stagnation of the internal market, the onset of policies of deregulation in Member States and criticism on the quantity as well as the quality of European legislation, the European Commission worked towards a new legislative policy.[252] What eventually followed in the 1990s was a debate on better EU governance, in which the use of new forms and modes of governance constituted one of the central issues.[253] The 'newness' of these tools denotes a shift from the 'old' way of governing, where preference was given to hierarchical instruments in the form of directives and regulations, towards an approach that gives preference to the use of more flexible, participatory, inclusive and soft measures.[254]

The reform debate eventually led to the White Paper on European Governance, adopted by the European Commission in July 2001.[255] In this Paper, the Commission brought forward several suggestions to improve and ensure 'good governance' in the EU, many of which echo the aforementioned shift away from hierarchical governance.[256] The starting point for these proposals for change was that "the Union must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments".[257] In the context of, in short, 'better regulation', this among other things implied that "legislation is often part of a broader solution combining formal rules with other non-binding tools, such as recommendations, guidelines or even self-regulation within a commonly agreed framework" and that "under certain conditions, implementing measures may be prepared within the framework of co-regulation".[258] Subsequently, all this was implemented in a coordinated strategy for better regulation, laid down in the Commission's Action Plan for Better Regulation.[259]

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[251] Senden 2005, p. 4.
[252] Senden 2005, pp. 4-5. Cf. (at a later stage) Scott & Trubek 2002, pp. 6-8 who list six factors that might explain the emergence of new governance in the EU.
[253] Craig & De Búrca 2015, p. 163. The White Paper on European Governance defines governance as "rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence" (COM(2001) 428 final, p. 8, footnote 1).
[254] Cardwell 2011, pp. 537-538, 542; Craig & De Búrca 2015, pp. 163-165. This is however neither to say that the European legislator no longer relies on 'old' hierarchical instrument nor that the 'new' modes of governance have not been employed in the past. Rather, the 'shift away' indicates a shift in emphasis. See Craig & De Búrca 2015, pp. 164-165; Cardwell 2011, pp. 544-545. For a short appraisal of the European move towards new forms of governance, see Craig & De Búrca 2015, pp. 163-165, with further references. For a more comprehensive account of new governance within the EU, see e.g. De Búrca & Scott 2006; Dawson 2011; Scott & Trubek 2002.
[255] European Commission, European Governance. A White Paper, COM(2001) 428 final.
[256] Nonetheless, as Craig and De Búrca point out, the White Paper has been criticized for proposing only a few concrete changes and for being an attempt by the Commission to consolidate its own position. See Craig & De Búrca 2015, p. 178. Cf. Cardwell 2011, p. 544. Eberlein and Kerwer admit that this can indeed be leveled at the White Paper but they tone down the criticism by pointing out that "one should not rush to dismiss new modes of governance as nothing but a convenient smokescreen for the Commission as it attempts to pursue revitalized but old-style regulation. Most importantly, documents such as the White Paper cannot be viewed as authoritative guides to the 'real' policy approach of key actors such as the Commission. They are notoriously political, ambiguous, and thus difficult to decipher. And they are not reliable guides to a complex 'political reality'". See Eberlein & Kerwer 2004, p. 124, with reference to several of the critics.
[257] COM(2001) 428 final, p. 4.
[258] COM(2001) 428 final, pp. 20-21.
[259] Senden 2005, p. 3.

4.3.1.2 Action Plan for Better Regulation

In 2002, the European Commission issued its Action Plan 'Simplifying and improving the regulatory environment', also known as the Better Regulation Action Plan.[260] In this plan, among other things, the Commission emphasizes that the employment of alternative instruments does not necessarily undermine the Treaty provisions or the prerogatives of the legislator.[261] According to the Commission, instruments such as co-regulation, self-regulation, voluntary agreements, the open method of coordination, financial interventions and information campaigns can, in specific circumstances, "be used to achieve the objectives of the Treaty while simplifying lawmaking activities and legislation itself".[262] The considerations on the use of self-regulation and co-regulation that follow on from this statement are illustrative of the way in which the European legislator applies these instruments in its policy:

> "The Commission can consider it preferable *not to make a legislative proposal* where agreements of this kind already exist and can be used to achieve the objectives set out in the Treaty. It can also *suggest*, via a recommendation for example, that this type of agreements be concluded by the parties concerned to avoid having to use legislation, *without ruling out the possibility of legislating if such agreements prove insufficient or inefficient*. These voluntary agreements constitute one form of self-regulation. Voluntary agreements can also be concluded on the basis of a legislative act, i.e. in a more binding and formal manner in the context of co-regulation, thereby enabling parties concerned to *implement a specific piece of legislation* [...]. Within the framework of a legislative act, coregulation makes it possible to ensure that the objectives defined by the legislator can be implemented in the context of measures carried out by parties recognised as being active in the field concerned."[263] (emphasis added, MM)

The Commission places particular emphasis on the use of co-regulation and formulates several criteria in this respect.[264] These criteria can be traced back in the Interinstitutional Agreement on Better Law-Making (2003), which was concluded one year after the introduction of the Better Regulation Action Plan.

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[260] Communication from the Commission, Action plan "Simplifying and improving the regulatory environment", COM(2002) 278 final. This so-called Better Regulation Action Plan builds on the conclusions of the Mandelkern Group, which put emphasis on the use of alternatives to regulation. Both self-regulation and co-regulation were mentioned in this respect, yet the Mandelkern Report puts particular emphasis on the use of co-regulation. See Mandelkern Group on Better Regulation, Final Report, 13 November 2001, particularly pp. 15-17 (available at <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm>, accessed 1 February 2016). For an overview of other documents concerning the use of alternatives to legislation that preceded the Better Regulation Action Plan, see Holloway et al. 2002, pp. 3-19 in particular. A critical account of the EU Better Regulation Program can be found with, for instance, Wiener 2006.

[261] COM(2002) 278 final, p. 11.

[262] COM(2002) 278 final pp. 11.

[263] COM(2002) 278 final pp. 11-12. Cf. Chapter 3, section 3.3.2 of this doctoral thesis on the functions of industry codes of conduct from the perspective of the legislator.

[264] COM(2002) 278 final, p. 13.

4.3.1.3 Interinstitutional Agreement on Better Law-Making 2003

The next step in the EU's Better Regulation policy was taken in 2003 with the conclusion of the IIA 2003 between the Commission, the Parliament and the Council. The IIA 2003 reflects the commitment of the three institutions to "improve the quality of law-making by means of a series of initiatives and procedures" set out in the Agreement.[265] It "establishes a global strategy for better lawmaking throughout the entire EU legislative process".[266] One of the key elements of the IIA 2003 concerns the use of alternative methods of regulation, European self-regulation and co-regulation in particular. In accordance with the principles of proportionality and subsidiarity, the Commission, the Parliament and the Council recognize the need to use alternative regulatory instruments when suitable or where a legal instrument is not specifically required by the Treaty on the Functioning of the European Union (TFEU).[267] Against this backdrop, the IIA 2003 provides a general framework for the use of European self-regulation and co-regulation. It introduces a common definition of both concepts as well as substantive and procedural conditions on their use in legislative policy.[268] Such a general, comprehensive framework had been lacking up until then: before the IIA 2003 was concluded, the criteria for the use of self-regulation and co-regulation had the shape of sector-specific requirements, mainly enclosed in soft law documents.[269] For that reason, the IIA 2003 signified an important milestone in the EU better regulation policy in respect of the use of alternative regulatory instruments. Yet, strikingly, the 2016 Inter-institutional Agreement on Better Law-Making, which has replaced the IIA 2003, does not refer to self-regulation and co-regulation.

> The revision of the IIA 2003 was a pending case for quite some time. Already in 2010, the Framework Agreement on relations between the Parliament and the Commission (2010) alluded to adaptation of the IIA 2003.[270] After the conclusion of this Framework Agreement, the European Parliament repeatedly stressed the need to revise the IIA and to adapt it to the new provisions of the Lisbon Treaty as well as to the smart regulation agenda.[271] It was also

[265] IIA 2003 (*OJ* 2003, C 321/01), recital 1.
[266] Communication from the Commission, Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 final, p. 4.
[267] IIA 2003 (*OJ* 2003, C 321/01), recital 16.
[268] COM(2005) 97 final, p. 4; Svilpaite 2007b, p. 4; Senden 2005, p. 3. The procedural and substantive criteria as formulated by the IIA 2003 are discussed in section 4.5.1.1.
[269] Svilpaite 2007b, pp. 4-5 (with references to several of these documents); Verdoodt 2007, p. 82; EESC report, European Self- and Co-regulation, 2013, pp. 10-12 (available at <www.eesc.europa.eu/?i=portal.en.self-and-co-regulation-literature.28949>, accessed 1 July 2016). Earlier (policy) documents listing criteria for the use of self-regulation and co-regulation include the White Paper on European Governance (COM(2001) 428 final, p. 21), the Mandelkern Report (2001, p. 17) and the Better Regulation Action Plan (COM(2002) 275 final, pp. 12-13).
[270] More specifically: "The two Institutions commit to agree on key changes in preparation of future negotiations on adaptation of the Inter institutional Agreement on better lawmaking to the new provisions introduced by the Lisbon Treaty, taking into account current practices and this Framework Agreement" (*OJ* 2010, L 304/47, recital 52).
[271] See, e.g., European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term (*OJ* 2010, C 341 E/01), recital 3(b); European Parliament resolution of 9 September 2010 on better lawmaking – 15th annual report from the Commission pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and

recommended to adopt an eventual new agreement on the basis of Article 295 TFEU and to make this new agreement binding.[272] In the end, this resulted in the IIA 2016. It remains unclear, however, whether this Agreement is of a binding nature (cf. Article 295 TFEU).

4.3.1.4 Smart regulation and REFIT

In the following years, the better regulation strategy was affirmed and updated on several occasions.[273] In 2010, against the background of the Europe 2020 Strategy,[274] the Commission decided that it was "time to "step up a gear": with the better regulation motto remaining in full force, better regulation had to become smart regulation.[275] Accordingly, the focus of the EU's regulatory policy was shifted to smart regulation. This concept is targeted at designing and delivering high quality regulation that is in conformity with the principles of proportionality and subsidiarity. It is about managing the quality of regulation throughout the entire policy cycle from the designing to the evaluation and revision stage.[276] As such, the smart regulation strategy not only consolidates the results of the better regulation policy, but also seeks to broaden and improve this policy by covering the entire policy cycle.[277]

In 2012, another addition to the Better Regulation program was presented under the heading of 'Regulatory Fitness and Performance Programme' (REFIT).[278] This program strengthens the smart regulation strategy and seeks to make the whole of EU legislation 'fit for purpose' by simplifying the regulatory framework and eliminating unnecessary regulatory costs.[279] Thus, REFIT works along two lines: the reduction of regulatory burdens and simplification. The use of self-regulation and co-regulation is part of the second strand, which pertains to the efforts of the EU to make European laws clearer and more understandable, and

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proportionality (*OJ* 2011, C 308 E/11), recitals 8-9; European Parliament resolution of 13 September 2012 on the 18th report on Better legislation - Application of the principles of subsidiarity and proportionality (2010) (*OJ* 2013, C 353 E/14) recital 4.

[272] European Parliament, Draft report on EU Regulatory Fitness and Subsidiarity and Proportionality - 19th report on Better Lawmaking covering the year 2011 (2013/2077(INI), recital 4. Article 295 TFEU offers the possibility to conclude binding interinstitutional agreements. See below, n 300.

[273] See COM(2005) 97 final and the strategic reviews of the Better regulation strategy in 2006, 2008 and 2009 (COM(2006) 689 final, COM(2008) 32 final and COM(2009) 15 final, respectively). Cf. Svilpaite 2007a, p. 4, footnote 9.

[274] Communication from the Commission, Europe 2020. A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final.

[275] Communication from the Commission, Smart Regulation in the European Union, COM(2010) 543 final, p. 2.

[276] COM(2010) 543 final, p. 3. One of the key elements of the smart regulation strategy, for example, is the introduction of an *ex post* evaluation of legislation (COM(2010) 543 final, pp. 4-5).

[277] Voermans 2010, p. 272; EESC report, European Self- and Co-regulation, 2013, p. 5. Cf. Korkea-aho 2012, p. 402: "Smart regulation does not deny or attempt to throw overboard the 'core values' of BR but rather to make those core values happen".

[278] Communication from the Commission, EU Regulatory Fitness, COM(2012) 746 final. See also <http://ec.europa.eu/smart-regulation/refit/index_en.htm> (accessed 1 July 2016).

[279] COM(2012) 746 final, pp. 2-3; REFIT Brochure, p. 2 (available at <http://ec.europa.eu/smart-regulation/refit/index_en.htm>, accessed 1 July 2016).

hence more user-friendly.[280] Self-regulation and co-regulation are considered "simpler alternatives to imposing detailed rules in legally binding agreements".[281]

4.3.1.5 Better Regulation Package 2015

The Better Regulation Package forms for now the latest development within the Union's better regulation policy. This package, launched on 19 May 2015 and comprising several documents, has three key objectives: to enhance the openness and transparency of EU policy-making, to strengthen the commitment of the Commission, the Parliament and the Council to the principles of better regulation, and to refresh the existing stock of EU legislation along the lines of a strengthened REFIT program.[282] Thus, what is sought is to "work more transparently and inclusively to produce higher quality proposals, and ensure that existing rules deliver important societal goals more effectively".[283] But what does the package bring as regards the use of alternative regulatory instruments?[284] Particularly relevant in this respect are three documents included in the package: the Communication 'Better Regulation for Better Results', the new Better Regulation Guidelines and the accompanying Better Regulation Toolbox, and what at the time was still just a proposal for a new Interinstitutional Agreement on Better Law-Making.

The part of the Communication that concerns strengthening the commitment to the better regulation principles also mentions the use of alternatives to regulation. More specifically, it states that the Commission "will consider both regulatory and well-designed non-regulatory means" when considering policy solutions.[285] The use of alternative policy instruments, including self-regulation and co-regulation, is furthermore part and parcel of the new Better Regulation Guidelines, which guide the process of impact assessment. Like the 2009 Impact Assessment Guidelines,[286] which have been replaced by the Better Regulation Guidelines, these Guidelines require that consideration is given to alternative policy instruments when designing policy options as part of an impact assessment.[287] The Guidelines however also refer to 'soft policy instruments' (including voluntary agreements or other forms of self-

[280] For the policy on the reduction of regulatory burdens, see <http://ec.europa.eu/smart-regulation/refit/admin_burden/index_en.htm>. Information on the simplification strand of REFIT can be found at <http://ec.europa.eu/smart-regulation/refit/simplification/index_en.htm> (websites accessed 2 February 2016).
[281] <http://ec.europa.eu/smart-regulation/refit/simplification/index_en.htm> (accessed 2 February 2016).
[282] Communication from the Commission, Better regulation for better results – An EU agenda, COM(2015) 215 final.
[283] COM(2015) 215 final, p. 13.
[284] For a discussion of the package from a more general perspective, see, e.g., Renda 2015 and the contributions in the special issue of the European Journal of Risk Regulation on the Better Regulation Package (2015, issue 3).
[285] COM(2015) 215 final, p. 6. The notion 'well-designed' links up with the Principles for Better Self- and Co-regulation developed by the Commission through open consultation (see <https://ec.europa.eu/digital-agenda/genealogy-cop>, accessed 1 July 2016). It follows on from the Better Regulation Toolbox (p. 89) that these principles should be reflected in every self- and co-regulatory initiative. On the Principles, see section 4.5.2.1 below.
[286] Impact Assessment Guidelines 2009, SEC(2009) 92, pp. 29-31 and Impact Assessment Guidelines 2009: Annexes 1-13, pp. 24-29. Both documents can be found at <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm> under 'Impact Assessment' (accessed 2 February 2016).
[287] For critical reflections on the place of alternative regulatory methods in EU impact assessments, see Meuwese & Senden 2009.

regulatory action and/or co-regulatory action) to be used at the implementation stage of the policy cycle.[288] Hence, the option of seeking recourse to self- or co-regulation now has to be considered at the level of both impact assessment and implementation.[289] However, whereas the foregoing suggests that the Better Regulation Package 2015 gives fresh impetus to the use of self-regulation and co-regulation, the IIA 2016 points in the opposite direction.[290] Unlike its predecessor from 2003, which prominently featured self-regulation and co-regulation, the IIA 2016 remains entirely silent upon the use of theses instruments.[291]

4.3.1.6 The place of self-regulation and co-regulation in EU legislative policy: Some critical reflections

On closer scrutiny, what stands out after the discussion of the development of the EU better regulation strategy in the previous subsections is that there are fluctuations in the degree of attention paid to the use of alternative regulatory instruments. Whereas the initial stages of the better regulation agenda explicitly and visibly promoted the use of alternative regulatory methods, climaxing in the adoption of the IIA 2003, references to these methods are more difficult to find in the consecutive stages of the EU's legislative strategy. The Communication on Smart Regulation does not mention the use of alternative instruments. It is only in the simplification strand of the REFIT program that references to self-regulation and co-regulation are explicitly mentioned. This is however not to say that these tools have been completely out of sight during these stages. On the contrary, with the Impact Assessment Guidelines prescribing that the use of alternatives to legislation must be considered during the policymaking process, self-regulation and co-regulation retained their place in EU legislative policy, albeit in a less visible fashion. In 2015, the issue was aroused from relative 'dormancy' with the adoption of the Better Regulation Package, in which the use of regulatory alternatives not only visibly featured the Commission's Communication, but was also assigned a place in the implementation phase of the policy cycle. At the same time, however, the IIA 2016 strikes at one of the suggested roots of self-regulation and co-regulation in EU legislative policy, namely the IIA 2003.

It is difficult to pinpoint what is behind these fluctuations. A possible explanation for the different degrees of 'visibility' of alternatives to legislation in the Commission documents setting out the Union's policy strategy lies in changes of emphasis within this policy. An additional explanation may be found in the enshrinement of the use of alternative tools in the

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[288] Better Regulation Guidelines, SWD(2015) 111 final, p. 23 (impact assessment) and p. 41 (implementation). See also Better Regulation Toolbox, pp. 83, 85, 87-90.

[289] <https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-endorsed-better-regulation-package> (accessed 2 February 2016).

[290] The only passage (remotely) hinting at the use of alternative instruments is the one on Impact Assessments, where we can read that Impact Assessments "should map out alternative solutions" and that "the principles of subsidiarity and proportionality should be fully respected, as should fundamental rights." See IIA 2016, *OJ* 2016, L 123/1, recital 12.

[291] In spite of the call of the European Economic and Social Committee for the future Interinstitutional Agreement to refine the IIA 2003 framework for self-regulation and co-regulation. See Opinion of the EESC on Self-regulation and co-regulation in the Community legislative framework, Brussels 22 April 2015, INT/754.

former Impact Assessment Guidelines. After all, it might be argued that such an enshrinement lessens the need to continuously put the issue to the forefront of EU legislative policy. Equally difficult to address is the question as to what the implications of the developments outlined in the previous subsections are for the use of self-regulation and co-regulation as alternative regulatory instruments at the European level. Nonetheless, several observations can be made that put into perspective the Commission's approbation of these regulatory instruments. More specifically, it can be pointed to the status of the IIA 2003 and the extent to which the Better Regulation policy has actually translated into private regulatory initiatives.

4.3.1.6.1 Status of the IIA 2003

Due to a complete absence of both concepts in the IIA 2016, the replacement of the IIA 2003 by the IIA 2016 raises questions as to the future place of self-regulation and co-regulation in EU policymaking. Nevertheless, it should be noted in this respect that the actual impact of the IIA 2003 might be nuanced.

The conclusion of the IIA 2003 was not all plain sailing. As Allio describes, the negotiation process was complicated by what he calls "institutional sensitivities and prerogatives" as well as by the need to maintain the existing balance between the Commission, the Parliament and the Council.[292] Both the Parliament and the Council stand accused of taking an ambivalent and sometimes rather reluctant stance towards the use of alternatives to legislation, fearing that such use could undermine their role in the legislative process.[293] The IIA 2003 section on alternative regulatory methods, more specifically, was of particular concern to the European Parliament, which was troubled by the eventual loss of democratic control that would result from the use of these methods as well as by the fact that these methods could be misused.[294] Scholarly opinions are divided as to whether the final paragraphs on self-regulation and co-regulation in the IIA 2003 represented an adequate response to these concerns. Some scholars have criticized said paragraphs for failing to fully

[292] Allio 2007, p. 80.

[293] Haythornthwaite 2007, pp. 24-25; Svilpaite 2007b, p. 29; Meuwese & Senden 2009, pp. 150-154. Cf. for example the Commission's report 'Better Lawmaking 2003', COM(2003) 770 final, p. 8 where the Commission indicated that "on several recent occasions, the European Parliament and/or the Council have questioned or even opposed Commission proposals using such alternative instruments". In its resolutions on EU consumer policy, the Council has, however, repeatedly taken a positive stance to self-regulation. See *OJ* 1999, C 206/01, recital 8; *OJ* 2003, C 11/1, recitals 5, 15; *OJ* 2009, C 279E/04, recital 6. Likewise, the European Parliament resolution of 4 September 2007 on Better Regulation in the European Union (*OJ* 2008, C 187E/60), recital 36, encourages the investigation of "alternatives to legislation with a view to improving the functioning of the internal market" as long as this does not impede democratic control by the European and national parliaments. Equally supportive of the use of alternatives is the Motion for a European Parliament Resolution on institutional and legal implications of the use of 'soft law' instruments (A6-0259/2007), under 3: "stresses that each EU institution, including the European Council, must consider both legislative and non-legislative options when deciding, on a case-by-case basis, what action, if any, to take". Yet, one year later, the Parliament again expressed its doubts on the use of such alternatives as it could turn into a form of "legislative abstinence" and would only benefit pressure groups and powerful economic players. See Report on 'Better lawmaking 2006' pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (A6-0355/2008), under 14.

[294] Allio 2007, p. 80; Allio, Ballantine & Hudig 2004, p. 18; Svilpaite 2007b, pp. 27-29. Cf. European Parliament resolution of 4 September 2007 on Better Regulation in the European Union, *OJ* 2008, C 187E/60, recital 36.

meet these concerns.[295] Senden, by contrast, points to the fact that the IIA 2003 does include safeguards against the Commission's uncontrolled use of self-regulation and co-regulation.[296] Furthermore, as mentioned in section 4.2.1 of this chapter, the limited scope of the IIA 2003 provisions on self-regulation and co-regulation has been criticized for leaving a grey area encompassing private regulatory initiatives that formally fall outside the IIA-framework as they do not meet its definitions and requirements.[297] Additionally, it has been argued that the criteria for the use of self-regulation and co-regulation laid down in the IIA 2003 limit the scope and flexibility of these instruments as well as the adoption of new private regulatory initiatives.[298] The IIA 2003 has furthermore been criticized for its lack of direction in respect of these criteria since the Agreement does not elaborate on them.[299]

This brings to the table the question on the legal status of the IIA 2003 and what influence, if any, it could actually have exerted on the use of alternative regulatory instruments in policymaking. In this regard, it should first and foremost be noted that Article 295 TFEU, which allows for the conclusion of binding interinstitutional agreements, did not exist when the IIA 2003 was adopted.[300] Therefore, the question on the legal binding force of the IIA 2003 and other interinstitutional agreements concluded before the TFEU came into force depends strongly on the framing of the agreement itself.[301] Senden has argued that the framing of the IIA 2003 warrants the conclusion that between the three institutions at least the Agreement has binding force.[302] The first argument that she advances in this respect pertains to wording of the IIA 2003. The use of fairly compelling terms, such as 'agree' and 'will',

[295] Allio, Ballantine & Hudig 2004, pp. 17-18; Svilpaite 2007b, pp. 27-29; Svilpaite 2007a, p. 25. Cf. the statement that the paragraph on the control mechanisms of the Parliament and the Council in case of co-regulation represented "something of a last-minute compromise between the three institutions" - quote from Lars Mitek Pedersen of the European Commission, derived from EESC, Summary of the hearing on the current state of co-regulation and self-regulation in the single market, Brussels 22 November 2004, p. 4 et seq. - available at <www.eesc.europa.eu/?i=portal.en.self-and-co-regulation-documents.3238> (accessed 25 July 2016).

[296] Senden 2005, p. 21.

[297] Svilpaite 2007a, pp. 10-13, 25-26; Van den Hoogen & Nowak 2010, pp. 356-357. As noted in section 4.2.1, this flaw is partially met by the new definitions introduced by the Better Regulation Toolbox 2015.

[298] Allio, Ballantine & Hudig 2004, p. 18.

[299] Svilpaite 2007b, p. 5; Meuwese & Senden 2009, pp. 161-162, 168. See also EESC Opinion on Self-regulation and co-regulation in the Community legislative framework, 22 April 2015 (available at <www.eesc.europa.eu/?i=portal.en.int-opinions.32859>, accessed 1 July 2016). The criteria are discussed in section 4.5.1.1 of this Chapter.

[300] Article 295 TFEU provides that "the European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature". However, as Senden rightly points out, this provision does not make clear when an agreement is actually binding (Senden 2005, p. 22).

[301] Senden 2005, pp. 21-22. See also Monar 1994, pp. 696-703. Eiselt and Slominski in this respect indicate, more generally, that eventual legal binding force of an interinstitutional agreement can follow on from the Treaty provision on which it is based or from the intention of the drafting parties. If the binding force cannot be based on either of these elements, the agreement at issue constitutes no more than a political declaration (Eiselt & Slominski 2006, pp. 212-213). See also Monar 1994, pp. 697-700, who cites examples of the EC Treaty provisions lending legal binding force to interinstitutional agreements.

[302] Senden 2005, p. 22. Cf. Svilpaite 2007b, p. 9, considering that it is up to the CJEU to decide on the binding force of the IIA 2003 upon Member States and private parties involved with European self-regulation and co-regulation. Similarly: Cafaggi 2011b, p. 99.

provides strong hints as to the intention of the institutions to be legally bound.[303] Senden's second argument is linked to the duty of sincere cooperation between the institutions as enshrined in Article 13 TEU. In seeking to reinforce interinstitutional cooperation, the IIA 2003 creates a specific duty of cooperation. Combined with the aforementioned duty of sincere cooperation, this may result in the IIA 2003 having binding force *inter pares*.[304] However, it should be kept in mind that the actual impact of the IIA 2003 also depends on the "political willingness of the institutions to implement its provisions and monitor progress", as Allio points out. [305]

The criticism leveled at the IIA 2003 provisions on self-regulation and co-regulation and the limited binding force of the agreement might raise doubts as to the actual impact of the IIA 2003. This brings us to the issue that is central to the next subsection: to what extent has the 'alternative regulatory methods' strand of the Union's Better Regulation policy been put into practice?

4.3.1.6.2 Better Regulation in practice

Have the Better Regulation program and the IIA 2003 actually led to the adoption of self- and co-regulatory initiatives? With the caveat that the literature and the scarce empirical data available at this point do not warrant a conclusive answer to this question, the overall picture that follows on from these sources is that the Commission has encouraged the further use of these instruments but that they have not been employed on a large scale.[306]

Illustrative in this respect are the references to self-regulation and co-regulation in the strategic reviews of the Better Regulation program and the annual reports on better lawmaking throughout the years (2001-2014).[307] The annual reports covering the period shortly after the adoption of the IIA 2003 (2004-2006), explicitly mention the use of alternatives to legislation, even though the topic is not extensively dealt with. Nonetheless, these reports show that the Commission has undertaken some activities in respect of self-regulation and co-regulation over these years, including an inventory of existing European practices, consultations with the European Economic and Social Committee (EESC), leading to the EESC database, and a number of successful (and unsuccessful) attempts to use these instruments.[308] The 2006 strategic review furthermore reads that alternatives to legislation,

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[303] Senden 2005, p. 22. See also Eiselt & Slominski 2006, p. 212, who deduce from the case law of the CJEU that the intention to be legally bound *inter pares* can be assumed to be present if the wordings of the agreement are "clear" and "sufficiently precise and unconditional". Monar 1994, pp. 698-699 claims that all interinstitutional agreements "share certain features which are necessary elements of a legal obligation" that do not create hard legal obligations, yet are "substantial enough to take IIAs beyond the confines of pure political undertakings into the legal sphere".

[304] Senden 2005, p. 22. See also Monar 1994, pp. 700-703, with reference to case law of the CJEU.

[305] Allio 2007, p. 81.

[306] Craig & De Búrca 2015, p. 176; Haythornthwaite 2007, pp. 24-25. See also the sources mentioned in n 307-316 below.

[307] The annual reports concern the implementation of the Better Regulation Action Plan. They can be found at <http://ec.europa.eu/smart-regulation/better_regulation/reports_en.htm> (accessed 1 July 2016). For the three strategic reviews, see COM(2006) 689 final, COM(2008) 32 final and COM(2009) 15 final. The following observations have also been made in Senden et al. 2015, pp. 7-8. See also Bokhorst 2014, pp. 231-232, 249.

[308] See Report from the Commission, "Better Lawmaking 2004" (12th report), COM(2005) 98 final, p. 4 and its Annex SEC(2005) 364, pp. 8-9; Report from the Commission, "Better Lawmaking 2005" (13th report),

including self-regulation and co-regulation, are "routinely examined" in the course of the process of impact assessment.[309] Earlier, in its 2005 report, however, the Commission signaled that in this process greater attention needed to be paid to the identification and assessment of alternative policy options.[310] Moreover, having stressed the Commission's commitment to consider alternatives to legislation, both the 2005 and the 2006 report stated that "while insisting on the potential of regulatory alternatives, the Commission's approach also recognises that, in many cases, regulations remain the simplest way to reach EU objectives".[311] Whether coincidentally or not, the following annual reports from 2007 to 2014, whilst in line with this statement, remain silent upon the use of such alternatives.

These observations correspond with the results of the empirical study conducted by Van den Hoogen and Nowak published in 2010.[312] Their analysis of European self-regulatory and co-regulatory initiatives, registered in the EESC database in the period 1990-2008, shows that the use of such initiatives gained momentum at the early stages of the Better Regulation program, i.e., from the late 1990s, when the Commission started to promote the use of alternatives, until 2005. The proliferation of these initiatives as of the late 1990s was brought to an abrupt halt after 2005. Additionally, Van den Hoogen and Nowak observe that regulatory alternatives are only of minor importance in EU policy making when compared with the number of traditional methods of regulation used by the European legislator.[313] This leads them to conclude that, in empirical terms and with the caveat that they only looked at *registered* cases, self-regulation and co-regulation have remained fairly marginal phenomena in the context of EU policymaking.[314]

The above is reflected in the observation of Senden and Meuwese (2009) that the Commission, the Council and the Parliament take an ambivalent attitude towards alternative regulatory instruments. Despite the commitments made in the Better Regulation program and the IIA 2003, these institutions still seem to have a preference for traditional means of

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COM(2006) 289 final, p. 5 and its Annex SEC(2006) 737, pp. 11-12; Report from the Commission, "Better Lawmaking 2005" (14th report), COM(2007) 286 final, p. 5 and its Annex SEC(2007) 737, pp. 7-9. The database can be found at <www.eesc.europa.eu/?i=portal.en.smo-database> (accessed 1 July 2016).

[309] Communication from the Commission, Strategic review of Better Regulation in the European Union, COM(2006) 689 final, p. 8.

[310] Annex to the Report from the Commission "Better Lawmaking 2005" (13th report), SEC(2006) 737, p. 7.

[311] COM(2006) 289 final, p. 5 and COM(2007)286 final, p. 5. Cf. Meuwese & Senden 2009, pp. 152-154 who refer to the Commission Communication 'A Europe of Results – Applying Community Law', COM(2007) 502 final, p. 5, where the Commission expressed a similar preference for regulations in the context of the implementation of EU legislation: "The impact assessment should examine implementation options and their implications, as well as the choice of legal instrument with a view to best facilitating the effectiveness of the measure. Regulations should be used wherever appropriate and to the greatest extent possible for implementing measures".

[312] Van den Hoogen & Nowak 2010.

[313] Van den Hoogen & Nowak 2010, p. 359. At 12 May 2016, the EESC database contained 147 of what the EESC labels as self-regulatory and co-regulatory initiatives, 39 of which are obsolete cases. This leaves us with 108 *registered* initiatives currently in force at the European level. However, following Van den Hoogen and Nowak, it should be noted that a number of these initiatives are in fact EU directives, regulations or other soft law initiatives in which the use of regulatory alternatives is promulgated. However, not all of these cases have in fact resulted in the creation of private measures. See Van den Hoogen & Nowak 2010, p. 360. The initiatives in the EESC database have been mapped by Senden et al. 2015.

[314] Van den Hoogen & Nowak 2010, p. 361.

regulation.[315] Overall, however, Senden and Meuwese conceive of the Better Regulation program as taking a favorable stance on alternatives to legislation.[316]

At this point, it should be emphasized, perhaps superfluously, that the foregoing does not warrant the conclusion that the European legislator never resorts to self-regulation and co-regulation, the more since practice has continued to develop after these studies. Illustrative in this respect are the different examples discussed in section 4.4.1 of this chapter, which highlight how industry codes of conduct are employed in EU legislative policy in the field of private law. In addition, it can be pointed at the Community of Practice on Self-and Co-Regulation (CoP), established on 10 December 2013, as a recent example of where the EU's 'paper' stance has translated into practice.[317] The CoP has been initiated by the European Commission Directorate General for Communications Networks, Content & Technology (DG Connect) following the public consultation on the Principles for Better Self- and Co-regulation.[318] The initiative, assembling public and private 'self-regulation and co-regulation' stakeholders, advocates good practice in European self-regulation and co-regulation. More specifically, it seeks to further the efficiency and trustworthiness of self-regulation and co-regulation through interaction and dialogue between these stakeholders, and to make these instruments a more credible and effective policy option.[319]

4.3.1.7 Concluding remarks

This section has shown that the use of self-regulation and co-regulation as alternatives to legislation forms an integral part of the Better Regulation policy of the EU, albeit that matters are not as straightforward as this statement suggests.[320] Whereas the initial stages of the Better Regulation program suggested a bright future for self-regulation and co-regulation, several developments put the emphasis initially placed on these alternative methods of regulation in perspective. First of all, self-regulation and co-regulation have not always been visibly present in the main legislative policy documents. It is only with the recent Better Regulation Package that the instruments seem to have returned to the forefront of EU policymaking. Simultaneously, however, the lack of references to self-regulation and co-regulation in the IIA 2016 raises doubts as to this, albeit that the actual impact of its predecessor, the IIA 2003, can also be questioned. Secondly, the paper commitments repeatedly made under the Better

[315] Meuwese & Senden 2009, pp. 152-154. Cf. the following empirical assessments of the Commission's impact assessment system, which all show that, at least at the time, the consideration of alternative policy options leaves much to be desired in several respects: Caroline Cecot et al., *An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the U.S. and the EU*, AEI-Brookings Joint Center Working Paper No. 07-09, December 2007; The Evaluation Partnership, *Evaluation of the Commission's Impact Assessment System*, Richmond UK, April 2007; Andrea Renda, *Impact Assessment in the EU. The State of the Art and the Art of the State*, Centre For European Policy Studies, Brussels 2006.
[316] Meuwese & Senden 2009, p. 154.
[317] Information about the initiative can be found at <https://ec.europa.eu/digital-agenda/en/community-practice-better-self-and-co-regulation-0> (accessed 1 July 2016).
[318] <https://ec.europa.eu/digital-agenda/genealogy-cop> (accessed 1 July 2016).
[319] <https://ec.europa.eu/digital-agenda/en/faqs-community-of-practice>, under 'What are the expected outcomes of the CoP's work?'; 'Is the CoP an advocate for SR/CR' and 'What is the expected and measured impact on EU policies and initiatives?' (website accessed 1 July 2016).
[320] Cf. Meuwese & Senden 2009, pp. 152-154; Bokhorst 2014, pp. 213, 249.

Regulation policy as regards the use of regulatory alternatives seem to have been put into practice to no more than a modest extent. This ambivalent approach makes it difficult to predict what the future will hold for the use of self-regulation and co-regulation as regulatory alternatives, the more since it has been suggested that the Commission keeps a keen eye on regulations and soft law.[321] We will have to wait for future developments to see whether the renewed commitments in the 2015 Better Regulation Package at this point can give fresh impetus to the use of self-regulation and co-regulation at EU level.

4.3.2 The Netherlands

The quality and quantity of legislation have been the focal point of Dutch legislative policy since the 1980s. In its initial stages, this policy focused sharply on deregulation. At the beginning of the 1990s, however, the emphasis changed and the deregulation approach was absorbed into a broader approach centering upon the quality of legislation.[322] The use of alternatives to legislation has thereby since long been enshrined in Dutch legislative policy: ever since the final report of the Geelhoed Committee (1984) such alternatives have been a recurrent theme in all major government reports on general legislative policy.[323]

4.3.2.1 The Geelhoed Committee and the Legislative Projects Review Committee

The final report of the Geelhoed Committee (*Eindbericht Commissie Geelhoed*), which is one of the landmarks within Dutch deregulation policy, concerned the reduction and simplification of government regulation.[324] The Committee also envisaged a role for self-regulation in this respect. First of all, the legislator should give particular consideration to the option of self-regulation when deciding upon the necessity and justifiability of government interference. In general, according to the Committee, preference should be given to self-regulation wherever social actors can be deemed capable of regulation.[325] Secondly, if public regulatory intervention is deemed appropriate, an option to be considered within that framework is the

[321] See *supra* n 311 and accompanying text; Menting & Vranken 2014, p. 10 with reference to L. Senden, 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control' *European Law Journal* 2013, pp. 57-75 and L.A.J. Senden & A. van den Brink, *Checks and balances of Soft EU rule-making*, Directorate-General for Internal Policies – Policy Department C: Citizens Rights and Constitutional Affairs 2012.
[322] Van der Voet 2005, p. 150; *Parliamentary Papers II* 1990/91, 22 008, no. 1-2, pp. 19-20. I will discuss the developments within Dutch legislative policy only insofar relevant with regard to the use of private regulation. More extensive overviews can be found with, for instance, Veerman, De Kok & Clement 2012, pp. 193-197; Van Gestel & Hertogh 2006, pp. 27-48; Van der Voet 2005, pp. 150-176.
[323] Van Gestel & Menting 2011a, p. 452.
[324] *Parliamentary Papers II* 1983/84, 17 931, no. 9. See also Van der Voet 2005, pp. 157-160.
[325] *Parliamentary Papers II* 1983/84, 17 931, no. 9, p. 77. The Committee substantiates its advice by pointing at the freezing effects of government interference, at the fact that not every social problem warrants public interference and at the fact that, given the boundaries within which the government has to operate, the government cannot tackle every social problem (at pp. 77-78).

encouragement of self-regulatory activities.[326] In other words, government intervention could also entail the encouragement of self-regulation.[327]

In 1987, the Legislative Projects Review Committee (*Commissie voor de Toetsing van Wetgevingsprojecten*, hereafter: CTW) was appointed to continue the work of the Geelhoed Committee. Under the heading, 'as much self-regulation as possible', the CTW assigned self-regulation a prominent role. This implied a limited role for the legislator, who should confine itself to facilitating social, self-regulatory activities, setting the minimum procedural and substantive framework for these activities, and supervising self-regulatory actions. However, the CTW points out that this more indirect and interactive way of policy realization can only be achieved when the social interests concerned are sufficiently and equitably organized, and when both the government and social stakeholders are willing to call the traditional forms of government regulation into question.[328]

4.3.2.2 Legislative quality: Government reports concerning Dutch legislative policy

Not until the government report 'A view on legislation' was issued in 1990, however, did the use of alternatives to traditional legislation become firmly rooted in Dutch legislative policy.[329] This landmark report, broadening the focus from quantity to quality of legislative policy, assigns a central role to alternatives to and in legislation.[330] This role is clearly expressed in the principles of subsidiarity and proportionality, which jointly constitute one of the six quality standards for legislation set by the report. More specifically, the subsidiarity principle stipulates that as far as possible regulatory responsibilities should be conferred upon local and regional authorities and social organizations. In this respect, the report reiterates the limited role for the legislator envisaged by the CTW (cf. above, section 4.3.2.1) and states that the legislator should seek to support, institutionalize and, if necessary, influence the social, self-regulatory mechanisms.[331] This implies that forms of statutorily structured and conditioned self-regulation should be deployed whenever possible.[332]

As Bokhorst observes, the government reports that followed 'A view on legislation' all continued along the lines (i.e., the six quality standards) set out by this report.[333] Accordingly,

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[326] *Parliamentary Papers II* 1983/84, 17 931, no. 9, p. 79. A similar duality can be found in the Dutch Legislative Drafting Instructions: self-regulation and co-regulation are to be considered before *and* after the decision of government intervention is taken. See below, section 4.3.2.3.

[327] Earlier on in the report, the Committee had already referred to the use of self-regulation as an alternative to governmental regulation in the context of undesirable market conduct and formulated preconditions for the use of self-regulation (*Parliamentary Papers II* 1983/84, 17 931, no. 9, pp. 43-44). These preconditions are discussed in section 4.5.2.2, under a.

[328] *Parliamentary Papers II* 1988/89, 20 800 VI, no. 13, p. 7.

[329] Van Gestel & Hertogh 2006, p. 35. For the report, see *Parliamentary Papers II* 1990/91, 21 800, no. 1-2.

[330] *Parliamentary Papers II* 1990/91, 21 800, no. 1-2, pp. 8, 51.

[331] *Parliamentary Papers II* 1990/91, 21 800, no. 1-2, p. 26. At this point, the report wordily falls back on the first annual report of the CTW (*Parliamentary Papers II* 1988/89, 20 800 VI, no. 13, p. 7).

[332] *Parliamentary Papers II* 1990/91, 21 800, no. 1-2, pp. 15, 26-27, 51.

[333] Bokhorst 2014, p. 178. See *Parliamentary Papers II* 1994/95, 24 036, no. 1 (*Marktwerking, deregulering en wetgevingskwaliteit*); *Parliamentary Papers II* 2003/04, 29 279, no. 9 (*Bruikbare rechtsorde*) and *Parliamentary Papers II* 2008/09, 31 731, no. 1 (*Vertrouwen in wetgeving*). As of 2010, the Dutch legislator has stopped to actively pursue a general legislative policy. See Bokhorst 2014, p. 229.

the use of self-regulation and co-regulation as well as other alternative instruments has remained a central theme within the general legislative policy of the Netherlands, albeit that the emphasis has changed repeatedly over the years.[334] In thus being part and parcel of Dutch legislative policy, self-regulation and co-regulation are policy tools that have to be considered under the Integrated Framework for Policy Analysis and Legislation (see below). However, Bokhorst notes, the legislator no longer actively encourages the use of these instruments.[335]

4.3.2.3 Legislative Drafting Instructions and the Integrated Framework for Policy Analysis and Legislation

The central place of alternatives to legislation in Dutch legislative policy is also reflected in the instruments that set the parameters for legislative drafting in general and the *ex ante* evaluation of legislative drafts and policy in particular: the Legislative Drafting Instructions and the Integrated Framework for Policy Analysis and Legislation, respectively.

4.3.2.3.1 Legislative Drafting Instructions

Like its European counterpart, the Dutch legislator is under an obligation to investigate the possibility of using alternative regulatory instruments, such as self-regulation and co-regulation, as part of the *ex ante* evaluation of legislative and policy initiatives. This obligation follows from the Legislative Drafting Instructions (*Aanwijzingen voor de Regelgeving*, hereafter: LDI),[336] which enshrine the six quality standards formulated in 'A view on legislation'.[337] In accordance with the principles of proportionality and subsidiarity, the LDI requires deliberations on the use of self-regulation and co-regulation at two stages of the legislative process. More specifically, Instruction 7 stipulates that an investigation should be conducted as to whether the policy objectives concerned can be attained through the self-regulatory capacity of the relevant sectors or whether this requires government intervention. Together with Instruction 6, in which we read that new laws and regulations can only be enacted when the need for this type of action is established, Instruction 7 puts self-regulation right at the beginning of the policy cycle: the 'self-regulation' option is to be considered

[334] Bokhorst 2014, pp. 198, 216, 229. See also Van Ommeren 2012, pp. 151-154. As Bokhorst indicates, this shift in focus has to do with the political color of the successive Ministers of Justice. Whereas liberal ministers seem to have a preference for deregulation, Christian Democratic ministers seem put more emphasis on self-regulation and co-regulation. See Bokhorst 2014, p. 229. Similarly: Van Lochem 2015, p. 151. Under the latest government nota, 'Trust in Legislation' (*Vertrouwen in wetgeving*) emphasis was put on co-regulation rather than on self-regulation. See Van Lochem 2015, pp. 151-152; Bokhorst 2014, p. 230.
[335] Bokhorst 2014, pp. 229, 395-396.
[336] As published in the Bulletin of Acts and Decrees 1992, 230 and subsequently amended. The latest version, i.e, ninth amendment, dates from 2011 (Bulletin of Acts and Decrees 2011, 6602). It follows from Instruction 4 of the LDI that "Ministers, state secretaries and the subordinate units and persons involved with the preparation and adoption of regulations" have to observe the LDI (my own translation). From the explanatory notes to this Instruction we learn that other bodies and persons involved in this process are recommended to follow the instructions. See also Polak 1993, p. 1397; Borman 1993, pp. 188-189; Eijlander & Voermans 1993, pp. 171-172, with the latter two contributions pointing out that third parties cannot invoke the LDI as the Instructions have no independent binding force.
[337] Bokhorst 2014, p. 178.

before taking any decision on public regulatory intervention. However, the role of self-regulation and co-regulation is still not played out even when government intervention is opted for. On the contrary, Instruction 8 provides that even if such intervention is deemed necessary, the legislator should still as much as possible link up with the self-regulatory capacity of the relevant sectors. It follows on from the explanatory notes to Instruction 8 that the legislator may only interfere directly when this self-regulatory capacity, even if backed by supportive government measures, can be expected to generate insufficient results.[338] Finally, it can be pointed at Instruction 212 which, in conjunction with Instruction 211, provides that legislative and regulatory drafts are to be accompanied by explanatory notes.[339] In these notes, a discussion should take place as to why *inter alia* government intervention was needed, why self-regulation or co-regulation was not an option and which policy options have been considered.[340]

4.3.2.3.2 Integrated Framework for Policy Analysis and Legislation

The policy option of using alternative (regulatory) instruments, including self-regulation and co-regulation, is also laid down in the Dutch assessment framework for the *ex ante* analysis of legislative drafts and policy: the Integrated Framework for Policy Analysis and Legislation (*Integraal Afwegingskader beleid en regelgeving*, hereafter: IFPL).[341] In fact, the questions as to the necessity of government intervention and the possibility of self-regulation form one of the central aspects of the Framework.[342] The IFPL includes a comprehensive list of instruments that the legislator and policy makers can rely upon in this respect.

> This list also includes codes of conduct, which are described as informal instruments that can be of a self-regulatory as well as of a co-regulatory nature. When the government is involved with a code of conduct it generally holds a non-hierarchical position and operates on an equal level with the private actors, thus the IFPL. Codes of conduct are therefore viewed as 'horizontal policy instruments'.[343]

Furthermore, to facilitate the employment of self-regulation and co-regulation, the IFL refers to several empirical studies in which the conditions for successful self-regulation have been researched.[344] Strikingly, however, within the framework of the IFPL the question on which policy instrument is to be deployed only comes after the question as to whether government

[338] The explanatory notes particularly refer to the instruments of standardization and certification.
[339] Ministerial regulations may be exempted from this obligation if the content of a regulation does not necessitate the provision of explanatory notes. See Instruction 211.
[340] Instruction 212 under b and c. Cf. Van Gestel & Menting 2011a, p. 453.
[341] For some critical reflections on the framework and a comparison between the IFPL and the method of Impact Assessment, see Meuwese 2012.
[342] *Parliamentary Papers II* 2010/11, 31 731, no. 6, pp. 2-3.
[343] Factsheet Gedragscode as included in the IFPL, under 6.1 (*Beleidsinstrumenten A-Z > Gedragscode*, at <www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/6-wat-het-beste-instrument/61/gedragscode>, accessed 1 July 2016).
[344] IFPL, under 6.1 (*Beleidsinstrumenten A-Z > Zelfregulering*, at <www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/6-wat-het-beste-instrument/61-0>, accessed 1 July 2016). I discuss these conditions in section 4.5.2.1 below.

interference is justified. At first blush, this suggests that 'pure' self-regulatory actions are out of the question. However, it follows from the IFPL that this is not necessarily the case: even with government intervention, self-regulation is still an option (cf. Instruction 8 LDI).[345]

4.3.2.3.3 The LDI and the IFPL in practice

Thus, in accordance with the LDI and the IFPL, the Dutch legislator is to assess the use of self-regulation and co-regulation as alternatives to legislation at several stages in the process of *ex ante* evaluation. However, doubts can be raised as to whether this assessment is actually carried out in practice. In the early stages of the Dutch policy on better regulation, the National Audit Office (*Rekenkamer*) already observed an ambiguous attitude towards the use of alternatives to legislation (1994).[346] In spite of the introduction of the IFPL in 2010, this attitude does not seem to have changed much since.[347] Empirical studies have found that there still is a lack of (explicit) attention for alternatives to regulation in the process of *ex ante* evaluation of draft legislation and regulations, as is reflected in the fact that whenever alternative policy options are concerned, the explanation required by Instruction 212 is often lacking or flawed.[348] However, this warrants neither the conclusion that alternatives to regulation are only sporadically considered, nor that the legislator never resorts to alternative regulatory instruments. Alternative policy options may have been considered, yet, contrary to Instruction 212, this may not have been put down in writing.[349] Furthermore, as the examples discussed in section 4.4.2 highlight, the Dutch government does seek recourse to industry codes of conduct.

4.4 References to codes of conduct inside and outside private law legislation

Broadly speaking, there are two ways in which the legislator can employ private regulation as a policy instrument. First of all, the legislator can decide to include an explicit reference to private regulation in legislation or regulations. Secondly, the legislator may choose to leave the task of regulation partly or entirely in the hands of private actors without any explicit references in the relevant public rules. In these cases, references to private regulation are more veiled and often have to be traced back in policy instruments concerning the topic covered by the private rules. The legislator can also agree informally and more tacitly with the use of private regulation either by refraining from regulatory intervention or by pressuring the industry to pick up the regulatory glove, backing this up with the threat of government intervention or otherwise, as the case may be.

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[345] IFPL, under 6 (*Wat is het beste instrument?*).
[346] National Audit Office, 'Wetgeving: organisatie, proces en product' (1994), as included in *Parliamentary Papers II* 1993/94, 23 710, nos 1-2, p. 15.
[347] The IFPL was introduced in 2010 as a comprehensive framework for the *ex ante* evaluation of policy and regulation and as such integrates all the then existing instruments for *ex ante* evaluation. See Meuwese 2012, p. 17; *Parliamentary Papers II* 2010/11, 29 515, no. 330.
[348] Van Gestel & Menting 2011a, the results are briefly repeated in Van Gestel & Menting 2011b (which is in English); Van Haeften, Junte & Grimmius 2010; Voermans & Eijlander 2002. See also Helder 2014.
[349] Cf. Van Haeften, Junte & Grimmius 2010, p. 9; Helder 2014, p. 388.

This section discusses examples of references to industry codes of conduct 'inside' (i.e., the first way) and 'outside' (i.e., the second way) European and Dutch private law legislation.[350] With the discussion being limited to several examples, I by no means pretend that this section provides an exhaustive overview of the use of codes as a policy instrument in European and Dutch private law. Rather, the objective is to acquire a taste of how the paper reality of legislative policy translates into private law practice. How do policymakers actually employ codes of conduct in European and Dutch private law?[351]

4.4.1 European private law

At the European level, the employment of alternative regulatory instruments occurs in different settings, both inside and outside the European legal framework. Inside the legal framework, one can find references to self-regulation and co-regulation in the TFEU,[352] secondary legislative acts (usually directives) and in tertiary, soft law acts (e.g., Commission communications).[353] Reliance on self-regulation and co-regulation as policy instruments can also occur outside the formal confines of this legal framework, as was pointed out in the introduction to this section.

4.4.1.1 References in European private law legislation

4.4.1.1.1 Consumer law

Self-regulation and co-regulation have long been part of EU consumer policy. Already in its 1999-2001 Action Plan, the Commission promoted dialogue between businesses and consumers leading to self-regulation agreements, which would "either lessen the need for legislation, complement legislation or add value to legislation".[354] In the 2002-2006 strategy that followed, consideration was given to the fact that the objective of a high level of consumer protection also implied "making better use of alternative forms of regulation",

[350] Part of this section has, in an earlier version, already been published (in Dutch) in Menting & Vranken 2014, pp. 11-21. The examples stemming from references in policy documents have been taken from the empirical studies conducted for my Master's thesis and for this doctoral thesis, respectively.
[351] Questions on the effectiveness and actual results of these references fall outside the ambit of this study and are therefore not addressed. A comprehensive list of examples of private regulation in the Community legislative framework (i.e., also outside the confines of EU private law) can be found in Appendix II to the Opinion of the EESC on Self-regulation and co-regulation in the Community legislative framework (2015) INT/754 (available at <www.eesc.europa.eu/?i=portal.en.int-opinions.32859>, accessed 1 July 2016). For a recent overview of the initiatives in the EESC database, see Senden et al. 2015.
[352] See Articles 154 and 155 TFEU which form the Treaty basis for the European Social Dialogue. The initiatives resulting from this Dialogue are listed in the online Social dialogue texts database (to be found at <http://ec.europa.eu/social/main.jsp?catId=521&langId=en>, accessed 1 July 2016).
[353] Senden 2005, p. 18. These references can concern private standard setting as well as private dispute resolution and enforcement. In line with the focus of this doctoral thesis, I will concentrate on the first category of references.
[354] Report from the Commission on the "Action Plan for Consumer Policy 1999-2001" and on the "General Framework for Community activities in favour of consumers 1999-2003", COM(2001) 486 final, p. 6. See also Communication from the Commission, Consumer Policy Action Plan 1999-2001, COM(98) 696 final, p. 9. On earlier policy, see Huyse & Parmentier 1990.

including self-regulation and co-regulation.[355] In its latest consumer policy strategy of 2012, the Commission promotes and supports self-regulation while seeking to enhance consumer knowledge.[356] The discussion in this section shows that this policy has translated into concrete references to codes of conduct in several European consumer law directives.

a. Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive (UCPD) is a first directive where reference is made to codes of conduct.[357] The roots of the UCPD can be traced back to the Green Paper on European Union consumer protection (2001).[358] Following the Commission's observation that the realization of a consumer internal market was hindered by fragmentation at the national and the European level, the Paper made a case for reform of EU consumer protection through greater harmonization.[359] The Commission put forward two ways in which this aim could be achieved: a specific approach, which would build on a set of specific directives, and a mixed approach, consisting of a framework directive on business-to-consumer commercial practices which would be supplemented by more targeted regulatory means if necessary.[360] Under the mixed approach, the Commission envisaged an important role for self-regulation and co-regulation, and ro European codes of conduct in particular, as a potentially useful complement to public regulation.[361] Until then, however, due to diverging national approaches to self-regulation, a lack of clarity on both the status of the commitments made in codes of conduct and their enforceability, attempts to create European-wide codes of conduct had not proven particularly successful.[362] The proposed framework directive could provide a basis for such European-wide codes concerning consumer protection.[363] The outcomes of the consultation

[355] Communication from the Commission, Consumer Policy Strategy 2002-2006, COM(2002) 208 final, under 3.1.

[356] Communication from the Commission, A European Consumer Agenda - Boosting confidence and growth, COM(2012) 225 final, under 4.2. In the previous strategy (2007-2013), self-regulation was placed in the context of enforcement. See Communication from the Commission, EU Consumer Policy strategy 2007-2013. Empowering consumers, enhancing their welfare, effectively protecting them, COM(2007) 99 final, p. 8. Cf. on the role of self-regulation in enforcement within consumer policy, the Communication from the Commission on the enforcement of the consumer acquis, COM(2009) 330 final, pp. 3-4.

[357] Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market, *OJ* 2005, L 149/22. In the Netherlands, the UCPD has been implemented in Articles 6:193a-193j DCC. The references to codes of conduct, more specifically, can be found in Articles 6:193c(2) and 6:193g DCC. See also Article 3:305d DCC. Vollebregt indicates that the implementation of the UCPD provisions on codes of conduct has been sloppy at points, leading to differences between the Directive and the DCC provisions as regards the demands imposed on traders in respect of codes. See Vollebregt 2010, pp. 269-273.

[358] Green Paper on European Union Consumer Protection, COM(2001) 531 final. See also Radeideh 2005, pp. 251-253.

[359] COM(2001) 531 final, pp. 2-8. See also Communication from the Commission, Follow-up Communication to the Green Paper on EU Consumer Protection, COM(2002) 289 final, p. 3. For a critical assessment of the Commission's arguments, see Collins 2004, pp. 8-25.

[360] COM(2001) 531 final, pp. 10-12.

[361] COM(2001) 531 final, pp. 5, 14-15; Follow-up Communication to the Green Paper on Consumer Protection, COM(2002) 289 final, p. 3.

[362] COM(2001) 531 final, pp. 5-6

[363] COM(2001) 531 final, pp. 11, 14. According to the Commission, one of the preconditions for making European self-regulation work is that "non-compliance with a voluntary commitment made by a business in respect of consumers" would be defined as an unfair or misleading trading practice (COM(2001) 531 final, pp. 14). The public consultation at this point showed that businesses were in favor of the idea of using European codes of conduct, yet strongly opposed the idea of making the commitments binding. Conversely, consumer

on the proposals made in the Green Paper led the Commission to choose the option of the 'mixed approach'.[364] This eventually resulted in 2005 in the adoption of the UCPD, which addresses the issue of unfair business-to-consumer commercial practices.

In line with the observations made in the Green Paper, the UCPD, which takes a maximum harmonization approach, seeks to contribute to the proper functioning of the internal market and to create a high level of consumer protection.[365] Put in more practical terms, the Directive aims to provide greater clarity about consumer rights and to simplify cross-border trade between businesses and consumers.[366] In this respect, the Directive also envisages a role for European and national codes of conduct, as these allow traders to effectively apply the principles of the Directive and to contribute to the establishment of fair commercial practices.[367]

There are three different contexts in which codes of conduct come to the fore in the UCPD. Firstly, codes are mentioned on the Directive's black list, enclosed in Annex I.[368] Commercial practices that are on this list are in all circumstances regarded as unfair. As regards codes of conduct, the black list designates as 'forbidden unfair practices' false claims about subscriptions to a code – "claiming to be a signatory to a code of conduct when the trader is not" - and about endorsement of the code by a public or private body - "claiming that a code of conduct has an endorsement from a public or other body which it does not have". Secondly, we can find references to codes of conduct in Article 6 UCPD, which concerns misleading actions. More specifically, it follows on from Article 6(2)(b) that:

> "2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves […] (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code"[369].

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groups were only cautiously positive and applauded the idea of 'binding commitments'. Member States generally showed themselves supportive of using codes of conduct. See COM(2002) 289 final, p. 5-6.

[364] COM(2002) 289 final, pp. 8-12. The role that codes eventually have come to play under the UCPD differs markedly from the role initially envisaged by the Commission in its Green Paper and the Follow-up Communication, as will be discussed briefly at the end of this subsection.

[365] Directive 2005/29/EC, recitals 1-13; Commission Proposal for the Unfair Commercial Practices Directive, COM(2003) 356 final.

[366] <http://ec.europa.eu/consumers/archive/rights/archives_en.htm> (accessed 1 July 2016). At the European level, the issue of unfair commercial practices in B2B relations is addressed through private regulation, namely the 'Vertical relationships in the Food Supply Chain: Principles of Good Practice' (available at <www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain>, accessed 1 July 2016). These Principles are briefly discussed in section 4.4.1.2 below.

[367] Directive 2005/29/EC, recital 20. See also Van Boom, Garde & Aksin 2014, p. 4; Pavillon 2014, pp. 137-138. Article 2(f) UCPD defines a code of conduct as "an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors".

[368] To be read in conjunction with Article 5(5) of the Directive.

[369] Directive 2005/29/EC, Article 6(2)(b).

Thus, in certain circumstances, the UCPD marks "the practice of undertaking and publicly signalling to be bound by, while at the same time not complying with, firm commitments contained in a code of conduct"[370] as a practice which should in certain circumstances be considered a misleading and therefore prohibited commercial practice.[371] Thirdly, codes of conduct can play a role in substantiating the open-textured standard of professional diligence, laid down in Articles 5 and 7 UCPD (which refer to "requirements of professional diligence").[372] This standard is defined in Article 2(h) UCPD as "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity". Whether or not a trader complies with a code of conduct constitutes an important factor in testing whether the trader has met the professional diligence standard. This also goes for traders who have not undertaken to adhere to the code of conduct concerned; in these cases also the code can serve as a yardstick in respect of the standard.[373] The wider the support for a code , the weightier compliance or non-compliance with the code becomes as a factor in establishing whether a trader has acted in conformity with the required standard of professional diligence. However, codes of conduct are not conclusive in determining the substance of this standard. That is to say that they do not provide a 'safe harbor' for traders: compliance with a code does not equate with meeting the requirements of professional diligence. Likewise, non-compliance does not *per se* warrant the conclusion that a trader has failed to meet these requirements.[374]

The UCPD also envisages a role for self-regulation in the control of unfair commercial practices.[375] From Article 10, more specifically, it follows on that the UCPD leaves room for control by code owners and recourse to self-regulatory bodies in case of complaints, provided that judicial or administrative recourse remains possible. In other words, filing a complaint with a self-regulatory body cannot deprive the claimant from his right to go down the route of administrative or judicial enforcement. Member States may encourage such self-regulatory control, thus Article 10. Additionally, Article 11(1) gives Member States the discretion "to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints", including private control schemes.[376] Article 17 seeks to enhance the 'visibility' of codes of conduct by requesting Member States "to, where appropriate, encourage trade owners and code owners to inform consumers of their codes of

[370] Van Boom, Garde & Aksin 2014, p. 4.
[371] The threefold rationale behind attaching legal consequences to commitments made in codes of conduct can be found in the Commission's Green Paper. The introduction of such consequences could enhance consumer confidence in public enforcement bodies as enforcers of code commitments in last resort, provide a strong argument for less substantive regulation and address the problem of free riders by serving as a reference point for public enforcement authorities. See COM(2001) 531 final, p. 14.
[372] See Directive 2005/29/EC, recital 20.
[373] Pavillon 2014, pp. 142-144; Howells 2006b, pp. 213-214. Cf. in the Dutch context *Parliamentary Papers II* 2006/07, 30 928, no. 3, p. 13.
[374] Pavillon 2014, pp. 142-144. Howells 2006b, pp. 213-215; Collins 2005, p. 423. Originally, the Commission did confer a presumption of conformity upon "membership of a code" (COM(2002) 289 final, p. 11), yet eventually dropped this idea under the final version of the UCPD. Cf. Collins 2004, pp. 30-36.
[375] Howells 2006b, p. 211.
[376] See also Directive 2005/29/EC, recital 20; Pavillon 2014, p. 144; Howells 2006b, pp. 211-212; Abbamonte 2007, p. 29.

conduct". Finally, it can be pointed at recital 20, which – with a view to establishing a high level of consumer protection - states that consumer organizations could be informed of and involved in the drafting process of a code of conduct.[377]

Several legal scholars have shown themselves critical of the actual contribution of codes of conduct to the attainment of the Directive's goals of consumer protection and harmonization. The references to codes of conduct eventually included in the UCPD do not reflect the ambitious plans as regards the role of codes of conduct that the Commission had at the beginning of the legislative process.[378] In this respect, Pavillon concludes that the Directive adopts a 'stick approach' rather than a 'carrot approach' when it comes to stimulating the use of codes of conduct. With the UCPD failing to grant privileges to traders that comply with an industry code (e.g., offering a safe harbor), the stimulating effect of the UCPD in respect of codes will mainly lay in the threat of liability for non-compliance or in legislative interference in case codes cannot do the trick. In doing so, the Directive, Article 6(2)(b) in particular, can even prove a disincentive for traders to introduce a code of conduct, according to Pavillon.[379] Indeed, as Pavillon points out, the UCPD has not led to the introduction of European codes of conduct linking up to the Directive and has provided only limited impetus for the development of national codes of conduct.[380]

b. Directive on Timeshare

European regulation of 'timeshare' has developed along the lines of both public and private regulation. The public regulatory regime on timeshare has its roots in 1994, when the first version of the Timeshare Directive was enacted. This version was replaced in 2009 by a new, more up-to-date directive.[381] The European trade association for timeshare businesses, the Resort Development Organisation (RDO) (then the Organisation for Timeshare in Europe, OTE), took up the regulatory glove itself in 1999 with the adoption of a Code of Ethics.[382] Noticeable is the interaction between these regimes running in parallel.

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[377] Consultation of consumer organizations is thus not obligatory for private regulators. Micklitz 2006, pp. 99-100 shows himself critical of the fact that consumer organizations lack a formal role in the drafting process, as it can lead to codes not taking into account consumer interests.

[378] Pavillon 2014, p. 139; Micklitz 2014, p. 119; Howells 2006a, p. 23; Wilhelmsson 2006, p. 254. See also Keirsbilck 2011, pp. 323-326.

[379] Pavillon 2014, pp. 140, 144-145 and 151-152. See also Collins 2005 p. 424 and Collins 2004, pp. 30-31. It should be noted, however, that Article 6(2)(b) initially included less stringent conditions for rendering a code legally binding. See Broekman 2005, p. 180; Commission Staff Working Paper, Extended Impact Assessment on the Directive concerning unfair business-to-consumer commercial practices in the Internal Market (Unfair Commercial Practices Directive), SEC(2003) 274, p. 12.

[380] Pavillon 2014, pp. 151-152.

[381] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (*OJ* 1994, L 280/83) and Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (*OJ* 2009, L 33/10). The Dutch government has implemented the Directive in Articles 7:50a-50i DCC.

[382] The current, revised version of the Code came into force on 1 January 2010. The Code and the accompanying ADR scheme are available at <http://rdo.org/code-of-conduct/>. There is also another code of conduct in place, namely that of the Timeshare Association Timeshare Owners and Committees (TATOC), the European consumer association for timeshare owners. I do not discuss the Code here, as I have not found any indications of this Code standing in a similar particular relationship of interaction as the Timeshare Directive and the RDO

The reason for the adoption of the RDO Code of Ethics in 1999 as a complement to the 1994 Timeshare Directive was twofold. First of all, the Code was introduced as a response to the Timeshare Directive, which was deemed imperfect by the RDO because of the significant differences in the national implementations of this Directive. Secondly, there was a felt need for self-regulatory intervention because of persisting malpractices within the industry.[383] Going beyond what was required by the Directive in certain respects, the Code at points offered stronger consumer protection.[384] Meanwhile, the timeshare market had changed significantly and new holiday products had entered the market. The 1994 Timeshare Directive did not catch these developments, resulting in distortions of competition and serious problems for consumers. This prompted the Commission to review the Directive.[385] The consultation of stakeholders conducted in the course of this review process revealed, among other things, that whereas most Member States, consumers and other stakeholders were in favor of a revision of the Directive, the majority of the organized European timeshare industry was against such a revision. The industry thereby advanced self-regulation as one of the solutions to address the aforementioned problems.[386] The Commission however noted that the consumer problems were not sufficiently addressed by the RDO Code, due to the fact that non-RDO members and rogue traders could not be forced to comply with it. Furthermore, there were numerous complaints about violations of the Code, in spite of the fact that it was generally complied with by RDO members.[387] Against this backdrop, the policy option of 'strengthening industry self-regulation' was discarded by the Commission on the basis of the outcomes of the impact assessment, which showed that self-regulation would not be able to attain the objectives set by the Commission.[388] Instead, enactment of a new Timeshare Directive was opted for, which - contrary to its predecessor - does refer to codes of conduct. The RDO Code of Ethics has been brought in line with the new regulatory framework.[389]

The most visible reference to codes of conduct in the 2009 Timeshare Directive, which applies to business-to-consumer transactions, can be found in Article 14 concerning 'consumer information and out-of-court redress'.[390] The Directive in this respect first of all provides that Member States must encourage traders and code owners to inform consumers of

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Code. The TATOC Code can be downloaded at <www.tatoc.co.uk/about-tatoc/code-of-practice>. Websites accessed 1 July 2016.

[383] <www.rdo.org/archived-articles/introduction-to-the-new-eu-directive-written-march-2009/>; Information on the RDO Code in the EESC Database (<www.eesc.europa.eu/?i=portal.en.smo-database&fiche=125&item-view=full>). Websites accessed 1 July 2016.

[384] Commission Staff Working Document, accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange – Impact Assessment, SEC(2007) 743 final, under 'OTE Code of Ethics, with regard to the 2005 revised version of the Code.

[385] Directive 2008/122/EC, recitals 1-2; Proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange, COM(2007) 303 final, p. 2.

[386] SEC(2007) 743 final, under 'Consultation'; COM(2007) 303 final, p. 4.

[387] SEC(2007) 743 final, under 'OTE Code of Ethics'.

[388] See SEC(2007) 743 final.

[389] See <http://rdo.org/code-of-conduct/> (accessed 1 July 2016).

[390] The definition of code of conduct in Article 2(1)(i) of the Directive is similar to the UCPD definition. See *supra* n 367.

their codes of conduct.[391] A similar obligation is imposed on the European Commission, which is to encourage the provision of information on codes of conduct by traders and their branch organizations, where appropriate by means of a specific marking. Furthermore, the Directive calls upon the Commission to encourage the introduction of European codes of conduct seeking to facilitate its implementation, where appropriate (Article 14(1)). The Directive also mentions the option of informing and involving consumer organizations in the process of drafting a code, so as to ensure a high level of consumer protection.[392]

The Timeshare Directive also entails more hidden references to codes of conduct in its provisions on the pre-contractual information that a trader has to provide to a consumer. Article 4 obliges the trader to provide a consumer, in a clear and comprehensible way, with accurate and sufficient information by means of a standard information form, enclosed in four Annexes. The Directive provides four of such information forms, tailored to the specificities of the different types of contracts within the timeshare industry (i.e., timeshare contracts, long-term holiday product contracts, resale contracts and exchange contracts). All of these forms include a section on codes of conduct: the trader has to indicate whether he has signed a code and, if so, where it can be found. Failure to provide the information required by Article 4 in writing is sanctioned by an extension of the 14 days withdrawal period by three months (Article 6(3)(b) of the Directive). For the remainder, Article 15 of the Directive leaves the formulation of penalties to the Member States.

c. Directive on Consumer Rights

References to codes of conduct can also be found in the Consumer Rights Directive, which came into force in October 2011.[393] This Directive applies to business-to-consumer contracts, with some types of contracts excluded from its scope. Strikingly, however, it mentions codes of conduct only in relation to distance and off-premises contracts. Article 6(1)(n) of the Directive, entailing the pre-contractual information requirements for these types of contracts, provides that, where applicable, a trader has to provide information on the existence of "relevant codes of conduct" and of the way in which copies of these codes can be obtained by the consumer. This information must be provided in a clear and comprehensible way. The Directive does not leave it at that: Article 6(5) stipulates that the information "shall form an integral part of the distance or off-premises contract and shall not be altered unless the

[391] Article 14(1); recital 22. In discussing the transposition of the Directive to the Dutch level, the Dutch legislator remarked that some of the provisions of the Directive did not necessitate implementation since they only obliged factual conduct. According to the legislator, Article 14(1) belonged to this category. The Dutch legislator referred to the publication of codes of conduct on <www.consuwijzer.nl> - a website on which the Dutch government provides information and advice to consumers on their rights - as an example of a way to meet the obligation imposed by Article 14(1). See *Parliamentary Papers II* 2009/10, 32 422, no. 3, p. 4.

[392] Directive 2008/122/EC, recital 22.

[393] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (*OJ* 2011, L 304/64). The Directive replaces Directive 97/7/EC on the protection of consumers in respect of distance contracts (*OJ* 1997, L 144/19) and Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises (*OJ* 1985, L 372/31). It changes Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (*OJ* 1999, L 171/12) and Directive 93/13/EEC on unfair contract terms in consumer contracts (*OJ* 1993, L 95/29). The scope of the initial proposal (COM(2008) 614 final) was wider and provided for a consolidation of all four Directives. The Dutch legislator has laid down the Directive references to codes of conduct in Articles 6:230m(n) and 6:230n(2) DCC.

contracting parties expressly agree otherwise".[394] However, the Directive itself does not provide sanctions for violations of this particular duty to inform. Article 24 leaves it up to the Member States to formulate penalties.[395]

> The Consumer Rights Directive furthermore leaves open what the notion of 'relevant codes of conduct' entails. With a view to the UCPD definition of a code of conduct, on which the Consumer Rights Directive builds, the Dutch legislator has interpreted this notion as requiring that a trader is only obliged to provide information on a code of conduct when he has actually subscribed to this code.[396] According to the legislator, the word 'relevant' indicates that the duty to inform consumers about a code only concerns codes of conduct that are of importance for consumers, such as codes which regulate consumer complaint handling. This implies that the information requirements do not apply in respect of codes of conduct that do not affect the legal position of consumers, said the Dutch legislator, providing the example of the Code of conduct for journalists in the context of a subscription to a newspaper.[397]

Finally, the Directive obliges Member States to, where appropriate, encourage traders and code owners to inform consumers about the codes of conduct they apply (Article 26).[398]

> For the sake of completeness, it can be pointed at the, now repealed, Directive on distance selling and the Commission Recommendation on codes of practice for the protection of consumers in respect of contracts negotiated at a distance. In the Recommendation, the Commission considers that the minimum consumer protection rules set by the Directive should be supplemented by voluntary codes of practice. The Commission therefore recommends, in short, that trade associations of suppliers should adopt codes of practice, which cover the points listed by the Commission, and should ensure that their members comply with these codes.[399] The Distance Selling Directive in fact links up with the Recommendation at this point by stipulating that

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[394] Accordingly, the information is binding upon the contracting parties, as follows from the DG Justice Guidance Document on the Consumer Rights Directive, (June 2014), p. 20 (available at <http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/index_en.htm>, accessed 1 July 2016). Likewise, clear and comprehensible information should be provided to consumers on the possibilities for out-of-court redress and redress mechanisms as well as on the ways in which these avenues can be accessed. See Article 6(1)(t) of the Consumer Rights Directive. It follows from Article 6(8) of the Directive that the information requirements come in addition to those of the Services Directive and the E-Commerce Directive.

[395] The Dutch legislator has not provided for specific sanctions at this point, even though some options are available under Dutch private law. See *Parliamentary Papers II* 2012/13, 33 520, no. 7, pp. 10-11; Tigelaar 2013.

[396] Although the legislator does not indicate on which part of the definition the interpretation is based, it seems obvious that the phrase "traders who undertake to be bound by the code" played a role.

[397] *Parliamentary Papers II* 2012/13, 33 520, no. 3, p. 34.

[398] Noteworthy in this respect is the difference in the wordings of Article 26 under the English version of the Directive and under the translated Dutch version. Whereas the English version speaks of "inform consumers of their codes of conduct", the Dutch translation of the Article speaks of 'inform consumers about their *rights*' ("*om consumenten over hun rechten in te lichten*"). The Dutch legislator copied this formulation in the Explanatory Memorandum to the Act implementing the Consumer Rights Directive. See *Parliamentary Papers II* 2012/13, 33 520, no. 3, p. 7.

[399] Commission Recommendation 92/295/EEC of 7 April 1992 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling) (*OJ* 1992, L 156/21).

Member States, where appropriate, have to encourage these associations to inform consumers about their codes.[400]

d. Proposed Directive on contract rules on the supply of digital content

The European Commission also assigns a role to codes of conduct in its proposal for a Directive on contract rules on the supply of digital content.[401] Against the backdrop of the Commission's struggle to achieve a Digital Single Market, the proposed directive is to introduce a fully harmonized set of EU consumer contract rules on faulty digital content.[402] The proposal refers to codes of conduct at two points. The first reference can be found in recital 28 and entails that suppliers should make use of, among other things, international, European or industry-specific codes of conduct when applying the rules of the directive. Furthermore, it states that in this context the Commission may consider the promotion of "the drawing up of codes of conduct by trade associations and other representative organisations that could support the uniform implementation of the Directive".[403] The second reference is included in Article 6 of the directive which deals with the conformity of the digital content with the contract. Paragraph 1 of this provision sets out the requirements that digital content has to meet in order to conform to the contract. In principle, these requirements are to be included in the contract. However, when the contract fails to do so in a clear and comprehensive fashion, industry codes of conduct might come into play. For, in this situation, the conformity of the digital content with the contract has to be assessed against the yardstick included in Article 6(2), according to which:

> "the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability, and other performance features such as accessibility, continuity and security, taking into account: […] (b) where relevant, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; […]".[404]

4.4.1.1.2 Media and advertising

Self-regulation and co-regulation, including codes of conduct, also play a part in the audiovisual and media policy of the European Union (under e)[405] as well as in the modest European regulatory framework on advertising (under f).

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[400] Directive 97/7EC on the protection of consumers in respect of distance contracts (*OJ* 1997, L 144/19), recital 19, Article 16. Cf. recital 18: "Whereas it is important for the minimum binding rules contained in this Directive to be supplemented where appropriate by voluntary arrangements among the traders concerned, in line with Commission recommendation 92/295/EEC […]".

[401] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final

[402] COM(2015) 634 final, pp. 2-3 and recitals 1-9 of the proposed Directive (COM(2015) 634 final, pp. 14-15).

[403] Recital 28 of the proposed Directive (COM(2015) 634 final, p. 19).

[404] Article 6(2)(b) of the proposed Directive (COM(2015) 634 final, p. 26).

[405] This policy is now part of the European Commission's Digital Agenda, which is one of the pillars of the Europe 2020 strategy. The main goal of this Agenda is to create a digital single market. See <https://ec.europa.eu/digital-agenda/en/digital-agenda-europe-2020-strategy> and Communication from the

e. Audiovisual Media Services Directive

The origins of the European audiovisual policy lie in the 1980s, when the EU – spurred by technical and market developments – started to develop its policy in this field.[406] Self-regulation and co-regulation constitute an important pillar of this policy,[407] as is *inter alia* reflected in the Audiovisual Media Services Directive (AVMSD).[408] This Directive, which imposes minimum rules on traditional television broadcasts and on-demand audiovisual media services, explicitly relies on self-regulation and co-regulation when it comes to the implementation of its provisions.[409] Recital 44 reads:

> "Experience has shown that both co-regulation and self- regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves. […] Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator. Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to formal obligations of the Member States regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co-regulation and/or self-regulatory regimes nor disrupt or jeopardise current co-regulation or self-regulatory initiatives which are already in place within Member States and which are working effectively" .[410]

Commission, A Digital Agenda for Europe, COM(2010) 245 final. On EU media policies, see <https://ec.europa.eu/digital-agenda/en/about-media-policies>. Websites accessed 1 July 2016.

[406] See the Commission's archived webpages on the history of the audiovisual regulatory framework: <http://ec.europa.eu/avpolicy/reg/history/index_en.htm>;
<http://ec.europa.eu/avpolicy/reg/history/historytvwf/index_en.htm> (accessed 1 July 2016).

[407] Cf. Verdoodt 2007, pp. 289-292.

[408] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. A codified version of the Directive was published in the Official Journal in 2010 (Directive 2010/13/EU, *OJ* 2010, L 95/1). References to the AVMSD are to this consolidated version.

[409] Communication from the Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, p. 11. For the role of self-regulation and co-regulation under the predecessor of the AVMSD, the Television Without Frontiers Directive (89/552/EEG), see Verdoodt 2007, pp. 286-289.

[410] Directive 2010/13/EU, recital 44. See also Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(2005) 646 final, p. 9. The AVMSD has been quite successful in promoting the use of self-regulation and co-regulation, as follows from the Commission Staff Working Document, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU, SWD(2016) 170 final, pp. 52-57 and the study on the "Effectiveness of self- and co-regulation in the context of implementing the AVMS Directive" (April 2016), carried out by Panteia and VVA Europe for the European Commission (DG for Directorate General

Accordingly, Article 4(7) of the AVMSD requires Member States, within the boundaries of their legal systems, to encourage national self-regulatory and co-regulatory initiatives in the fields coordinated by the Directive. The provision lays down as conditions in this respect that the initiatives are "broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement".[411] Article 9(2), in turn, entails a more specific call. It obliges both the Member States and the European Commission to encourage media service providers to adopt codes of conduct addressing "inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended".[412]

In its 2015 Digital Single Market strategy, the European Commission announced a (REFIT) review of the AVMSD, with the aim of establishing whether the regulatory framework is still able to adequately address the rapid technological and market developments in the world of audiovisual media. The review has been set for 2016.[413] On 25 May 2016, the Commission took an important step in the review process by launching a proposal for a new directive, which is to amend the AVMSD.[414] The proposed directive also puts significant emphasis on the use of self-regulation and co-regulation, yet does so in an even more explicit and comprehensive fashion. Below, I will outline the main changes that the proposal aspires to bring.

Like the AVMSD, the proposed directive entails a general call upon the Member States to promote the use of self-regulatory and co-regulatory codes of conduct (in Article 4(7))[415] as well as an obligation for the Members States and the Commission to foster the introduction of codes of conduct on, in short, commercial communications concerning food and beverages broadcasted in or around children's programs (Article 9(2))[416]. However, the proposed directive does not leave it at that. Firstly, the proposal envisages adding a new subsection to Article 9 of the AVMSD, requiring Member States and the European Commission to encourage the use of codes of conduct concerning audiovisual commercial communications

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Communications Networks, Content & Technology). The study can be found at <https://ec.europa.eu/digital-single-market/en/news/audiovisual-and-media-services-directive-self-and-co-regulation-study> (accessed 1 July 2016).

[411] Directive 2010/13/EU, Article 4(7).

[412] See also <http://ec.europa.eu/avpolicy/reg/tvwf/advertising/codes/index_en.htm> (accessed 1 July 2016). In the first report on the implementation of the AVMSD, the Commission concluded that "more effort needs to be made to create scale, support and best practice" for these codes and that their effectiveness had to be further assessed. See First Report from the Commission on the application of Directive 2010/13/EU "Audiovisual Media Service Directive". Audiovisual Media Services and Connected Devices: Past and Future Perspectives, COM(2012) 203 final, p. 11.

[413] COM(2015) 192 final, pp. 10-11, 20. See also Commission Staff Working Document, A Digital Single Market Strategy for Europe - Analysis and Evidence, SWD(2015) 100 final, pp. 42-45.

[414] Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final.

[415] See also COM(2016) 287 final, p. 5 and recital 12 of the proposed directive.

[416] See also COM(2016) 287 final, p. 12 and recital 10 of the proposed directive. The proposed new version of Article 9(2) is more comprehensive than its AVMSD equivalent.

for alcoholic beverages, with the objective of effectively limiting the exposure of minors to such communications.[417] Secondly, more emphasis is put on the facilitation of self-regulatory and co-regulatory practices; the European Commission is called upon multiple times to facilitate the development of European codes of conduct.[418] Furthermore, in respect of certain, but not all, European codes of conduct, the proposed directive stipulates that drafts and amendments in case of already existing codes must be submitted to the Commission, which may request the European Regulators Group for Audiovisual Media Services (ERGA) to file an opinion on said codes.[419] Thirdly, the applicable conditions in the proposed directive for the use of self-regulation and co-regulation are more extensive than those of Article 4(7) of the AVMSD. More specifically, Article 4(7) of the proposed directive stipulates that:

> "Member States shall encourage co-regulation and self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. Those codes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned. The codes of conduct shall clearly and unambiguously set out their objectives. They shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at. They shall provide for effective enforcement, including when appropriate effective and proportionate sanctions".[420]

e.1 Recommendation on the protection of minors and human dignity in audiovisual and information services

Self-regulation and co-regulation also play an important role in EU audiovisual media policy concerning the protection of minors and human dignity.[421] The provisions included in the AVMSD in this respect (i.e., Article 12 in the context of on-demand services and Article 27 in the context of television broadcasting) are complemented by two Recommendations on the protection of minors and human dignity in audiovisual and information services, which put emphasis on the use of self-regulation and co-regulation.[422]

In 1996, the Commission initiated a European debate on the protection of minors and human dignity in media services with a Green Paper on the topic. In this paper, the Commission noted that the developments on the market for audiovisual media and information services necessitated a more flexible regulatory framework to protect minors

[417] Article 9(3) of the proposed directive. See also recital 11 of this directive.
[418] See Articles 6a(3), 9(2), 9(4) and 28a(7) of the proposed directive.
[419] See Articles 4(7) and 28a(8) of the proposed directive. The ERGA is an advisory body, consisting of national independent regulatory bodies in the field of audiovisual services. See Commission Decision of 3 February 2014 on establishing the European Regulators Group for Audiovisual Media Services, C(2014) 462 final, Articles 2 and 4(1).
[420] Article 4(7) of the proposed directive. Recital 7 at this point refers tot the Principles for Better Self- and Co-Regulation, which will be discussed in section 4.5.1.2 of this chapter.
[421] Verdoodt 2007, p. 291 speaks of a complementation of European economic policy with the protection of several crucial values of overriding public interest.
[422] Cf. Verdoodt 2007, pp. 291-294. On the use of soft law instruments, recommendations in particular, to "shape the processes of self-regulation and co-regulation", see Senden 2005 pp. 21 et seq. Cf. in the context of a safer internet environment, Decision 854/2005/EC of the European Parliament and of the Council of 11 May 2005 establishing a multiannual Community Programme on promoting safer use of the Internet and new online technologies (*OJ* 2005, L 149/1).

against harmful media content and to ban content affecting human dignity. Self-regulation was put to the fore as one of the policy options.[423] The Green Paper *inter alia* resulted in the enactment of a Council Recommendation (98/560/EC) in 1998.[424] This Recommendation represents a significant milestone in EU media policy in several respects. Not only was it the first legal instrument to address the content of audiovisual media and information services provided through all media channels including the Internet, but it was also the first instrument to systematically apply a self-regulatory and co-regulatory framework for the media sector.[425] The Recommendation perceives self-regulation as a useful instrument to address problems concerning the protection of minors and human dignity. It advocates greater use of national self-regulatory frameworks, developed through cooperation between the industry actors and other stakeholders, as a supplement to European and national public regulation. As such, self-regulation should contribute to a quick implementation of solutions, while maintaining the flexibility needed to remain responsive to the rapid development of audiovisual and media services.[426] The Recommendation calls upon the industry, the Member States and the Commission to take action accordingly. The industry and other stakeholders are called upon to cooperate in the development of codes of conduct regulating the protection of minors and human dignity in the context of the provision of online services. Member States, in turn, are recommended *inter alia* to promote the establishment of national frameworks for self-regulation, supplementing the national regulatory framework, by operators of online services. The Commission, in short, is invited to support matters financially. Both the industry codes of conduct and this national framework for self-regulation should be drawn up in accordance with the 'Indicative guidelines for the implementation, at national level, of a self-regulation framework' set out in an Annex to the Recommendation.[427] These guidelines, which seek to provide consistency in the development of national self-regulation and hence enhance the effectiveness of the self-regulatory process, cover four key components of this self-regulatory framework: "consultation and representativeness of the parties concerned"; "codes of conduct", stating what issues the codes should cover; "national bodies facilitating cooperation at community level", and "evaluation of self-regulation frameworks".[428] In 2006, the Recommendation was updated and supplemented by a new Recommendation (2006/952/EC).

[423] Green Paper on the protection of minors and human dignity in audiovisual and information services, COM(96) 483 final. See also Verdoodt 2007, p. 291.

[424] Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (*OJ* 1998, L 270/48). On this Recommendation, see also Verdoodt 2007, pp. 291-294.

[425] Verdoodt 2007, pp. 291-292.

[426] Recommendation 98/560/EC, recitals 13 and 20.

[427] Recommendation 98/560/EC, under I(1), II(2), III(1). From the evaluation reports issued by the Commission we learn that the Recommendation has resulted in various private regulatory initiatives, including codes of conduct. See Evaluation report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, COM(2001) 106 final and Second Evaluation Report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, COM(2003) 776 final.

[428] Recommendation 98/560/EC, Annex 'Indicative guidelines for the implementation, at national level, of a self-regulation framework for the protection of minors and human dignity in on-line audiovisual and information services'.

Noting that self-regulation of the audiovisual sector has proven to be an effective, but not sufficient additional measure to protect minors, this Recommendation also assigns a role to self-regulation in the protection of minors and human dignity.[429]

f. Advertising

The European public regulatory framework on advertising is fairly modest: traditionally, the regulation of advertising has been in the hands of the industry itself.[430] The Directive on Misleading and Comparative Advertising constitutes the main component of the European public regulatory framework.[431] Also in this Directive, which applies to misleading and unlawful comparative advertising practices in B2B relations, one can find references to self-regulation. The Directive encourages "the voluntary control exercised by self-regulatory bodies to eliminate misleading or unlawful comparative advertising" as it "may avoid recourse to administrative or judicial action".[432] A precondition for such a self-regulatory control system is that it comes in addition to court or administrative proceedings,[433] which means that one should not be deprived of the right to seek recourse to these proceedings. The same goes for voluntary control of advertising of medicinal products for human use.[434]

4.4.1.1.3 Other

g. E-Commerce Directive

Electronic commerce (e-commerce) started to attract the attention of the European Commission at the end of the 1990s because of its rapid emergence and its perceived potential for the European market. The Commission deemed it necessary to introduce a regulatory framework for e-commerce to remove the legal barriers to e-commerce so as to exploit its full potential.[435] This framework was to be built on four principles, one of these being the principle "no regulation for regulation's sake".[436] This principle entails that no Community action will be taken where mutual recognition of national rules or appropriate self-regulatory

[429] Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (*OJ* 2006, L 378/72), recital 12.
[430] To a greater or lesser extent, most EU Members States have in place a national self-regulatory framework. At the European level, the advertising industry is represented by The European Advertising Standards Alliance (EASA), which promotes responsible advertising by providing guidance, *inter alia* through standards, on effective advertising self-regulation. See <www.easa-alliance.org/About-EASA/Who-What-Why-/page.aspx/110> (accessed 1 July 2016).
[431] Directive 2006/114/EG of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (*OJ* 2006, L 376/21).
[432] Directive 2006/114/EG, recital 18.
[433] Directive 2006/114/EG, Article 6.
[434] Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use (*OJ* 2001, L 311/67), Article 97(5).
[435] Communication from the Commission, A European Initiative in Electronic Commerce, COM(97) 157, pp. 5-6; Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, p. 3 (see pp. 7-10 for an overview of the issues necessitating a legal framework).
[436] COM(97) 157, p. 14. See also COM(1998), 586 final, p. 17.

codes can effectively achieve the free movement of e-commerce services.[437] In the view of the Commission, European-level industry self-regulation in general and codes of conduct in particular, can also further consumer trust in e-commerce, which is essential for the creation of a single market for e-commerce services. Accordingly, the E-Commerce Directive came to include several references to codes of conduct.[438]

The E-Commerce Directive, adopted in 2000, seeks to ensure the cross-border movement of e-commerce services and to create a genuine internal market for such services.[439] The Directive also assigns a role to European codes of conduct in this regard. Article 16(1), more specifically, first of all requires both the European Commission and the Member States to encourage the development of European codes designed to contribute to the implementation of the Directive. In doing so, as follows on from Article 16(2), these actors should also encourage the involvement of consumer organizations in the drafting and implementation of codes of conduct where these codes affect their interests. Furthermore, Article 16(1) of the Directive requires the Commission and the Member States to encourage: the voluntary transmission of draft codes to the Commission; the electronic accessibility of codes of conduct in the Community languages; feedback by private regulators to the Member States and the Commission about the application of their code and its impact on e-commerce; and the creation of codes of conduct concerning the protection of minors and human dignity. The Directive thereby stresses that the fact that the Member States and the Commission are to encourage the creation of codes of conduct affects neither the voluntary nature of these codes, nor the freedom to decide whether or not to subscribe to any such code.[440] Particular attention is paid to codes of conduct of the regulated profession in relation to commercial communication. With codes of conduct being considered the instrument best suited to set the rules on commercial communication by the professions, the Commission and the Member States should encourage the drawing-up or adaptation of European-wide codes on online commercial communications.[441]

> The first implementation report on the application of the E-Commerce Directive of November 2003 shows that the encouragement of codes of conduct has resulted in the introduction of several European codes of conduct, both by the industry and the regulated professions. At the time of the report, the establishment of industry codes on e-commerce was however slowing down yet again.[442]

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[437] COM(97) 157, p. 14. Cf. Communication from the Commission, The impact of the e-economy on European enterprises: economic analysis and policy implications, COM(2001) 711 final, p. 17.
[438] COM(97) 157 final, p. 21; COM(1998), 586 final, pp. 5, 17-18; COM (2001) 711 final, p. 17.
[439] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*OJ* 2000, L 178/1), recitals 3, 5, 8, Article 1(1).
[440] Directive 2000/31/EC, recital 49.
[441] Directive 2000/31/EC, recital 32, Article 8.
[442] First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, COM(2003) 702 final, pp. 11, 16-17.

Furthermore, Article 10(2) obliges Members States to ensure that, as part of the pre-contractual information to be provided to the recipient of the service, a service provider "indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically". "Parties who are not consumers" can derogate from this information requirement.[443] Currently, the Commission is reviewing the E-Commerce Directive as part of its Digital Single Market Strategy.[444]

h. Services Directive

The Services Directive, the origins of which date back to the beginning of this century, is yet another directive in which we can find references to codes of conduct.[445] The legal framework the Directive establishes in order to eliminate barriers to cross-border provision of services, builds on a combination of regulatory techniques, including the use of alternative methods of regulation in general and codes of conduct in particular.[446] More specifically, the Directive "limits itself to harmonising essential quality requirements and for the rest encourages voluntary quality enhancing measures and codes of conduct at Community level".[447] As this quotation already suggests, private voluntary measures and codes of conduct are considered important tools for reaching the Services Directive's aim of fostering high quality services, including the enhancement of information and transparency as regards services providers and their services.[448] European codes of conduct, more specifically, are deemed to have several beneficiary effects in this respect: not only can these codes promote high quality of services, but they can also facilitate the free movement of services and enhance the degree of trust in cross-border services.[449] Against this backdrop, both Article 22(3) (relating to the quality of

[443] The Dutch legislator has implemented this obligation in Article 6:227b(1)(e) DCC.

[444] <https://ec.europa.eu/digital-single-market/en/e-commerce-directive> (accessed 1 July 2016). See also the Commission's Digital Single Market Strategy, COM(2015) 192 final.

[445] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*OJ* 2006, L 376/36). For an extensive account of the role of codes of conduct in the field of services, see Delimatsis 2010. Cf. also Barnard 2008, particularly pp. 379-381.

[446] Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final/3, p. 9.

[447] Commission Staff Working Paper, Extended impact assessment of proposal for a directive on services in the internal market, SEC(2004) 21, p. 47. See also Services Directive (2006/123/EC), recital 7. Interestingly, part of the barriers in the field of services identified by the Commission were thrown up by the disparity between national private regulatory schemes. See Report from the Commission on the State of the Internal Market for Services presented under the first stage of the Internal Market Strategy for Services, COM(2002) 441 final, p. 50.

[448] Directive 2006/123/EC, recital 113, Articles 26 and 37; Handbook on implementation of the Services Directive, p. 47 (available at <http://ec.europa.eu/growth/single-market/services/services-directive/implementation/index_en.htm>, accessed 1 July 2016); DG for Internal Market and Services, Enhancing the quality of services in the Internal Market: The role of European codes of conduct, European Communities 2007, p. 6 (available at <http://ec.europa.eu/internal_market/services/docs/services-dir/codeconduct/the_role_of_european_codes_of_conduct_en.pdf>, accessed 1 July 2016); Delimatsis 2010, p. 1055. Article 26(5) of the Directive, more specifically, promotes the development of voluntary European service standards. The European Commission has mandated European Standards Organizations to develop such standards. See European Commission, 'Mandate Addressed to CEN, CENELEC and ETSI for the programming and development of horizontal service standards', Brussels, 24 January 2013, M/517 EN (available at <http://ec.europa.eu/growth/tools-databases/mandates/index.cfm?fuseaction=search.detail&id=525>, accessed 1 July 2016).

[449] Handbook on implementation of the Services Directive, p. 51; DG for Internal Market and Services, Enhancing the quality of services in the Internal Market: The role of European codes of conduct, European

services) and Article 37 (in the context of cross-border services) of the Directive refer to codes of conduct.

Article 22(3)(d) asks Member States to ensure that, at the recipient's request, a service provider supplies information on "any codes of conduct to which the provider is subject and the address at which these codes may be consulted by electronic means, specifying the language version available". Furthermore, pursuant to Article 22(3)(e), Member States should ensure that the service provider, when asked by the recipient, provides information on available non-judicial dispute settlement mechanisms. Article 37(1) of the Directive, in turn, calls upon Member States, in cooperation with the European Commission, to take measures to encourage the development of European-wide codes of conduct aimed at facilitating the cross-border provision of services or the establishment of a service provider in another Member State. These European codes "are intended to set minimum standards of conduct and are complementary to Member States' legal requirements".[450] Accordingly, Member States can continue to take more stringent legal measures and national codes can still provide greater protection.[451] The codes should be in conformity with Community law, thus Article 37(1).

The Services Directive devotes particular attention to codes of conduct of professional bodies. The Directive in this respect not only asks Member States to encourage both the development of such codes at the European level and the implementation of these European codes at the national level, but also indicates what these codes should include content-wise. It also stipulates that the codes should comply with Community law, especially competition law, and the legally binding rules on professional ethics and conduct in domestic law.[452] Additionally, the Commission has indicated that when drafting a code of conduct, professional bodies should conform to principles of good governance such as: integration, transparency, responsibility, inclusiveness and accountability.[453] Furthermore, Delimatsis indicates, as a consequence of the very broad definition of 'requirement' under the Services Directive, the self-regulatory activities of professional bodies are subjected to the rules laid down in the Directive.[454]

i. Protection of personal data

Codes of conduct are also assigned a regulatory role under the Data Protection Directive, which – for the time being – constitutes the main pillar of the European data protection

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Communities 2007, p. 6. Cf. Delimatsis 2010, p. 1057 who in this regard speaks of a mobility-enabling function and a confidence-building function of European codes of conduct.

[450] Directive 2006/123/EC, recital 114.

[451] Directive 2006/123/EC, recital 114.

[452] Directive 2006/123/EC, recitals 100, 113-114. With regard to professional rules concerning commercial communication, the Directive requires that these are "non-discriminatory, justified by an overriding reason relating to the public interest and proportionate" (Article 24(2)). See also Delimatsis 2010, pp. 1058-1063.

[453] DG for Internal Market and Services, Enhancing the quality of services in the Internal Market: The role of European codes of conduct, European Communities 2007, p. 10; Handbook on implementation of the Services Directive, pp. 51-52. See also Delimatsis 2010, pp. 1065-1066.

[454] Delimatsis 2010, p. 1054. See also Article 4(7) of the Services Directive which, insofar relevant, defines 'requirement' as: "any obligation, prohibition, condition or limit provided for in […], the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy […]."

regime.[455] This Directive will be replaced by the General Data Protection Regulation, which entered into force on May 2016 and will apply from 25 May 2018.[456] As the Data Protection Directive is currently still in force, I will discuss the role of codes under both the Directive and the Regulation, starting with the Directive.

Codes of conduct and the Data Protection Directive

The Data Protection Directive views codes of conduct as an aid to facilitate its application.[457] Article 27(1) of the Directive calls upon both the Commission and the Member States to encourage trade associations and other representative organizations to create European or national codes of conduct "intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors".[458] The Directive thus, in other words, encourages the use of codes of conduct to detail the provisions of domestic law implementing the Directive with industry-specific rules on data protection. Article 27 furthermore provides that European and national private regulators should have the opportunity to seek public approval of their codes of conduct, drawn up with the purpose of detailing the national data protection provisions. According to Article 27(2) of the Directive, national private regulators should in this respect be able to submit their codes to their national data protection authority, which should be authorized by individual Member States to assess to what extent any codes submitted to it conform with the national provisions adopted pursuant to the Directive.

In the Netherlands, the Data Protection Directive has been implemented in the Dutch Personal Data Protection Act (*Wet Bescherming Persoonsgegevens,* hereafter: Wbp).[459] Article 25 Wbp, mirroring the requirements of Article 27(2) of the Directive, concerns the use of codes of conduct as a tool to detail the general, abstract norms of the Wbp and the approval of such codes by the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*, hereafter: DPA).[460] In order for a code to gain the approval of the DPA, certain formal and substantive requirements have to be

[455] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*OJ* 1995, L 291/31).
[456] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (*OJ* 2016, L 119/1). Already in 2012, the Commission launched a proposal to reform the EU data protection regime by introducing *inter alia* a new General Data Protection Regulation. See Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final. The Regulation was eventually adopted by the Parliament on 14 April 2016.
[457] Directive 95/46/EC, recital 61. In recital 26, it is remarked that "codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible".
[458] See also Directive 95/46/EC, recital 61.
[459] Act of 6 June 2000, providing for rules on the protection of personal data, Bulletin of Acts and Decrees 2000, 302, as subsequently amended.
[460] The precursor of the Wbp, the Data Protection Act (*Wet Persoonsregistraties*), comprised a similar regime. The related provisions of Data Protection Directive have been based on the system set out by the *Wet Persoonsregistraties*. See *Parliamentary Papers II* 1997/98, 25 892, no. 3, pp. 16, 128-129.

met.[461] Article 25(3) Wbp, for instance, provides that the DPA only has to assess a code if the parties filing the request for approval can be deemed sufficiently representative and if the code description of industry sectors involved is sufficiently accurate.[462] Furthermore, Article 25(1) Wbp stipulates that, "taking account of the specific characteristics of the industry sectors concerned", a code has to be a "correct elaboration of the Wbp or of other legislation concerning the processing of personal data". A mere reiteration of the legal provisions is not sufficient: the code has to provide a sector-specific translation of the legal rules on personal data protection.[463] Additionally, Article 25(1) Wbp states that a code that provides for a dispute resolution system can only gain DPA approval if sufficient safeguards are offered as regards the independence of the system.

Article 27(3) of the Directive provides that European codes of conduct can be submitted to the 'Working Party on the Protection of Individuals with regard to the Processing of Personal Data' (also called the 'Article 29 Working Party', hereafter: Art. 29 WP), an independent advisory and consultative body of European supervisory authorities founded by Article 29 of the Directive.[464] When asked to give an opinion on a code submitted to it, Art. 29 WP will not only determine whether the code is in accordance with the European Data Protection Directive and, where relevant, with domestic law implementing the Directive, but will also assess whether the code is of sufficient quality, internal consistency and of sufficient added value to the applicable legal data protection regime.[465] The Commission may ensure that codes of conduct that received the approval of the Art. 29 WP get "appropriate publicity", thus Article 27(3). Until now, however, the promotion of European codes of conduct under the Directive does not seem to have been particularly successful, judging by the limited number of codes approval has been sought for.[466]

Codes of conduct and the General Data Protection Regulation

While the role of codes of conduct under the General Data Protection Regulation (GDPR) remains essentially the same as it currently is under the Data Protection Directive, namely that of facilitating the proper application of the European rules, the GDPR provides a more

[461] These requirements can be found at <https://autoriteitpersoonsgegevens.nl/nl/zelf-doen/gedragscodes> (accessed 1 July 2016).
[462] See also *Parliamentary Papers II* 1997/98, 25 892, no. 3, p. 130.
[463] *Parliamentary Papers II* 1997/98, 25 892, no. 3, pp. 16, 129-130.
[464] Directive 95/46/EC, Article 29. For more information on the Article 29 Working Party, see <http://ec.europa.eu/justice/data-protection/article-29/index_en.htm> (accessed 1 July 2016).
[465] Article 4(1) of the Working Document that the Art. 29 WP has adopted in this respect. See 'Future work on codes of conduct: Working Document on the procedure for the consideration by the Working Party of Community codes of conduct', adopted 10 September 1998 (WP13) (available at <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/index_en.htm>, accessed 1 July 2016).
[466] Report from the Commission, First report on the implementation of the Data Protection Directive (95/46/EC), COM(2003) 265 final, p. 26; Communication from the Commission on the follow-up of the Work Programme for better implementation of the Data Protection Directive, COM(2007) 87 final, p. 5. The documentation of the Article 29 Working Party still shows very little movement in this respect. See <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/index_en.htm> (accessed 1 July 2016).

comprehensive and tighter framework for the use of codes of conduct.[467] The GDPR will also lead to a European Data Protection Board replacing Art. 29 WP.[468] In regulating the use of codes of conduct, Article 40 addresses three different groups of actors as follows.

Firstly, Article 40(1) aks Member States, national supervisory authorities, the European Data Protection Board and the Commission to encourage "associations or other bodies representing categories of controllers or processors"[469] to draw up "codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises"[470].

Secondly, Article 40(2) provides that bodies representing categories of controllers of processors "may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation" and non-exhaustively lists a number of issues that these codes may address.[471] Pursuant to Article 40(5) these bodies are under an obligation (the GDPR uses the word 'shall') to submit their draft code, or amendment or extension of an existing code to the national supervisory authority, that then has gives an opinion on the alignment of the code with the GDPR and approves the code if it is of the opinion that it provides 'sufficient appropriate safeguards'. If the code has a national scope, the authority has to register and publish it (Article 40(6)). However, where the code concerns processing activities in several Member States, the European Data Protection Board has to give its approval to the code: the national supervisory authority has to submit the code to the Board prior to approving it itself (Article 40(7)). Once the Board gives its approval, its opinion has to be submitted to the Commission, which may decide it has general validity within the entire European Union (Article 40(8-9)).[472]

Thirdly, Article 40(3) addresses controllers and processors that are not subject to the GDPR. It provides that these actors may also adhere to data protection codes which have been approved by a national supervisory authority and have been assigned general validity by the Commission.[473] Such adherence is not without obligation: Article 40(3) obliges them to make "binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards including with regard to the rights of data subjects".

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[467] The provisions concerning codes of conduct in the final version of the GPDR are also more detailed than the provisions on the topic included in the Commission proposal of 2012. See COM(2012) 11 final, p. 14 (Article 38).

[468] COM(2012) 11 final, p. 14.

[469] Regulation (EU) 2016/679, recital 98. When creating a new code or amending or extending an existing code, these bodies should consult relevant stakeholders and take account of the views expressed during these consultations, thus recital 99 of Regulation (EU) 2016/679

[470] Regulation (EU) 2016/679, Article 40(1). The GDPR likewise demands these actors to encourage, particularly at EU level, "the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors" (Article 42(1)). See also recital 100.

[471] In short, 'controllers' are actors who determine the purposes and means of the processing of personal data, whereas 'processors' are actors that process personal data on behalf of the controller. See Regulation (EU) 2016/679, Article 4(7) and 4(8).

[472] Article 40(10) states that the Commission shall ensure appropriate publicity for these codes.

[473] It follows on from Article 40(3) that the rationale behind this provision is to "provide appropriate safeguards within the framework of personal data transfers to third countries or international organisations".

Furthermore, several provisions of the GDPR designate adherence to an approved code of conduct as "an element by which to demonstrate" compliance with certain obligations under the GDPR.[474] Finally, Article 41 lays down rules for bodies monitoring approved codes of conduct.

j. Product Safety Directive

Under the General Product Safety Directive, codes of practice (to stick with the terminology of the Directive) can play a role in establishing whether a product can be deemed safe.[475] It follows on from Article 3(2) of the Directive that the question whether a product meets the Directive's generic definition of a safe product in first instance has to be answered in relation to the requirements imposed in this respect by European or national legislation adopted in accordance with EU law. In absence of such legislation, European standards or certain national voluntary standards transposing European standards can be resorted to. Article 3(3) stipulates that when none of these instruments is available, the question whether a product conforms to the general safety requirement has to be answered by taking into account, among other things, "product safety codes of good practice in force in the sector concerned".[476] Additionally, Article 8(2) requires the national competent authorities to encourage and promote voluntary action by producers and distributers, including the creation of codes of good practice, in the context of certain measures to be taken in respect of dangerous products, such as a ban on the marketing of such products). The Directive also provides that the recall of products may take place in the context of national codes of practice on this issue (see Articles 5(1) and 8(2)).

k. Corporate governance

Codes of conduct are also part of the European regulatory framework for corporate governance. As the Commission puts it: "the EU corporate governance framework is a combination of legislation and soft law, namely national corporate governance codes applied on a 'comply or explain' basis".[477] The Directive on company reporting promotes the application of such corporate governance codes.[478] This Directive requires listed companies to include a corporate governance statement in their annual report in which *inter alia* they have to refer to the applicable corporate governance codes and report on their application of these

[474] Regulation (EU) 2016/679, Articles 24(3), 28(3), 35(8). See also recital 81. Article 83(1)(j) states that in deciding whether to impose an administrative fine and when deciding on the amount of the fine, due regard has to be given to, among other things, adherence to approved codes of conduct.
[475] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (*OJ* 2002, L 11/4). The Dutch legislator has transposed the Directive in the Commodities Act (*Warenwet*).
[476] See also Directive 2001/95/EC, recital 16.
[477] Communication from the Commission, Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740 final, p. 3.
[478] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (*OJ* 2013, L 182/19). In October 2014, this Directive was amended by Directive 2014/95/EU (*OJ* 2014, L 330/1) which introduces disclosure requirements for certain large undertakings as regards their corporate social responsibility commitments: these undertakings have to prepare a non-financial statement containing information on certain social and environmental matters.

codes on a comply-or-explain basis.[479] Firstly, this 'comply-or-explain' approach, laid down in Article 20(b) of the Directive, entails that in case an undertaking departs from a corporate governance code, it has to include in its corporate governance statement an explanation as to which parts of the code it departs from and the reasons for doing so. Secondly, whenever an undertaking decides not to refer to any provisions of a corporate governance code, it also has to explain in its corporate governance statement why it has not done so.[480]

Although this system of reporting enjoys the wide support of companies and investors, research showed that the quality of the explanations as well as the monitoring of the corporate governance statements left much to be desired in many Member States.[481] For the Commission, this was one of the reasons to adopt a Green Paper on the European corporate governance framework, asking how to improve the effectiveness of this framework. As regards the issues concerning corporate governance reporting, a large majority of respondents were in favor of requiring companies to better explain departures from corporate governance codes.[482] This led the Commission to announce action on this point, which in 2014 eventually resulted in a Commission Recommendation on the quality of corporate governance reporting. This recommendation seeks to improve the quality of corporate governance statements in general and the quality of explanations provided in case of departure from a code in particular. In short, it sets out in general terms what information is to be provided and stipulates that this information must be sufficiently clear, accurate and comprehensive.[483]

4.4.1.2 References outside EU private law legislation

Besides references to codes of conduct in European private law directives, the field of European private law also includes more 'hidden' references to these codes.

A first example of a reference to a code of conduct outside EU legislation can be found in the 'protection of minors' strand of the Union's audiovisual media policy. At the European level, the protection of minors in the field of online and offline gaming takes places through PEGI (Pan-European Game Information), a private regulatory regime created by the Interactive Software Federation of Europe (ISFE). This regime is based on two codes of conduct: the PEGI Code (2003, dealing with age labelling, promotion and advertising of

[479] Green Paper, The EU corporate governance framework, COM(2011) 164 final, p. 2. See also Directive 2013/34/EU, Article 20(1)(a-b).
[480] Dutch private law already included a provision on corporate governance codes. Article 2:391(5) DCC, 'the legal basis' for such codes, provides that if a corporate governance code is designated by order in council, listed companies are obligated to report on their compliance with the code in their annual report on the basis of 'comply or explain'. See Memelink 2010, p. 43; *Parliamentary Papers II* 2007/08, 31 508, no. 3; *Parliamentary Papers II* 2003/04, 29 449, no. 1. The Corporate Governance Code, the Dutch Banking Code and the Insurer Governance Principles have been designated by order in council. See for the different codes <http://corpgov.nl/corporate-governance-code>;<www.commissiecodebanken.nl/>;<www.mcverzekeraars.nl/>, respectively (accessed 1 July 2016).
[481] COM(2011) 164 final, pp. 4, 18-20, with reference to the Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States of 23 September 2009 (available at <http://ec.europa.eu/internal_market/company/ecgforum/studies_en.htm>, accessed 20 April 2016).
[482] COM(2012) 740 final, pp. 3, 6-7. For the Green Paper, see COM(2011) 164 final.
[483] Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain') (*OJ* 2014, L 109/43).

interactive products) and the PEGI Online Safety Code (2007, concerning the protection of young people in the online gaming environment).[484] The European institutions have explicitly encouraged the establishment of private regulatory regimes in this field. In a resolution of 2002 pre-dating the establishment of the PEGI-regime, for example, the Council, "acknowledged that self-regulation is one of the adequate means, through the participation of all interested parties, in particular that of consumers, to support age-rating systems for interactive leisure software contained in video games and computer games, on its own or as a complement to the measures implemented by Member States in this field".[485] The Commission, in turn, has expressed its support for PEGI, calling it "a good example of self-regulation in line with the better regulation agenda".[486] Thereupon, the Commission called upon the Member States to integrate the information and classification system set out by PEGI in their national systems and asked the industry to further improve the PEGI-system. Additionally, the industry was, among other things, called upon to create a Pan-European Code of conduct on the sale of games to minors within two years. This led to the introduction of the PEGI Retail Code, annexed to the PEGI Code.[487]

The second example stems from the advertising industry, which has a long tradition of private regulation. In 2010, the then European Commissioner for the Digital Agenda, Neelie Kroes, invited the European advertising industry to self-regulate the issue of online behavioral advertising, notably as a means to implement Article 5(3) of the E-Privacy Directive (2009/136/EC) concerning the use of cookies.[488] The call issued by Kroes eventually led to the drawing-up of a European code of conduct for Online Behavioural Advertising: the IAB Europe EU Framework for Online Behavioural Advertising (2011).[489] However, not everyone was equally enthusiastic about the regulatory framework initially established by the Code.

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[484] The PEGI Code, which includes a code for retailers, can be found at <www.pegi.info/en/index/id/1185/>. For the PEGI Online Safety Code, see <www.pegionline.eu/en/index/id/235/>. Websites accessed 1 July 2016. Most Member States rely on the PEGI system in the protection of minors playing video games, with some domestic legislation even being based on PEGI. See Report from the Commission, Protecting Children in the Digital World, COM(2011) 556 final, p. 8 and the accompanying Commission Staff Working Paper (SEC(2011) 1043 final), p. 22; Communication from the Commission, on the protection of consumers, in particular minors, in respect of the use of video games, COM(2008) 207 final, p. 9.

[485] Council Resolution of 1 March 2002 on the protection of consumers, in particular young people, through the labelling of certain video games and computer games according to age group (*OJ* 2002 C 65/2), recital 9.

[486] COM(2008) 207 final, p. 9. The European Parliament equally welcomed the PEGI system, see European Parliament resolution of 12 March 2009 on the protection of consumers, in particular minors, in respect of the use of video games (2008/2173(INI)).

[487] COM(2008) 207 final, pp. 9-10.

[488] 'Towards more confidence and more value for European Digital Citizens European Roundtable on the Benefits of Online Advertising for Consumers', speech delivered by Neelie Kroes, Brussels 17 September 2010, Speech/10/452 (available at <http://europa.eu/rapid/press-release_SPEECH-10-452_en.htm?locale=en>, accessed 1 July 2016). In this speech, Kroes indicated that the self-regulatory system must include "clear and simple complaint handling, reliable third-party compliance auditing and effective sanctioning mechanisms" so as to avoid self-regulation becoming both a fiction and a failure. See also <www.easa-alliance.org/page.aspx/386> (accessed 1 July 2016) and European Commission, Working Document on the Implementation of the revised Framework - Article 5(3) of the ePrivacy Directive, 20 October 2010, COCOM10-34, p. 6, where the Commission services expressed their willingness to provide assistance to the industry.

[489] The Code can be found at <https://ec.europa.eu/digital-single-market/en/content/iab-europe-eu-framework-online-behavioural-advertising>. Later, the Code was complemented by an EASA Best Practice Recommendation, see <www.easa-alliance.org/page.aspx/386>. Websites accessed 1 July 2016.

The Article 29 WP for example criticized the Code for proposing inadequate solutions and for not leading to compliance with the e-Privacy Directive.[490]

The Principles of Good Practice in vertical relationships in the Food Supply Chain (2011), which seek to tackle the problem of unfair B2B trading practices in the food supply chain, constitute a third example.[491] These Principles have been developed within the framework of the High Level Forum for a Better Functioning of the Food Supply Chain, set up by the European Commission.[492] Following a request from the Commission, which sought to address the issue of unfair commercial trading practices, the B2B platform of the Forum organized a multi-stakeholder dialogue to discuss (un)fair trading practices in the food supply chain. This dialogue resulted in the Principles being adopted.[493] A voluntary framework for the implementation of the Principles came into force in 2013.[494] Recently, the Commission suggested opening up a dialogue on how to improve this so-called 'Supply Chain Initiative' and announced it would continue to closely monitor the Initiative.[495]

The European Commission can also work the other way around and wholly or partially overturn its decision to leave regulation to private actors. The Common Principles for Bank Account Switching are an example of an industry code that was eventually replaced by EU legislation. At the end of 2007, the Commission, as part of its policy to improve the competitiveness and efficiency of the European financial retail markets, invited the European banking industry to adopt a common set of rules on bank account switching. It did, however, express a reservation at the time: should the industry fail to take adequate measures, legislative intervention would be considered.[496] The failure of the industry to consistently follow the rules, as a result of which consumers faced difficulties when trying to switch bank accounts, eventually led the Commission to carry out its 'regulatory threat': the enactment of

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[490] See Press Release Article 29 Working Party, 'Online behavioural advertising: industry proposed solutions inadequate', 15 December 2011 (available at <http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/index_en.htm>); Letter Article 29 Working Party to IAB Europe and EASA, 3 August 2011 (Ref. Ares(2011)849374); Letter from the Article 29 Working Party addressed to the Online Behavioural Advertising (OBA) Industry regarding the current approach of the Code of Conduct, 1 March 2012 (Ref. Ares(2012)240896). Both letters are available at <http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm> (websites accessed 1 July 2016).

[491] The Principles can be found at <www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain> (accessed 1 July 2016).

[492] The Forum is composed of national authorities responsible for the food sector at ministerial level, industry representatives and representatives of NGOs (<http://ec.europa.eu/growth/sectors/food/competitiveness/supply-chain-forum/index_en.htm>, accessed 1 July 2016).

[493] Principles of Good Practice in vertical relationships in the Food Supply Chain, Introduction. See also Communication from the Commission, Setting up a European retail action plan, COM(2013) 36 final, p. 11 and Report from the Commission on unfair business-to-business trading practices in the food supply chain, COM(2016) 32 final, p. 8. The Dutch Ministry of Economic Affairs, in turn, facilitated two pilots, one within the agri-food industry and one within the fashion industry, in which a code of conduct was used to address the issue of unfair commercial practices in B2B relationships. The outcomes eventually led the Minister to decide to leave regulation to the industry, reserving a monitoring background role for the government. See *Parliamentary Papers II* 2015/16, 31 531, no. U.

[494] Available at <www.supplychaininitiative.eu/about-initiative/framework> (accessed 1 July 2016).

[495] COM(2016) 32 final, p. 12.

[496] Commission Staff Working Document, Initiatives In The Area Of Retail Financial Services. Accompanying the document to the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of Regions: A single market for 21st century Europe, SEC(2007) 1520, p. 2.

the Directive on payment accounts (2014/92/EU) in 2014 put an end to the self-regulatory regime.[497]

In a similar fashion, the nature of the European regulatory framework for mortgages changed from private to public. Initially, regulatory action in this field, spurred by several issues hampering the establishment of a single market for mortgage credit, was left to the mortgage industry. This led to the drawing up of the European Voluntary Code of Conduct on Pre-contractual Information for Home Loans. The Code was backed by a European Agreement on the Code, concluded under the aegis of the Commission, and endorsed by a Recommendation.[498] Also in this case, the Commission announced that it would issue legislative measures should the industry fail to satisfactorily comply with the code or when an insufficient part of the industry would sign up to the Code.[499] As the Code failed to effectively address the market failures concerning the provision of pre-contractual information on home loans to consumers, the Commission eventually decided to replace the Code by the Directive on mortgage credit (2014/17/EU), which not only mirrors the Code provisions but goes even further.[500]

4.4.2 Dutch private law

Dutch private law also included several references to industry codes of conduct, the majority of which result from the European directives discussed in the previous section. Accordingly, it will not come as a surprise that we can find these references in statutory provisions concerning unfair commercial practices (Articles 6:193c(2)(b) and 6:193g DCC), distance selling and doorstep selling (Article 6:230m(n) DCC), e-commerce (Article 6:227b(1)(e) DCC), corporate governance (Article 2:391(5) DCC) and the protection of personal data (Article 25 Wbp). This section however concentrates on examples of references that have their origins at the national level.[501]

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[497] Directive on Payment Accounts – Frequently Asked Questions, 15 April 2014, MEMO/14/300 (available at <http://europa.eu/rapid/press-release_MEMO-14-300_en.htm?locale=en>, accessed 1 July 2016).

[498] See Communication from the Commission, Financial services: Enhancing consumer confidence, COM(97) 308 final, p. 10; Communication from the Commission, Implementing the framework for financial markets: action plan, COM(1999) 232 final; the first, second and third Financial Services Action plan Progress report (COM(1999)630 final p, 9; COM(2000) 336 final, p. 16; COM(2000) 692 final, p. 20, respectively, available at <http://ec.europa.eu/finance/general-policy/actionplan/index_en.htm>, accessed 1 July 2016). See also Commission Recommendation 2001/193/EC of 1 March 2001 on pre-contractual information to be given to consumers by lenders offering home loans (*OJ* 2001, L 69/25).

[499] European Commission press release 5 March 2001, 'Home loans: Commission endorses guideline on prior information to consumers', IP/01/305. See also Recommendation 2001/193/EC, recital 7.

[500] Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property, COM(2011) 142 final, pp. 4, 10; Commission Staff Working Paper Impact Assessment – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property SEC(2011) 356, p. 14; <https://ec.europa.eu/digital-single-market/en/content/voluntary-code-conduct-pre-contractual-information-home-loans> (accessed 1 July 2016).

[501] For more examples of private regulation in Dutch private law, not limited to codes of conduct, see Giesen 2007, pp. 17-28.

a. Advertising

In the Netherlands, the regulatory framework for advertising is traditionally dominated by rules drawn up by the advertising industry. The Dutch Advertising Code (*Nederlandse Reclame Code*, hereafter: NRC), authored by the Dutch Advertising Code Authority (*Stichting Reclame Code*, hereafter: SRC), goes back to 1963.[502] There were at least two reasons for adopting a self-regulatory code at the time, as Van Boom et al. indicate. The first reason was the introduction of the Code of Advertising Practice of the International Chamber of Commerce in several European countries in the 1960s. The second reason lay in the pressure exerted on the advertising industry at the time by the Dutch government, which envisaged enacting legislation in order to protect consumers against advertising. With the successful adoption of the Advertising Code, the industry was able to pre-empt legislative interference.[503] The NRC comprises a General Section and a Section of Special Advertising Codes, which apply to both B2B and B2C advertising. The relevant provisions of the UCPD, the Directive on misleading and comparative advertising and the AVMSD have been implemented in the NRC.[504] In the first instance, enforcing the NRC lies with the Advertising Code Authority (*Reclame Code Commissie*) with leave to appeal to the Board of Appeal (*College van Beroep*).[505] Where necessary, the Authority for Consumers & Market (*Autoriteit Consument & Markt*) and the judiciary provide additional monitoring and enforcement.[506]

> Considering the foregoing, it appears a bit odd to discuss the Dutch regulatory framework on advertising in the context of legislative references to codes of conduct. Yet, several provisions of the Media Act 2008 refer to the NRC, which warrants a discussion of the framework at this point.[507] The Media Act, more specifically, requires both public and commercial broadcasters that include advertisements in their media offering to be affiliated with the NRC or with a comparable scheme drawn up by the SRC. It also provides that both categories of broadcasters are supervised by the SRC in this context.[508] These requirements illustrate the significance of the private regulatory regime. Furthermore, the Media Act makes it possible for the Minister of Education, Culture and Science to take action in case, in short, the SRC fails to correctly implement the European rules on advertising.[509]

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[502] Dutch Advertising Code (1 January 2015, English version), p. 4 (available at <www.reclamecode.nl> >> English). The private regulatory framework is completed by the Code of Conduct for Pharmaceutical Advertising (*Gedragcode Geneesmiddelenreclame*), which will not be taken into consideration at this point.

[503] Van Boom et al. 2009, p. 53.

[504] Dutch Advertising Code (1 January 2015, English version), p. 4; Van Boom et al. 2009, pp. 53-54; <www.reclamecode.nl/adverteerder/default.asp?nieuwsID=321> (accessed 1 July 2016). As the NRC also applies to B2B advertising, the implementation of the UCPD in the NRC implies that the rules of the Directive are given a broader scope of application.

[505] Dutch Advertising Code (1 January 2015, English version), p. 5; Van Boom et al. 2009, p. 55.

[506] Van Boom et al. 2009, p. 58. This system meets the requirements of the Directive on misleading and comparative advertising at this point (cf. section 4.4.1.1.2 under f). See *Parliamentary Papers II* 2000/01, 27 619, no. 3, pp. 9-10.

[507] The amendments made to the Media Act 2008 (Bulletin of Acts and Decrees 2008, 583, as subsequently amended) in March 2016 affect neither the references to the code discussed in this section nor the ones discussed under b ('Media Act'). See *Wet van 16 maart 2016 tot wijziging van de Mediawet 2008 in verband met het toekomstbestendig maken van de publieke mediadienst* (Bulletin of Acts and Decrees 2016, 114) and *Parliamentary Papers II* 2014/15, 34 264, no. 3.

[508] Articles 2.92 (public broadcasters) and 3.6 (commercial broadcasters) Media Act 2008.

[509] Article 9.16 Media Act 2008. See also Menting & Vranken 2014, p. 22.

b. Media Act

Article 2.3(2) of the Media Act 2008 provides that the Netherlands Public Broadcasting (*Nederlandse Publieke Omroep*, hereafter: NPO) has to draw up a code of conduct in furtherance of good governance and integrity within the NPO and the national public media institutions. Paragraph 3 of the provision sets out the essential topics the code should cover. The NPO has complied with this statutory demand by introducing the *Gedragscode Goed Bestuur en Integriteit Publieke Omroep* (2012).[510] The report that the NPO has to file annually with the Dutch Media Authority and the Minister of Education, Culture and Science has to include a section on compliance with the code (Article 2.58(e) Media Act 2008).

c. References outside legislation

References to codes of conduct can also be found outside legislation, i.e., in policy documents and in 'practice'. A first example in this respect comes from the Dutch Association of Insurers' Code of conduct on informed contract extension and contract terms concerning non-life insurance and loss-of-income insurance for private individuals (*Gedragscode geïnformeerde verlenging en contractstermijnen particuliere schade- en inkomensverzekeringen*). The Minister of Finance considered this Code an appropriate means to regulate the issue of contract terms of private insurance contracts and their tacit renewal. However, the Minister warned, should the Code fail to achieve the intended results, legislative intervention could still be considered.[511]

A more recent example can be found in the franchise sector, where persistent problems in the franchisor-franchisee relationship have led to a call for franchise-specific legislation to strengthen the position of franchisees vis-à-vis franchisors. The Minister of Economic Affairs, however, saw no good in legislative intervention.[512] Subsequently, the attention of the franchise industry and the government was directed towards self-regulation, particularly towards a code of conduct and alternative dispute resolution.[513] This led to the appointment of a Committee which was assigned the tasks of drafting a Franchise Code of Conduct and giving shape to an alternative dispute resolution process. However, the Minister did announce that failure to reach an agreement on a code of conduct might eventually lead to legislative

[510] Available (in Dutch) at <www.integriteitomroep.nl/gedragscode/> (accessed 1 July 2016).

[511] *Parliamentary Papers II* 2009/10, 29 507, no. 89, pp. 10-11. However, a code is not always considered a viable alternative to legislation, as the case of the code of conduct of the Dutch Publishers Association on the termination and renewal of subscriptions to newspapers and magazines illustrates. The Code has been put forward by the industry as a viable alternative to the then pending legislative proposal concerning the tacit renewal of consumer contracts, but the legislator was of a different opinion. See *Parliamentary Papers* 2006/07, 30 520, no. 6; *Parliamentary Papers II* 2008/09, 30 520, no. 8.

[512] *Parliamentary Papers II* 2013/14, 31 113, no. 119.

[513] *Parliamentary Papers II* 2014/15, 31 113, no. 140. Part of the franchise industry is already regulated by a code of conduct: members of the Netherlands Franchise Association (*Nederlandse Franchise Vereniging*) have to abide by the European Code of Ethics for Franchising (available at <www.nfv.nl/juridisch-franchisegevers/>, accessed 1 July 2016). The new Franchise Code, however, would apply to the entire franchise industry. Interestingly, the industry also signaled the fact that the Dutch judiciary is generally not inclined to take account of the aforementioned European Code as applied by the Netherlands Franchise Association. The industry in this respect indicated a need to link the new Franchise Code to franchise agreements in such a way that the Code can be taken into account in legal disputes, for instance by referring to the Code in a fashion that is similar to the way in which general terms and conditions become applicable to an agreement. See *Parliamentary Papers II* 2013/14, 31 113, no. 140, pp. 1-2.

intervention.[514] All this eventually resulted in the Dutch Franchise Code (*Nederlandse Franchise Code*), introduced on 17 February 2016. On the same day, the Minister announced that he will explore the possibility of embedding the Code into legislation.[515]

Public supervisory bodies have also played their part in pressuring industry sectors to adopt new codes or tighten existing ones. The Code of Conduct for Consumers and Energy Suppliers (*Gedragscode Consument en Energieleverancier*), for instance, results from a call of the Office of Energy and Transport Regulation of the Netherlands Competition Authority (now the Authority for Consumers & Markets) upon energy suppliers to end the malpractices in customer advertising that emerged after the liberalization of the Dutch energy market in 2001. The Office in this respect urged the industry to draw up a joint code of conduct concerning the main aspects of 'switching energy supplier' and announced that if the energy suppliers failed to do so, it would enact additional rules itself.[516] The industry's response to this call was timely and it established a self-regulatory regime that, in a revised and tighter form, still remains in force.[517]

The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, hereafter: AFM), in turn, has prompted and participated in the revision and tightening of the norms for consumer credit laid down in the codes of conduct on consumer credit of the Dutch Banking Association (*Nederlandse Vereniging van Banken*, hereafter: NVB), the Dutch Finance Houses' Association (*Vereniging van Financieringsondernemingen in Nederland*, hereafter: VFN) and the Dutch Home Shopping Association (*Nederlandse Thuiswinkel Organisatie*, hereafter: NTO). The reason for the AFM to step in was that the then self-regulatory norms could result in irresponsible lending.[518] Furthermore, the AFM has designated the revised norms of these codes of conduct as the minimum standard when interpreting the open-textured legal standard of responsible lending enshrined in Article 4:34 of the Dutch Financial Supervision Act (*Wet op het Financieel Toezicht*, hereafter: Wft). This implies that credit providers that are not affiliated with the NVB, the VFN or the NTO, and are hence not bound to the aforementioned codes, are allowed to flesh out the norm of responsible lending themselves, though they have to do so in a way that meets, at a minimum, the level of protection the codes offer against overextension of credit.[519] Case law has endorsed this approach.[520]

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[514] See *Parliamentary Papers II* 2014/15, 31 113, no. 149; *Parliamentary Papers II* 2015/16, 31 113, no. 153.
[515] *Parliamentary Papers II* 2015/16, 31 113, no. 165; <www.rijksoverheid.nl/actueel/nieuws/2016/02/17/kamp-verkent-wettelijke-verankering-franchise-code>, accessed 1 July 2016).
[516] <www.acm.nl/nl/publicaties/publicatie/5185/NMa-eist-dat-energiesector-problemen-klantenwerving-oplost/>; <www.consuwijzer.nl/nieuws/energiesector-komt-met-gedragscode-klantencontact> (accessed 1 July 2016).
[517] The Code can be downloaded at <www.energie-nederland.nl/positionpaper/658/> (accessed 1 July 2016).
[518] Report *Verantwoorde Kredietverstrekking 2006*, AFM 12 January 2007, p. 5 (available at <www.afm.nl/~/media/files/rapport/2007/verantwoorde-kredietverstrekking-2006-120107.ashx>, accessed 18 January 2016), pp. 5, 28-30. See also Van Poelgeest 2012, p. 60.
[519] <www.afm.nl/nl-nl/professionals/doelgroepen/kredietaanbieders/normen> (accessed 1 July 2016). See also Van Poelgeest 2012, pp. 60, 71-72.
[520] See Rb. Rotterdam 4 May 2011, ECLI:NL:RBROT:2011:BQ3835, para 2.10, confirmed by CBb 28 November 2013, ECLI:NL:CBB:2013:260, para 5.4.

There are also industry codes of conduct that have eventually been wholly or partially backed or replaced by public regulation. The SMS Service Provision Code of Conduct (*Gedragscode SMS Dienstverlening*) constitutes a first example in this respect. In 2003, the then Independent Post and Telecommunications Authority of the Netherlands (OPTA, now merged into the Authority for Consumers & Markets), the Ombudsman Foundation (*Stichting de Ombudsman*) and the Consumer's Association (*Consumentenbond*) appealed to the responsibility of SMS services providers take action against the obscure way in which SMS services were provided. This led to the adoption of the aforementioned Code.[521] Yet, the Code repeatedly failed to adequately remedy the problems in the sector, despite several revisions of the code that the Dutch government initiated. Early 2010, the ongoing problems once again led the government to call for a tightening of the Code, yet this call was accompanied by a ministerial regulation to support the operation of the Code (*Regeling universele dienstverlening en eindgebruikersbelangen*), which entered into force in February 2011.[522]

The Code of Conduct for Mortgage Loans (*Gedragscode Hypothecaire Financieringen*, hereafter: GHF) equally lost part of its regulatory scope to public regulation. The Dutch regulatory regime on mortgage credit started out as an entirely self-regulatory regime, which was a result of the fact that the legislator gave preference to private regulation over legislative interference at the time (end of the 1980s).[523] Over the following decades, both the AFM and the government became involved with the further development of the GHF, particularly with the code rules on how to prevent overextension of credit. Findings of the AFM that application of the GHF rules (still) led to poor lending practices, causing significant financial risks for consumers, and that elements of the Code were insufficiently complied with, has for instance led to pressure on the industry from the side of the government and the AFM to tighten the rules of the GHF at this point.[524] By showing itself responsive to such pressure, the mortgage industry managed to avoid legislative intervention for quite some time.[525] In fact, the GHF-norms for the assessment of the borrowing capacity of a consumer were, like the codes on consumer credit mentioned above, taken by the AFM as 'a reasonable starting point' in the interpretation of the legal norm of responsible lending (Article 4:34 Wft).[526] Eventually,

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[521] <www.acm.nl/nl/publicaties/publicatie/8267/OPTA-pakt-problematiek-rond-SMS-abonnementen-aan/>; <www.acm.nl/nl/publicaties/publicatie/8346/Gedragscode-voor-SMS-diensten/> (accessed 1 July 2016).

[522] *Parliamentary Papers II* 2009/10, 31 412, no. 16 and no. 21; *Regeling universele dienstverlening en eindgebruikersbelangen*, as published in Government Gazette 2011, no. 3687 (see particularly p. 5).

[523] *Besluit van de directeur-generaal van de Nederlandse mededingingsautoriteit tot het gedeeltelijk verlenen en het gedeeltelijk afwijzen van een ontheffing als bedoeld in artikel 17 van de Mededingingswet, 1998, zaaknummer 235 en 1189* (available at <www.acm.nl/nl/download/bijlage/?id=464>, accessed 1 July 2016*)*. The Code came into force on 1 October 1990.

[524] AFM, *Kwaliteit advies en transparantie bij hypotheken. Oriëntatiepunt voor en goede adviespraktijk*, 2007 (available at <www.afm.nl/~/profmedia/files/rapporten/2007/kwaliteit-advies-transparantie-hypotheken.ashx?la=nl-nl>); AFM, *Consultatiedocument toetskader hypothecaire kredietverlening*, 2009; DNB & AFM, Risico's op de hypotheekmarkt voor huishoudens en hypotheekverstrekkers, 4 September 2009 (available at <www.dnb.nl/publicatie/publicaties-dnb/incidentele-publicaties/dnb222060.jsp>). Websites accessed 1 July 2016. See also *Parliamentary Papers II* 2005/06, 29 507, no. 35; Mak 2015, p. 422; Van Boom 2012, p. 271; Van Poelgeest 2012, pp. 65-66.

[525] See, e.g., *Parliamentary Papers II* 2005/06, 29 507, no. 35; *Parliamentary Papers II* 2010/11, 29 507, no. 94 and no. 97; Van Boom 2012, p. 271; Van Poelgeest 2012, pp. 65-66.

[526] AFM, *Kwaliteit advies en transparantie bij hypotheken. Oriëntatiepunt voor en goede adviespraktijk*, 2007, pp. 40-41; AFM, *Consultatiedocument toetskader hypothecaire kredietverlening*, 2009. This approach was also

however, the GHF had to give way to public regulation at this point: as of 1 January 2013, the criteria for assessing the borrowing capacity of consumers are set by the Temporary Rules on mortgage credit (*Tijdelijk regeling hypothecair krediet*), which partly builds on the GHF-norms.[527] The Temporary Rules were enacted following the lack of clarity on the interpretation of some of these norms that arose due to divergent opinions of the AFM and the industry at this point.[528] Nonetheless, the GHF did not cease to exist, as the criteria set by the Temporary Rules are minimum criteria which are in addition to the criteria set by the mortgage lenders themselves, i.e., the GHF-norms. This allows the industry to set more stringent rules.[529] Moreover, the scope of the GHF is broader than the scope of the Temporary Rules, which also implies that the GHF retains added value.[530]

4.4.3 Intermezzo: A brief return to the functions of industry codes of conduct

At this point, it is worthwhile to take a brief glance at how the findings of this section relate to the functions identified in the previous chapter. As was set out in that chapter (Figure 3.5), industry codes of conduct can have one or more of the following functions from the perspective of the legislator:

Figure 4.1 – Functions from a governance perspective

Policy instrument function
i. Alternative to public regulation
ii. Complementary function
iii. Harmonization function
iv. Safeguarding function

If we relate these functions to the private law examples discussed above, the following picture emerges. The function that comes to the fore most prominently is, not surprisingly given its overarching nature, the policy instrument function. Both the European and the Dutch legislator employ codes of conduct to attain the policy goals set for a certain field of private law, such as the realization of an internal market for e-commerce, the regulation of unfair commercial practices or consumer protection. The protective function of industry codes is

endorsed in case law, see Rb. Rotterdam 20 May 2010, ECLI:NL:RBROT:2010:BM5231, para 2.12, confirmed by CBb 19 July 2013, ECLI:NL:CBB:2013:69, para 5.2.

[527] Netherlands Government Gazette 2012, no. 26433, p. 6. See also <www.nvb.nl/nieuws/2012/1639/tijdelijke-regeling-hypothecair-krediet.html> (accessed 18 January 2016).

[528] *Wijzigingsbesluit financiële markten 2013*, Bulletin of Acts and Decrees 2012, no. 695, p. 97; *Tijdelijk regeling hypothecair krediet*, Netherlands Government Gazette 2012, no. 26433, p. 6; Mak 2015, pp. 423-424.

[529] See Article 115(1) in conjunction with Article 115(4) Market Conduct Supervision Financial Institutions Decree (*Besluit gedragstoezicht financiële ondernemingen Wft*); *Tijdelijk regeling hypothecair krediet*, Netherlands Government Gazette 2012, no. 26433, p. 6. Cf. Mak 2015, p. 424.

[530] Cf. Kerste et al. 2011, p. 95. The NVB website makes clear that the GHF remains in force, albeit in a revised form, i.e., without the code rules now enshrined in the Temporary Rules. See <www.nvb.nl/nieuws/2012/1639/tijdelijke-regeling-hypothecair-krediet.html>. Websites accessed 18 January 2016.

also reflected in the examples discussed, most notably in the field of consumer law, media services and personal data protection. The harmonizing potential of industry codes is drawn on by European directives that promote the use of these codes as a means to facilitate their implementation (e.g., the Services Directive, the E-Commerce Directive, the AVMSD).

Codes of conduct that result from legislative references, logically, in most cases bear a complementary function. Prime examples of such 'complementary' codes are the data protection codes of conduct drawn up to substantiate European or national public rules on data protection. The complementary function however also comes to the fore in cases where initially independent codes have been backed by legislation, such as the Dutch Code of conduct on mortgage credit and the Dutch SMS Code. Such legislative interference changes the nature of the regime from alternative to complementary. When the legislator resorts to a code of conduct outside the realm of legislation, a code most often functions as an alternative to governmental regulation. Admittedly, codes of conduct are in effect always an alternative to governmental regulation since their deployment in essence always involves choosing whether or not to take public regulatory action. However, the previous chapter has reserved the label 'alternative' for codes of conduct that are deployed instead of (further) legislative intervention. Still, however, codes that are a regulatory alternative can function in a broader, general legislative framework. Examples in this respect that I have have reviewed in this chapter are the PEGI codes, the EU Code for Online Behavioural Advertising and the Dutch Code for Consumers and Energy Suppliers.

4.4.4 Conclusions

The examples discussed in this section show that both the European and the Dutch legislator rely upon industry codes of conduct within the field of private law in various different ways. At the European level, several private law directives encourage the use of European-wide and national codes of conduct aimed at contributing to the attainment of the goals of these directives and to their implementation. The European legislator has also pulled codes of conduct into the legal sphere in a more explicit way, most notably by imposing duties on traders to inform consumers about codes of conduct they adhere to, by establishing a regime for the formal approval of codes on data protection and by sanctioning non-compliance with a code as an unfair commercial practice.[531] At the Dutch level, by contrast, there are practically no references to codes in private law legislation other than those stemming from European legislation. The European and the Dutch legislator have also actively initiated the drawing up of industry codes 'outside' legislation. This section has touched upon several examples in which regulation has been wholly or partially left to the industry, either in the course of the policy making process or following pressure exerted by the legislator on the industry to adopt a code of conduct.

[531] I will discuss the implications of these references for the legal relevance of industry codes of conduct in section 4.7.

4.5 Criteria, conditions and recommendations[532]

It follows from the above that the attention for alternative regulatory mechanisms in European and Dutch legislative policies has translated into several legislative references to industry codes of conduct and into the deployment of industry codes as a policy instrument 'outside' legislation. The choice of the legislator to resort to industry codes is, however, not a free one: both the European and the Dutch legislator have to operate within a framework that sets boundaries to their regulatory choice. These boundaries not only follow from legislation and general principles of law, but can also be found in policy documents discussing the use of alternative regulatory instruments. This section concentrates on the latter set of restraints and discusses the criteria for the use of self-regulation and co-regulation following on from European (section 4.5.1) and Dutch (section 4.5.2) legislative policy.[533]

4.5.1 European Union

Until the adoption of the IIA 2016, the IIA 2003 formed the key document when it comes to constraints on the deployment of alternative regulatory instruments at the European level. As set out above, the IIA 2003 for the first time introduced general criteria, both of a substantive and of a more procedural nature, for the use of self-regulation and co-regulation.[534] These criteria to a large extent reflect the conditions formulated in policy documents concerning the EU Better Regulation Agenda published in the run-up to the IIA 2003.[535] However, the future of these criteria is highly uncertain, as the IIA 2016 lacks references to self-regulation and co-regulation.[536] Given the fact that this Agreement has replaced the IIA 2003, it seems likely that criteria for the use of self-regulation and co-regulation from now on have to be found elsewhere. The Better Regulation Toolbox and the Principles for Better Self- and Co-Regulation might jointly constitute this new source.

Against this background, this section starts out with a brief discussion of the old criteria for the use of self-regulation and co-regulation included in the IIA 2003 (section 4.5.1.1).[537] Thereupon, the conditions put forward by the Better Regulation Toolbox and the Principles for Better Self- and Co-regulation will be described (section 4.5.1.2).

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[532] Part of this section has, in an earlier version, already been published (in Dutch) in Menting & Vranken 2014, pp. 30-40.

[533] For a brief discussion of the legal restrictions to the regulatory choice of the legislator, see Meuwese & Senden 2009, pp. 154-162 (EU law) and Van Heesen-Laclé & Meuwese 2007 (Dutch law).

[534] Senden 2005, p. 18; Meuwese & Senden 2009, pp. 159-162.

[535] Prior to the adoption of the IIA 2003, general conditions on the use of co-regulation could, for instance, be found in the Mandelkern Report (2001, p. 17), the White Paper on European Governance (COM(2001) 428 final, p. 21) and the Better Regulation Action Plan (COM(2002) 278 final, pp. 12-13).

[536] In its opinion on self-regulation and co-regulation, published in the run-up to the IIA 2016, the EESC explicitly called for the "clear and precise definition of a general set of basic principles and essential requirements which the self-regulation and co-regulation mechanisms must meet in order to be recognised and/or recommended by the EU". It subsequently listed a number of criteria. See Opinion of the EESC on Self-regulation and co-regulation in the Community legislative framework, Brussels 22 April 2015, INT/754, under 5.18 (quotation) *et seq*.

[537] Where appropriate, references to relevant documents pre-dating the IIA 2003 will be made.

4.5.1.1 The Interinstitutional Agreement on Better Law-Making 2003

As regards the use of alternative methods of regulation, the IIA 2003 reads as follows:

> "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*".[538] (emphasis added, MM)

Under the IIA 2003, the European legislator could only resort to self-regulation or co-regulation when these requirements were met. Co-regulatory regimes could thereby be subject to additional requirements imposed by the legislative act they are based on.[539] The IIA 2013 also included some control mechanisms.[540] The Agreement did however not elaborate on the content of the criteria it put forward.[541] Svilpaite has made an effort to detail these criteria, building on various other policy documents dealing with self-regulation and co-regulation in general or with specific types of self-regulation and co-regulation, such as voluntary environmental agreements.[542] In the following, I will for a large part draw on her work, with the caveat that it is not clear whether 'implementing criteria' for one alternative regulatory instrument, such as environmental agreements, apply to other forms of self-regulation and co-regulation, such as codes of conduct, as well.

1) Consistent with Community law

The first condition that the IIA 2003 imposed on the use of self-regulation and co-regulation is that it should always be consistent with Community law. First of all, as can be deduced from recital 16 of the Agreement, this implies that these instruments can only be used "where the Treaty does not specifically require the use of a legal instrument".[543] Furthermore, as Svilpaite indicates, this condition covered at least compliance with (i) Treaties and binding legislation, (ii) soft law and (iii) international obligations.[544]

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[538] *OJ* 2003, C 321/01, recital 17. These requirements resemble those formulated in respect of the use of co-regulation in the Mandelkern Report (2001, p. 17), the White Paper on European Governance (COM(2001) 428 final, p. 21) and the Better Regulation Action Plan (COM(2002) 278 final, p. 13).

[539] In the words of the IIA 2003(*OJ* 2003, C 321/01), recital 18: "This mechanism [co-regulation, MM] may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned" (emphasis added, MM).

[540] These mechanisms will not be discussed. For an account of the control mechanisms, see, e.g., Svilpaite 2007b, pp. 25-27, with further references.

[541] Senden & Meuwese 2009, pp. 161-162, noting that this might complicate the assessment as to whether the criteria have been complied with.

[542] Svilpaite 2007b.

[543] *OJ* 2003, C 321/01, recital 16. See also Svilpaite 2007b, p. 6.

[544] Svilpaite 2007b, p. 6.

i. Treaties and binding legislation

Svilpaite ranks the rules on the internal market, including the four freedoms, the rules on employment and social policy and the non-discrimination principle as the most-listed Treaty provisions that self-regulatory and co-regulatory schemes should comply with. Special reference is often made to compliance with European competition law rules (see below, under 6). Secondary EU law can also condition the use of alternative regulatory instruments.[545]

In the discussion of examples of references to codes of conduct in EU legislation in section 4.4.1.1, two examples of secondary EU law imposing such requirements have passed in review.

- Article 4(7) of the *Audiovisual Media Services Directive* for instance stipulates that self-regulatory and co-regulatory regimes, to be encouraged by the Member States, should enjoy the broad acceptance of the main stakeholders in the Member States concerned and should provide for effective enforcement.[546]
    - The *proposal for a new, amended AVMSD* adds that the objectives of the codes should be set out in a clear and unambiguous way, that "regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed" should be provided and that effective enforcement is to include "when appropriate effective and proportionate sanctions".[547]
- The *Services Directive* also conditions the use of European codes of conduct. Regarding the use of codes of conduct in general, the Directive provides that these codes set out minimum requirements and are hence complementary to public measures.[548] Additionally, Article 37(1) re-emphasizes that these codes should be in compliance with EU law. More specific requirements are imposed on codes of conduct of professional bodies. As was set out in section 4.4.1.1.3 (under h), the Directive not only indicates what these codes should include content-wise, but also demands compliance of these codes with Community law, competition law in particular, and the national legally binding rules on professional ethics and conduct.[549] Private rule-making by professional organizations is also subject to the Directive itself.[550] Furthermore, the Commission has indicated that professional bodies should meet certain principles of good governance when drawing up a code of conduct.[551]
- Although I did not discuss it in section 4.4.1.1, the Universal Service Directive is also worthy of mention at this point. Perceiving co-regulation as a suitable way to stimulate better quality standards and service performance, recital 48 of this Directive reads as follows: "co-regulation should be guided by the same principles as formal regulation, i.e. it should be objective, justified, proportional, non-discriminatory and transparent".[552]

[545] Svilpaite 2007b, pp. 6-9.
[546] Directive 2010/13/EU.
[547] Article 4(7) of the proposed directive (COM(2016) 287 final).
[548] Directive 2006/123/EC, recital 114.
[549] Directive 2006/123/EC, recitals 100, 113-114.
[550] Delimatsis 2010, p. 1054.
[551] DG for Internal Market and Services, Enhancing the quality of services in the Internal Market: The role of European codes of conduct, European Communities 2007, p. 10; Handbook on implementation of the Services Directive, pp. 51-52.
[552] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (*OJ* 2002, L 108/51), recital 48.

ii. Soft law

Constraints on the use of self-regulation and co-regulation can also be found in soft law documents. Going by the analysis of Svilpaite, these constraints can be both explanatory and complementary in nature. Whereas explanatory criteria in fact substantiate the general criteria formulated by the IIA 2003, complementary criteria are in addition to these general IIA criteria.[553] Senden indicates that soft law instruments, most notably recommendations, can also be used to confirm or provide support for alternative regulatory instruments.[554]

> Illustrative in this respect is the *1998 Recommendation on the protection of minors and human dignity in audiovisual and information services* which not only promotes the use of self-regulation, but also includes guidelines for their use. The 'Indicative Guidelines for the implementation, at national level, of a self-regulation framework', annexed to the Recommendation, cover four key components that national self-regulation should encompass. Firstly, it is indicated that the relevant stakeholders should be involved in the self-regulatory process (under 'consultation and representativeness of the parties concerned'). Secondly, the Guidelines set out what codes of conduct concerning the protection of minors and human dignity in audiovisual and information services should include content-wise (under 'codes of conduct'). Thirdly, the Guidelines call for the setting up of national coordinating bodies (under 'national bodies facilitating cooperation at community level'). Fourthly, the parties concerned are asked to set up a national system for the evaluation of self-regulatory schemes.[555]

iii. International obligations

Finally, if interpreted broadly, the requirement that self-regulation and co-regulation should be in compliance with Community law also entails an obligation to comply with the international obligations of the European Union, such as those included in international trade agreements and WTO provisions.[556]

2) Transparency

The second requirement imposed by the IIA 2003, which is of a more procedural nature, is that the use of self-regulation or co-regulation 'meets the criteria of transparency'. It follows from the IIA itself that this requirement particularly concerns the publication of a self-regulatory or co-regulatory measure.[557] From a broader perspective, Svilpaite submits, the

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[553] Svilpaite 2007b, pp. 9-10. An illustration of this practice can be found in the area of environmental law, where the Commission actively encourages the development of voluntary European environmental agreements. See, e.g., Senden 2005, pp. 15-16; Van Calster & Deketelaere 2001; Orts & Deketelaere 2001; Croci 2005; Communication from the Commission on Environmental Agreements, COM(96) 561 final; Communication from the Commission, Environmental Agreements at Community Level - Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412 final.

[554] Senden 2005, pp. 24-27, providing a closer analysis of the link between recommendations and self-regulation.

[555] Council Recommendation 98/560/EC. See also section 4.4.1.1.2 under e.1.

[556] Svilpaite 2007b, p. 10.

[557] *OJ* 2003, C 321/01, recital 17. Cf. the White Paper on European Governance (COM(2001) 428 final), p. 21 which demands in respect of co-regulation that "the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy". A similar condition is mentioned in the Better Regulation Action Plan, COM(2002) 278 final, p. 13 and Annex I of the Impact Assessment Guidelines 2009 (SEC(2009) 92), p. 27.

transparency requirement not only concerns publication of the measures, but "should also cover participation, decision making and institutional structures of private parties involved in self- and co-regulation".[558] This is also reflected in the White Paper on European Governance, which reads as follows: the organizations participating in co-regulation "must be representative, accountable and capable of following open procedures in formulating and applying agreed rules".[559]

3) Representativeness of the parties involved

Thirdly, the IIA 2003 demanded that 'the representativeness of the parties involved' be ensured. The Agreement however provided neither clues as to who 'the parties involved' are nor as to when said parties could be deemed sufficiently representative. Thus, once again, hints as to how this requirement was to be substantiated had to be sought elsewhere. Svilpaite has brought together the following criteria, which "have been mentioned as indicative for the assessment of the representation test in various documents"[560]:

> "the representation of the vast majority of the relevant economic sector, with as few exceptions as possible; proportional coverage of the sector (e.g., sectoral and geographical cover), or scope of a measure; the consultations with the interested and affected parties and taking into account variety of interests; etc. In some documents and reports the requirement of representativeness is supplemented by the requirement to be organized and responsible, have means to ensure effective implementation and compliance of the agreed rules, and be accountable".[561]

Svilpaite also points at the criteria for assessing the eligibility of European organizations to take part in a 'civil dialogue' on policy making, formulated by the EESC in its opinion on the Commission's White Paper on European Governance.[562] Although such dialogues involve a much broader spectrum of actors, the criteria can nonetheless bear indicative force in the context of the IIA 2003. The EESC submits that in order for a European organization to be eligible to take part in a civil dialogue, it should:

> "1) exist permanently at Community level; 2) provide direct access to its members' expertise and hence rapid and constructive consultation; 3) represent general concerns that tally with the interests of European society; 4) comprise bodies that are recognised at Member State level as representative of particular interests; 5) have member organisations in most of the EU Member States; 6) provide for accountability to its members; 7) have authority to represent and act at European level; 8) be independent and mandatory, not bound by instructions from outside bodies; 9) be transparent especially financially and in its decision-making structures".[563] (nos added, MM)

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[558] Svilpaite 2007b, pp. 20-21, with further references.
[559] COM(2001) 428 final, p. 21.
[560] Svilpaite 2007b, p. 2.
[561] Svilpaite 2007b, p. 2. The requirement of a satisfactory sectoral and geographical cover can also be found in the IIA 2003 (recital 23).
[562] Svilpaite 2007b, p. 23, with reference to EESC, Opinion on European Governance – A White Paper, Brussels 20 March 2002 (CES 357/2002), *OJ* 2002, L 122/61.
[563] EESC, Opinion on European Governance – A White Paper, Brussels 20 March 2002 (CES 357/2002), *OJ* 2002, L 122/61, pp. 5-6.

4) Added value for the general interest

The fourth requirement put forward by the IIA 2003 is that the use of self-regulation or co-regulation represents 'added value for the general interest'. According to Svilpaite, the added value of these instruments in this regard can lie in their operational qualities. These qualities for example concern in the fact that they can be a flexible and swift form of regulation and in the fact that they, as such, can contribute to legal or administrative simplification.[564] The added value of self-regulatory and co-regulatory measures should however also be reflected in the substance of the commitments they entail, Svilpaite submits. These commitments should also contribute to the general interest, for instance by setting a high standard for environmental protection.[565] Svilpaite in this regard also quotes the EESC, which has stated that self-regulation and co-regulation should take place "with a desire to respect and promote certain fundamental values such as honesty, good faith, respect for others, openness to partnership, and a competitive spirit".[566] She remarks that the added value of a self-regulatory or co-regulatory measure is likely to lie in these features.[567] This also appears to echo through in the White Paper on European Governance, which states that the private regulators' representativeness, accountability and capability of following open procedures in adopting and applying the rules "will be a key factor in deciding the added value of a co-regulatory approach in a given case".[568]

5) Precluded areas

Fifthly, the IIA 2003 precluded the use of self-regulation and co-regulation in three situations, namely (i) where fundamental rights or (ii) important political options are at stake, or (iii) where the rules have to be applied in a uniform fashion in all Member States.[569]

i. Fundamental rights

Not surprisingly, the IIA 2003 does not make clear why self-regulation and co-regulation cannot be resorted to when fundamental rights hang in the balance. Cafaggi submits that this might have to do with an implicit belief that only legislative acts, enacted by democratically legitimized bodies which can be held politically accountable and can be subjected to judicial review, are to curtail these rights.[570] This belief can be questioned, however, as can the proportionality and perhaps even the sustainability of the unconditional preclusion of self-regulation and co-regulation when fundamental rights are in play.[571] The shining example

[564] Svilpaite 2007b, p. 19. Cf. IIA 2003 (*OJ* 2003, C 321/01), recital 17: "they [self-regulation and co-regulation, MM] must ensure swift and flexible regulation"; Annex I of the Impact Assessment Guidelines 2009 (SEC(2009) 92), pp. 24, 27.
[565] Svilpaite 2007b, p. 19. She deduces this requirement from recital 23 of the IIA 2003, which provides that the Commission is to notify the European Parliament of self-regulation which it regards "as being satisfactorily in terms of […] the added value of the commitments given".
[566] EESC report, The Current State of Co-Regulation and Self-Regulation in the Single Market, 2005, p. 19 (available at <www.eesc.europa.eu/?i=portal.en.publications.80>, accessed 1 July 2016).
[567] Svilpaite 2007b, p. 19.
[568] COM(2001) 428 final, p. 21.
[569] IIA 2003 (*OJ* 2003, C 321/01), recital 17.
[570] Cafaggi 2006b, p. xviii. See also Svilpaite 2007b, p. 11.
[571] Cafaggi 2006b, p. xviii; Svilpaite 2007b; Verdoodt 2007, p. 83.

here is the media sector, where the need to protect and balance fundamental rights is pre-eminently present. Although regulation in this sector almost by definition interferes with certain fundamental rights (e.g., the freedom of speech versus the right to privacy), EU media policy has put particular emphasis on self-regulation and co-regulation and has encouraged its use to protect certain fundamental rights (e.g., the protection of minors and human dignity) (cf. section 4.4.1.1.2).[572] Alternative regulatory mechanisms are also present in the medical sector and in the field of data protection, where fundamental rights can equally be at stake. Hence, an outright exclusion of the use of self-regulation and co-regulation when fundamental rights are at stake is untenable.[573]

ii. Important policy options

The application of self-regulation and co-regulation is likewise precluded when important policy options are at stake. However, neither the IIA 2003 nor other policy documents indicate how to establish whether a policy option qualifies as 'important'.[574]

iii. Uniform application EU law

The preclusion of the use of self-regulation and co-regulation in areas where a uniform application of EU rules is required appears to be motivated by the concern that private regulation might stand in the way of such a uniform application. Instead, public regulation would be best suited to reach a high level of uniformity.[575] Again, however, this assumption can be questioned. Here, Svilpaite points at the use of European directives to reach uniformity always bearing the risk of "inconsistant implementation and diverse application in different Member States".[576] Furthermore, Cafaggi notes that private regulators do not always have an incentive to differentiate, since their motivation to reach a harmonized level of regulation might be even greater than that of Member States.[577] The results of the empirical study support this observation: codes of conduct, notably those drawn up by European industry associations, can have a harmonization function. Even the Commission itself, albeit somewhat implicitly, acknowledges the harmonizing potential of self-regulation and co-regulation employed alongside EU directives, as the examples discussed in the previous section show. For that reason, it can be argued that self-regulation and co-regulation should not be by definition intolerable when the uniform application of EU law is to be ensured.[578]

A different, yet related issue is that of the use of alternative regulatory instruments to implement European directives. On this point, the IIA 2003 remained silent, which implies that the use of these instruments in this context is not precluded beforehand. Indeed, Article

[572] Verdoodt 2007, p. 83. Svilpaite 2007b, pp. 11-12; Cafaggi 2006b, p. xviii.
[573] Menting & Vranken 2014, p. 40.
[574] Svilpaite 2007b, pp. 13-14, interpreting this particular condition as displaying an *a priori* distrust of self-regulatory and co-regulatory practices on the part of the Commission and other EU institutions.
[575] Svilpaite 2007b, p. 12; Cafaggi 2006b, p. xix.
[576] Svilpaite 2007b, p. 12.
[577] Cafaggi 2006b, pp. xix-xx. Cafaggi indicates that the rationale behind this campaign for more uniformity is related to the private regulators' "incentive to monopolize the rule-making function and the production of network externalities" (Cafaggi 2006b, p. xx).
[578] Cf. Svilpaite 2007b, p. 13.

288 TFEU establishes that it is up to the national authorities to choose the form and methods to achieve the result intended by any directive. That is however not to say that Member States are entirely free in deciding which methods of implementation they use; the CJEU has limited their discretion in this respect by formulating a set of requirements for the transposition of EU directives. The starting point here is that Article 288 TFEU does not prescribe legislative action at the national level. The CJEU, however, has assigned a central role to the principle of legal certainty, which implies that "the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty".[579] Accordingly, there is only very limited space for transposing directives by any means other than binding legislation, particularly because of the requirement of 'unquestionable binding force'.[580] Sometimes, a directive itself leaves room for implementation through alternative instruments. The Directive on Misleading and Comparative Advertising, for example, allows for self-regulatory control of misleading or comparative advertising as well as private complaint handling processes.[581]

6) No distortion of the principles of competition and the unity of the internal market

Finally, the IIA 2003 provided that self-regulation and co-regulation are only allowed when they do "not affect the principles of competition or the unity of the internal market".[582] As I will discuss in Chapter 5, the CJEU has brought private regulation within the realm of both the free movement rules and competition law. Within the latter context, private regulators as well as Member States can incur competition law liability when private regulatory schemes fall foul of EU competition law.[583]

4.5.1.2 The Better Regulation Toolbox and the Principles for Better Self- and Co-regulation

As mentioned in the introduction to this section, for now it appears that when the IIA 2016 entered into force, the general framework on the use of self-regulation and co-regulation laid down in the IIA 2003 ceased to exist. However, the Better Regulation Toolbox already refers to another set of criteria, namely the Principles for Better Self- and Co-regulation (the Principles). The statement that these Principles "should be reflected in all self- and co-regulatory initiatives" suggests that they might constitute a new benchmark for assessing the use of self-regulation and co-regulation.[584]

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[579] Case C-159/99 *Commission v Italy* (2001) ECR I-4007, para 32. See also Case C-29/84 *Commission v Germany* (1985) ECR 1661, para 23 and Lenaerts, Van Nuffel & Bray 2005, pp. 766-769 with further references to case law.

[580] Interdepartementale Commissie Europees recht (ICER), 'Handleiding wetgeving en Europa. De voorbereiding, totstandkoming en nationale implementatie van Europese regelgeving' (2009), p. 103 (available at <www.minbuza.nl/ecer/icer/handleidingen.html>, accessed 1 July 2016). See also Svilpaite 2007b, pp. 14-18.

[581] Directive 2006/114/EC, Article 6 (discussed above in section 4.4.1.1.2 under f). See also ICER, 'Handleiding wetgeving en Europa' (2009), pp. 104-106.

[582] IIA 2003 (*OJ* 2003, C 321/3), recital 17.

[583] See Chapter 5, section 5.5 and, more extensively, Mataija 2016.

[584] Better Regulation Toolbox 2015, p. 89. See also 'Self- and Co-Regulation in the Better Regulation Package (Vade Mecum)', 9 June 2015, p. 2: "In the Communication, the Guidelines and the Toolbox, the Principles of better self- and co-regulation are clearly endorsed as benchmarks for good practice of self- and co-regulatory

The Principles have their origins in the EU strategy for Corporate Social Responsibility. In its 2011-2014 CSR Action Plan, the Commission expressed its intention to develop a code of good practice for self-regulation and co-regulation together with enterprises and other stakeholders, aimed at improving the effectiveness of the CSR process.[585] This has led to the adoption of the Principles, developed with the contribution of experts and through a public consultation process, as well as to the establishment of a 'Community of Practice' (CoP), a platform which unites stakeholders wishing to contribute to the further development of the Principles.[586] The Principles, reflecting best practices, address the 'conception phase' and the 'implementation phase' of self-regulatory and co-regulatory practices. The principles concerning the *conception* phase require, in brief: that the participants are as *representative* as possible; *openness* of both the drafting process and the actual operation of the private regulatory scheme; that the participants observe the principle of *good faith*; that the *objectives* of the private action are set out clearly and unambiguously; and that the private rules are *in compliance with* legislation and fundamental rights as laid down in EU law and in domestic law. The principles on the *implementation* phase demand that the private regulatory initiative is open to *iterative improvements*; that a sufficiently open and autonomous *monitoring system* is in place; that *evaluation* mechanisms are in place; that an independent dispute resolution scheme and sanctions are available; and that the private regulators are transparent about the financial support that they receive.

A brief comparison of these criteria with the requirements laid down in the IIA 2003 shows that the Principles reflect the compliance requirement as well as the criteria of representativeness and transparency. The 'added value requirement' and the 'precluded areas' requirement, by contrast, do not have an equivalent in the Principles. The Better Regulation Toolbox suggests that the latter requirement no longer holds by providing that "the self/co-regulation initiatives cannot a priori be excluded from any policy area".[587] The Principles provide more details as to the content of the criteria than does the IIA 2003.

Finally, it should be reiterated that it remains somewhat opaque whether the Principles actually take the place of the IIA 2003 framework for the use of self-regulation and co-regulation, the more so since the Principles are proclaimed to "offer a benchmark for effective self- and co-regulation", yet without being "final or comprehensive".[588] Furthermore, it has been indicated that the Principles are "are entirely without prejudice to the Commission's right of initiative, to the exercise of legislative and regulatory discretion, notably regarding

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actions" (available at <https://ec.europa.eu/digital-single-market/en/content/self-and-co-regulation-better-regulation-package-vade-mecum>, accessed 1 July 2016).

[585] Communication from the Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 final, p. 10.

[586] See Activity Report on action #5 of the Communication 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', pp. 3-5 (available at <https://ec.europa.eu/digital-single-market/news/principles-better-self-and-co-regulation-and-establishment-community-practice>). On the CoP, see also section 4.3.1.6.2 above. The Principles can be found at <https://ec.europa.eu/digital-single-market/node/69742>. For more information on the Community of Practice, see <https://ec.europa.eu/digital-single-market/en/community-practice-better-self-and-co-regulation-0>. Websites accessed 1 July 2016.

[587] Better Regulation Toolbox 2015, p. 89.

[588] Activity Report on action #5 of the Communication 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', p. 4.

the choice of appropriate instruments for legislation or regulation, which remains to be judged case by case, […]".[589] On the other hand, the Commission's proposal for a new AVMSD explicitly refers to the Principles, indicating that codes of conduct that concern issues that fall within the scope of the directive should follow the Principles.[590]

4.5.2 The Netherlands

The Dutch legislator, in contrast to its European counterpart, has adopted a more piecemeal approach in developing criteria for the use of self-regulation and co-regulation as alternatives to legislation. A general framework, like the ones set out by the now obsolete IIA 2003 and the Principles for Better Self- and Co-regulation, is lacking at the national level. The IFPL, which may be expected to be a main source in this respect, seems to be more focused on the factors that determine whether self-regulation and co-regulation are likely to be successful and entails only limited preconditions as to the use of these mechanisms (section 4.5.2.1). Clues as to the conditions under which the Dutch legislator sees fit the use of self-regulation and co-regulation have to be gathered from policy documents other than those on general legislative policy (section 4.5.2.2).[591]

4.5.2.1 The IFPL

Compared with the IIA 2003 and the Principles of Better Self- and Co-regulation, the IPFL lays down very few criteria. In fact, the Framework only mentions three preconditions any particular sector has to meet in order for policy makers to allow self-regulation: 1) a certain level of knowledge, 2) support, and 3) a 'sufficiently' dense organization.[592] However, the IFPL does not explain when the required level of knowledge and degree of organization can be deemed present within the sectors involved. Additionally, the IFPL refers to an assessment framework, developed by the Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum*) based on empirical research, which includes several factors that influence the success or failure of a self-regulatory regime.[593] This framework

[589] Activity Report on action #5 of the Communication 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', p. 4.
[590] Recital 7 of the proposed directive (COM(2016) 287 final).
[591] See also section 4.4.1.1.3 under i where the criteria are discussed for the official approval of data protection codes.
[592] IFPL, under 6.1 (*Beleidsinstrumenten A-Z > Categorieën beleidsinstrumenten > Co-regulering en zelfregulering*, at <www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/6-wat-het-beste-instrument>, accessed 1 July 2016)
[593] More specifically, the framework refers to societal demands; density rate of organization; support; clear sanctioning; evaluation of self-regulation; practicability; extent and size of branch; divergence of interest; tradition of self-regulation; stable problem field; private interests; state support. See Van Boom et al. 2009, pp. 18-19. A follow-up study found that both the degree of organization of a sector and support for the self-regulatory initiative especially determine whether or not any self-regulatory initiative succeeds. More specifically, the researchers found that "if the interests in a given branch converge, the density rate of organisation is high – and vice versa – which in turn facilitates an assessment of the support in this branch for the policy goals underlying the self-regulatory initiative". See Van Boom et al. 2011, p. vi. Cf. also the factors identified in Baarsma et al. 2003, pp. 30-31, 51-56. The IFPL also refers to this empirical study (under 6.1).

allows policy makers to arrive at a more balanced opinion as to the likelihood that self-regulatory measures will be successful, thus the IFPL.[594] However, as such, these factors do not tell us much about the limits and criteria imposed on the use of self-regulation and co-regulation, even though they can be said to play a background role in this respect. After all, if these factors indicate that self-regulation is likely to be unsuccessful, the government may have a valid argument for not using this instrument. In this respect, they in fact do link up with Instruction 8 of the LDI, which provides for direct government intervention only if the self-regulatory capacity of the relevant sectors cannot be expected to produce the required results, even if backed by public measures (see section 4.3.2.3.3).

4.5.2.2 Other policy documents

Strikingly, government documents concerning specific policy areas shed more light on the matter as to when the legislator is allowed to opt for self-regulation and co-regulation. This 'ad hoc' approach does however make it difficult to ascertain the actual weight and relevance of the criteria formulated in these documents. Is the use of private regulation always subject to these criteria? With this caveat in mind, this section surveys several of these policy documents.

a. Report of the Geelhoed Committee

The first document that can be mentioned here is the final report of the Geelhoed Committee. This report, which can be situated in the context of Dutch general legislative policy (see section 4.3.2.1), lists several criteria for 'effective self-regulation'.[595] Like government regulation, self-regulation must first of all meet certain minimum quality requirements, including the accessibility and clarity of the rules and a sufficient degree of certainty that the rules are indeed being complied with. Secondly, any dispute resolution scheme included in the self-regulatory regime must, to the greatest possible extent, meet the principles of due process. Thirdly, as regards the interests covered, the Committee notes that the focus of the self-regulatory rules may not be too one-sided, as this might lead to conflicts with competition law. Self-regulation may not have a negative effect on effective competition. Here the Committee warns that a conflict between self-regulation and competition law might prompt the government intervention that the self-regulatory measure sought to evade.[596]

[594] IFPL, under 6.1 (*Beleidsinstrumenten A-Z > Zelfregulering*, at <www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/6-wat-het-beste-instrument/61-0>, accessed 1 July 2016). The IFPL includes a factsheet on codes of conduct, along with a list of success factors and failure factors specific to this instrument. See IFPL, under 6.1 (*Beleidsinstrumenten A-Z > Gedragscode > Factsheet Gedragscode*, at <www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/6-wat-het-beste-instrument/61/gedragscode>, accessed 1 July 2016).
[595] *Parliamentary Papers II* 1983/84, 17 931, no. 9, p. 44.
[596] *Parliamentary Papers II* 1983/84, 17 931, no. 9, p. 44.

b. Reaction to the Green Paper on consumer protection

A more extensive reflection on the requirements for the use of self-regulation, and the ways in which these requirements could be implemented, can be found in the government document setting out the Dutch reaction to the European Commission's Green Paper on consumer protection.[597] Particularly relevant in this respect is the Dutch answer to the Commission's question as to whether it would be useful to lay down a basis for self-regulation in a framework directive. In its response, the Dutch government starts out by noting that self-regulation is often used in the Dutch context as an alternative to or substitution for existing public regulation.[598] According to the government, this requires the target groups of a self-regulatory scheme to be sufficiently organized, that relevant interests are balanced equally, that the actors involved are sufficiently bound to the scheme and that enforcement is sufficiently ensured.[599] Subsequently, the issue raised by the Commission is addressed: embedding self-regulation in legislation.[600] The Dutch government is of the opinion that it can be appropriate to provide legislative backing to self-regulation, but that this should not occur through a general framework directive. Specific directives are a more suitable means in this respect since self-regulation differs between industries. However, the government does not see much in the use of obligatory forms of legislative support. It points out in this respect that the voluntary nature of self-regulation would not benefit from a tight regulatory framework. Furthermore, the wide variety of self-regulatory mechanisms within and between Member States might require a multiplicity of rules, which could render the use of some forms of self-regulation impossible. Against this backdrop, the Dutch government advocates forms of government support that stimulate the use of self-regulation. Nonetheless, the government does not show itself unfavorable disposed to the formulation of minimum quality criteria.[601] Finally, in another part of the response, stress is given to the importance of stakeholder participation. If possible, all stakeholders, i.e., consumer as well as business organizations, should be involved in the self-regulatory process, thus the Dutch government.[602]

c. Financial Services Act

In the Explanatory Memorandum to the former Financial Services Act (*Wet Financiële Dienstverlening*) we can find further clues as to what criteria self-regulatory initiatives have to meet in order to function as a policy instrument.[603] Although the framework set out by the

[597] *Parliamentary Papers II* 2001/02, 27 879, no. 3.
[598] Cf. the fact that the Dutch legislator has repeatedly expressed a clear preference for self-regulation in the context of consumer policy. See, e.g., *Parliamentary Papers II* 1992/93, 23 162, no. 1; *Parliamentary Papers II* 2003/04, 27 879, no. 9; *Parliamentary Papers II* 2011/12, 27 879, no. 41.
[599] *Parliamentary Papers II* 2001/02, 27 879, no. 3, p. 7.
[600] The government in this respect remarks that the Dutch notion of self-regulation refers to self-imposed measures which in principle do not have a legal basis. It is possible, however, to lay down in legislation that self-regulation can replace statutory provisions. See *Parliamentary Papers II* 2001/02, 27 879, no. 3, p. 7.
[601] *Parliamentary Papers II* 2001/02, 27 879, no. 3, pp. 7-8, also pointing at the development of a 'voluntary European self-regulatory model'.
[602] *Parliamentary Papers II* 2001/02, 27 879, no. 3, p. 8.
[603] *Parliamentary Papers II* 2003/04, 29 507, no. 3. The Act sought to enshrine the responsibilities of the financial services industry and to that end introduced a new legal framework for financial services and mediation.

Act ceased to exist after having been replaced by the Financial Supervision Act in 2007, it is nonetheless worthwhile looking at a bit more closely. What makes this case particularly interesting is that the Explanatory Memorandum, in the run-up to the formulation of such criteria, illustrates how the interplay between public and private regulation can take shape.

The Explanatory Memorandum starts out by noting that legislation would be rendered superfluous where effective, high quality self-regulation is in place, which is complied with by all market players within the financial services industry. The self-regulatory 'web' that existed at the time was woven by different industry codes of conduct concerning the relation between financial service providers and consumers. The legislator, however, deemed this web insufficient since only part of the industry had committed itself to the self-regulatory initiatives in force. This resulted in an unequal playing field within the industry, where market players complying with the codes had to compete with free riders that in turn had a negative impact on their reputation. However, the role of the Financial Service Act, then still in draft form, was not to replace or discourage the existing self-regulatory initiatives. Rather, the Act was to be conceived of as 'a legal guarantee' of those initiatives, with which it sought to link up.[604]

In accordance with these deliberations, the legislator explicitly left room for an industry-wide code of conduct to implement the legal criteria for the provision of financial services formulated by the Financial Services Act, provided the code met certain requirements. In brief, these requirements concern: the content of the code (the rules should: be checked against the relevant public interests, be necessary and proportionate to these public interests and burden the regulatory addressees as little as possible); the scope of the code (it should cover all sectors within the financial industry); support for the code (multiple representative trade associations from the entire industry must approve the code in its entirety and unconditionally); coverage (the subscribing organizations should be able to ensure that a large part of the industry agrees and complies with the code within reasonable time); enforceability of the code; compliance with competition law (i.e., no unjustified restrictions on competition) and the legitimacy of the code (the code should comply with legislation, including the Competition Law Act).[605] To ensure that the code could be truly considered an elaboration of the public interests covered by the Financial Service Act, the code also had to be assessed and approved by the Minister of Finance. Once this final hurdle had been successfully taken, the code could replace government regulation.[606]

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[604] *Parliamentary Papers II* 2003/04, 29 507, no. 3, p. 4. The objective of the Act, more specifically, was to raise the level of service provision on the side of the free riders (or ban these free riders from the market). Cf. The report 'Bemiddeling in financiële diensten' (2002) of the Dutch Social and Economic Council (SER) in which complete market coverage is identified as a precondition for attaining adequate consumer protection through self-regulation in the financial services industry (pp. 41-42, available at <www.ser.nl/nl/publicaties/adviezen/2000-2009/2002/b20927.aspx>, accessed 1 July 2016).

[605] *Parliamentary Papers II* 2003/04, 29 507, no. 3, pp. 14-15.

[606] *Parliamentary Papers II* 2003/04, 29 507, no. 3, pp. 15-16.

d. 'Legislation for the electronic superhighway'

The government report 'Legislation for the electronic superhighway' (*Nota Wetgeving voor de elektronische snelweg*), dating from February 1998, lays down an assessment framework for the Dutch legislator to apply when drafting the regulatory framework for what the report metaphorically calls the 'electronic superhighway', i.e., the transition to the information society.[607] In the report, the legislator voiced its preference for self-regulation, particularly in the short term. In the long term, government regulation might become the preferred option.[608] However, self-regulation cannot always be resorted to as an alternative to government regulation, as the legislator indicated. Self-regulation cannot be employed in cases where "values and standards that are fundamental to a democracy based on the rule of law" are at stake.[609] Furthermore, the following four criteria have to be met: "the target groups involved should be sufficiently organized; the relevant societal interests should be balanced equally; all parties involved should be sufficiently bound; compliance with the self-regulatory arrangements should be sufficiently ensured".[610] It is noted in the report that these criteria do not differ markedly from those imposed on self-regulation outside the context of the 'electronic superhighway'.[611] The responsibility rests with the government in assuring that self-regulatory initiatives adopted in the context of the 'electronic superhighway' meet the aforementioned criteria. The report lists several means that are at the disposal of the government in this respect, including the enactment of legislation supporting self-regulation and the threat of legislative intervention.[612]

4.5.3 A brief overview

The discussion in this section shows that both the European and the Dutch legislator have set boundaries to the use of alternative regulatory instruments. The main difference between the European and the Dutch approach in this respect is that at the European level, the criteria have been brought together in a single general framework, whereas at the Dutch level a variety of different policy documents has to be sifted through to deduce what the criteria are. The picture that emerges when all criteria are taken together is nonetheless a fairly consistent one. When the legislator wishes to seek recourse to self-regulation and co-regulation, both substantive and procedural requirements have to be met. The more procedural requirements are in essence principles of good governance. For instance, the drafting process has to be transparent and the rules should be made publicly available (EU), the actors involved should be representative (both) and sufficiently organized (NL), the relevant social interests should be balanced equally (NL) and stakeholder participation is preferred (both). Monitoring and enforcement should also be provided for (both). The more substantive requirements concern

[607] *Parliamentary Papers II* 1997/98, 25 880, no. 2, pp. 3-5.
[608] *Parliamentary Papers II* 1997/98, 25 880, no. 2, p. 12.
[609] *Parliamentary Papers II* 1997/98, 25 880, no. 2, pp. 12-13, 181 (my own translation).
[610] *Parliamentary Papers II* 1997/98, 25 880, no. 2, p. 181 (my own translation). The four criteria are indeed identical to the ones formulated in the government's reaction to the Green Paper (*supra*, under b).
[611] *Parliamentary Papers II* 1997/98, 25 880, no. 2, p. 181.
[612] *Parliamentary Papers II* 1997/98, 25 880, no. 2, pp. 13, 181.

the compliance of self-regulation and co-regulation with European and national legislation in general, and competition law in particular (both). The use of these instruments should have added value for the general interest (EU) and cannot be deployed when fundamental rights or fundamental values and standards are at issue (NL). Going by the Better Regulation Toolbox, the EU appears to have dropped the 'precluded area' criterion. In sum therefore, the criteria for the use of self-regulatory and co-regulatory instruments are more or less the same in the EU and the Netherlands.[613] It remains unclear, however, whether and how the conformity of self- and co-regulatory initiatives with these criteria is actually assessed.

4.6 The approach of the European and the Dutch legislators compared

So far, the approaches of the European and the Dutch legislators towards private regulation (self-regulation and co-regulation) have been discussed separately. In practice, obviously, these legislators do not operate in isolation. The strong interrelatedness of the European legal order and the legal orders of the Member States implies that the course pursued by the European legislator influences national legislative policies, and vice versa, albeit to a lesser extent.[614] This section compares the European and the Dutch legislative approaches towards private regulation in general and to industry codes in the field of private law in particular.

4.6.1 Common ground between EU and Dutch legislative policies

The core of the legislative policies of the EU and the Netherlands is the same: both policies revolve around the quality of legislation, with slight changes of focus over the years.[615] With both policies being firmly rooted in the principles of proportionality and subsidiarity, the use of alternatives to public regulation, including self-regulation and co-regulation, has been drawn to the attention of the legislator at both levels. At the beginning, both the European and the Dutch legislator refrained from actively engaging with private regulatory initiatives. At the European level, emphasis initially lay on the coordination of different forms of purely voluntary self-regulation, while at the Dutch level, at the time of the Geelhoed Committee, private regulation was perceived as one of the tailpieces of the deregulation process.[616] This perception changed over time, as Van Gestel indicates. The European legislator came to pursue a course of active promulgation of the use of self-regulatory and co-regulatory initiatives, both directly at the European level and more indirectly at Member State level.[617] Likewise, with the adoption of a legislative policy focusing on quality rather than quantity of legislation (cf. the report 'A View on Legislation'), the Dutch legislator came to see private

[613] See also Menting & Vranken 2014, p. 40.
[614] Bokhorst 2014, pp. 165-166.
[615] See also Bokhorst 2014, pp. 165-234, who provides an extensive analysis of the way in which the respective policies have developed over the years, and Verdoodt 2007, pp. 69-76.
[616] Van Gestel 2005, pp. 103-104; Oude Vrielink 2011, p. 66.
[617] Van Gestel 2005, pp. 103-104.

regulation as a policy instrument that it could employ more actively.[618] Thus, within both the European and the Dutch context a similar change of perception can be witnessed. Whereas self-regulation and co-regulation were initially viewed as independent regulatory tools that could be used to replace public regulation, they are nowadays most often perceived as complementary policy instruments that are part of a broader mix of regulatory tools, as Verdoodt indicates.[619] The European and the Dutch legislative approaches to self-regulation and co-regulation are accordingly no longer solely one of approving existing private initiatives, but also one of active employment and promotion of self-regulation and co-regulation.[620]

Along these lines, the use of self-regulation and co-regulation has developed into one of the cornerstones of the legislative policies of both the EU and the Netherlands. Following the EU Better Regulation Guidelines and the Dutch LDI and IFPL, the use of these instruments has to be considered as a policy option. At least, that is the reality on paper. Several empirical studies have put critical side notes to the extent to which this policy has actually materialized in practice. However, as noted before, this is not to say that the European and the Dutch legislators never resort to self-regulatory and co-regulatory measures, the more since the development of such measures is also initiated in a less 'visible' fashion, namely outside the confines of the formal legislative or policy-making processes. In European and Dutch private law, for instance, this policy has resulted in the legislator actively promoting the drawing-up of industry codes of conduct as well as actually developing codes of conduct, as the examples discussed in section 4.4 of this chapter show.

4.6.2 Differences: Top-down versus bottom-up

Although self-regulation and co-regulation are thus part and parcel of European as well as Dutch legislative policy, there are some marked differences between the EU and the Netherlands at this point. For instance, the use of alternatives to legislation was already on the radar of the Dutch legislator before regulatory alternatives became part of EU legislative policy.[621] There are also differences as to the way in which the use of self-regulation and co-regulation is eventually couched and implemented, three of which I discuss next.

1) Vision on co-regulation

The first difference lies in the interpretation of the concept of co-regulation. In essence, co-regulation always involves a hierarchical element, as it is the government that sets the boundaries within which private actors can perform their regulatory activities.[622] This hierarchical element comes to the fore more prominently, however, under the European

[618] Oude Vrielink 2011, pp. 66-67; Wetenschappelijke Raad voor het Regeringsbeleid, *De toekomst van de nationale rechtsstaat*, The Hague: Sdu Uitgevers 2002, pp. 125-129.
[619] Verdoodt 2007, pp. 52-53, 71. Verdoodt remarks that these two 'tracks' are not mutually exclusive, but rather exist side by side (p. 53). For broader reflections on this development, see Verdoodt 2007, pp. 70-76.
[620] Cf. Verdoodt 2007, p. 70.
[621] Bokhorst 2014, p. 165.
[622] Cf. Best 2003, p. 3.

conception of co-regulation than under the Dutch conception. In the EU, co-regulation is perceived as an implementation mechanism, which in fact presupposes a hierarchical relationship between the legislator and the private regulator. In the Netherlands, by contrast, co-regulation is perceived as entailing a clear element of cooperation: following the Dutch interpretation, co-regulation results from a joint effort of the government and private actors. So, the Netherlands has a less top-down interpretation of the concept.[623]

2) Criteria

The second difference concerns the way in which the criteria for the use of self-regulation and co-regulation have been embedded. Whereas the European criteria have been brought together in a single general framework (the replaced IIA 2003 and the Principles for Better Self- and Co-Regulation), the Dutch criteria are spread over different policy documents.

3) Examples

The third difference pertains to the ways in which the European and the Dutch legislators have employed industry codes of conduct in European and Dutch private law.[624] The examples discussed in section 4.4 show that both legislators actively initiate the drawing up of industry codes 'outside' the legislative context, for instance by facilitating the drafting process or by using the threat of legislative intervention as a stick to move an industry towards self-regulation. The European legislator also makes use of legislative references to codes of conduct to promote the development of such codes or to embed them in private law (see section 4.4.1.1). The Dutch legislator, by contrast, has thus far only rarely referred to codes of conduct in private law legislation; the vast majority of references in Dutch private law legislation have their origins in European directives. Viewed from this perspective, the European legislator adopts a more directive role than its Dutch 'counterpart'. This has resulted in a numerical dominance of references in European private law legislation over legislative references at the Dutch level. It should be noted, however, that quite a number of the European legislative references, either in an obligatory fashion or otherwise, merely call upon the Commission or the Member States to encourage the development of European or national codes of conduct. These references do not *per se* create private regulatory measures. Thus, in fact, the primacy of the European legislator remains intact: no codes of conduct are deployed as a policy instrument in the sense that they constitute a real alternative or supplement to the directive concerned. The directive constitutes the main tool and codes of conduct are just optional supporting measures.

Considering the nature of these three differences, the terms 'top-down' and 'bottom-up' seem best suited to characterize the European and the Dutch legislative approaches to private

[623] Verbruggen 2009, p. 429; Eijlander 2005, p. 7. See also section 4.2 of this chapter.

[624] At this point, I should re-emphasize that the object of analysis is limited to examples of references to codes of conduct. Accordingly my findings cannot be extrapolated either to the use of codes in private law in general or to the general legislative course pursued by the European and the Dutch legislators in this regard. Nonetheless, and mindful of this caveat, the analysis does allow for some tentative conclusions.

regulation, at least in the field of private law.[625] Whereas the European approach is of a more top-down nature, reflected in the hierarchical view on co-regulation, the general framework with criteria, and the legislative references to industry codes, the Dutch approach is more bottom-up, as follows from the 'consensus-based' concept of co-regulation, the ad hoc approach when it comes to criteria and the relative absence of legislative references in Dutch private law. A possible explanation for these differences can be found in the regulatory styles at the European and the Dutch level. In this regard, it can be noted that the functions of European legislation differ from national legislation. As Eijlander points out, national legislation pursues uniformity and equality, while European legislation has to manage national diversity.[626] The European struggle for convergence and the elimination of national barriers necessitates a more directive, top-down approach. The stance of the European legislator, accordingly, is fairly pragmatic, as Van Schagen indicates: the use of self-regulation and co-regulation is not an aim in itself, but is a means to attain EU policy goals, most notably the creation of the Internal Market. Not surprisingly, Van Schagen continues, a clear preference is thereby shown for European-wide codes, rather than national initiatives.[627] The Dutch regulatory style, on the other hand, is characterized by a search for consensus, to be reached through a process of consultation. Accordingly, societal actors have traditionally been involved in public decision-making processes.[628] A bottom-up approach fits in with this regulatory style.

4.7 Spheres of interaction and influence

At this point, it can be noted that the four spheres that are central to this chapter, i.e., the European, the Dutch, the public and the private sphere, do not operate in isolation. Rather, as can be inferred from the discussions in the previous sections, there are several relationships of influence and interaction between these spheres.

4.7.1 The impact of the European legislative approach on Dutch private law

The first relationship in which such interaction and influence come to the fore, is between the European sphere and the Dutch sphere. A decision of the European legislator to rely upon private regulatory measures or to include references to codes of conduct in EU legislation not only impacts the place of codes of conduct in European private law, but also influences the place of these codes in national (Dutch) private law in several respects (cf. the classification of the European approach as top-down).[629]

First of all, the EU directives that, either in an obligatory fashion or otherwise, call upon Member States to encourage the development of national codes of conduct, 'force' Member

[625] Cf. from a different perspective Van Schagen 2013, p. 181.
[626] Eijlander 20005, pp. 7-9.
[627] Van Schagen 2013, pp. 62-64, 115-119, 174, 181, 450, 453.
[628] Bokhorst 2014, p. 251.
[629] This implies that Member States that, unlike for instance the Netherlands or the UK, are not familiar with the use of self-regulation and co-regulation, will in effect be forced to use such instruments.

States to at least think about the place of such codes in their national private law system. Secondly, the choice of the European legislator to wholly or partially leave regulation to private actors implies that national actors - public and private alike - are confronted with rules for private regulatory relationships that stem from a private rather than a public regulatory source. In this way, European private regulation enters the Dutch sphere of private law. EU influence, thirdly, can also be felt the other way around. This is the case when the EU enacts legislation in a field that at Member State level is regulated by one or more private regulatory schemes. As the European rules have to be implemented at the national level and with the possibilities of implementation through private regulation being limited, the national private regulatory schemes will be affected by these rules.[630]

> Worthy of mention in this regard is Cafaggi's account of the impact of the level of harmonization chosen by the European legislator in directives on private regulation. When it is opted for minimum harmonization, private regulators are only allowed to adopt standards that either equal the standards laid down by the directive or go beyond these standards.[631] The corresponding expectation would be that if a regime of maximum harmonization is in place, private regulatory initiatives can only specify or implement the directive; they cannot entail stricter rules.[632] However, Cafaggi submits, the fact that maximum harmonization has been chosen does not in all cases affect the scope and domain of private regulation. Purely self-regulatory schemes, rooted in the private autonomy of the regulators, can still lay down higher standards. Co-regulatory initiatives, on the other hand, cannot be employed by Member States to circumvent the maximum harmonization regime of a directive by imposing stricter standards.[633] Thus in these cases, the regulatory power of private actors and semi-private asctors will be constrained.

Fourthly, references in European directives lead to codes of conduct actively entering the realm of Dutch private law: most of the references to codes in Dutch private law stem from EU directives. As these references influence the legal relevance of codes of conduct (see below, section 4.8), it is at this point, arguably, that the national impact of the EU legislative approach to codes of conduct is most felt.

4.7.2 Public-private interaction

The relation between the public sphere (legislation and policy) and the private sphere (industry codes of conduct) in this chapter is one of mutual influence and interaction, particularly when this relation is given shape 'outside legislation'.[634] The examples discussed in section 4.4 in this respect show that the decision to use an industry code as a policy

[630] EU legislation can for instance necessitate a revision of national private regulation, as was the case with the Dutch Advertising Code that has to be revised following the enactment of the UCPD. See <www.reclamecode.nl/adverteerder/default.asp?nieuwsID=321> (accessed 1 July 2016). It can also replace national private regulatory initiatives. See Van Schagen 2013, pp. 168-169.
[631] Cafaggi 2011b, p. 101.
[632] Cf. Cafaggi 2011b, pp. 101-102.
[633] Cafaggi 2011b, pp. 102.
[634] Not surprisingly, the legislative references to codes of conduct are more unilateral in nature.

instrument is in the vast majority of cases not a matter of either public or private regulation. Codes can, for instance, be relied upon within the realm of an already existing legislative framework (cf. the complementary function). Furthermore, when the legislator decides to leave regulation to the industry, he retains a background role, ready to intervene if the regulatory results achieved by the industry are unsatisfactory.[635] Put in more general terms; there is often a relationship of continuous interaction between the industry, wishing to maintain its regulatory position, and the legislator, who has the possibility of legislative intervention in reserve.[636] This interaction can be initiated by private actors as well as public actors: whereas in some cases the legislator directly or indirectly calls upon private actors to take regulatory action, in other cases private actors take the lead themselves, with the legislator linking up with the ensuing private rules (e.g., by designating the rules as a formal substantiation of an open-textured legal standard). The intensity of the interaction is determined by the functioning of the industry code of conduct. The discussion in section 4.4 has shown that inefficiency and ongoing problems can prompt action from the side of the legislator, leading to either a revision or a tightening of the code, or to the code being overturned, or wholly or partially backed by legislation.

> From a broader perspective, these findings tie in with the principle of institutional complementarity, coined by Cafaggi. Viewed from that perspective, public and private regulation function as complements rather than substitutes. More specifically, "public and private regulation complement each other in terms of goals, instruments and reinforce the overall applicability and effectiveness of the regulatory process".[637] As such, public and private regulatory regimes can stand in cooperative as well as competitive relationships with each other.[638] The concept of institutional complementarity defined by Cafaggi comprises both a horizontal and a vertical dimension. Horizontal complementarity, more specifically, refers to the interaction and complementarity of European public and private actors. Directives encouraging the creation of European codes of conduct and the cases in which the European legislator threatened to intervene at the European level constitute examples of horizontal complementarity (cf. section 4.4.1). Vertical complementarity concerns instances of interaction and complementarity between European public actors and national private actors or vice versa, between European private actors and national public actors. This form of complementary for instance becomes visible when European directives are implemented by national private regulation.[639]

[635] Cf. IIA 2003 (*OJ* 2003, C 321/01), recital 23: "It [the European Commission, MM] will, nonetheless, consider the possibility of putting forward a proposal for a legislative act, in particular at the request of the competent legislative authority or in the event of a failure to observe the above practices".
[636] See the literature referred to in Chapter 1, n 42 and 43, and the text accompanying these footnotes. Cf. also Cafaggi 2011b, pp. 100-103 on what he calls the 'institutional complementarity' between private regulation and public-lawmaking on the European level.
[637] Cafaggi 2011b, p. 100.
[638] Cafaggi 2011b, pp. 100-101.
[639] See Cafaggi 2011b, pp. 100-103.

4.8 Conclusions

General observations

This chapter has adopted a three-step approach in order to arrive at an answer to the questions as to how the European and Dutch legislators approach industry codes of conduct in private law and what consequences this approach has for the legal relevance of these codes. The first step in this respect showed that the use of alternatives to legislation, including industry codes, is one of the cornerstones of European as well as Dutch legislative policy, albeit that the emphasis put on the use of these alternatives in these policies contrasts sharply with the number of private regulatory initiatives (visibly) resulting from these policies. Both the European and the Dutch legislator have subjected the use of industry codes as a policy instrument to a set of formal criteria (third step). Although these criteria form an integrated part of the European and the Dutch approach, it remains opaque as to what extent the codes are actually tested against these criteria and how this occurs. Against this background, the European and Dutch legislators have brought industry codes within the realm of European and Dutch private law in different ways (second step). The European legislator has promoted the drawing up of industry codes in different private law directives, introduced legislative references to these codes and on several occasions resorted to codes as an alternative or supplement to public regulatory measures. The Dutch legislator, by contrast, has mainly limited itself to the use of industry codes as policy instruments in private law. As the examples discussed highlight, the relationship between industry codes on the one hand and the legislator and the public regulatory framework on the other hand that exists as a result of governmental reliance on industry codes is often one of continuous interaction, the formal labeling of industry codes as alternative regulatory instruments in EU and Dutch legislative policy notwithstanding.[640] This interaction also echoes through in the different functions that industry codes can have from a governance perspective: codes not only function as a regulatory alternative, but also as a complement to public regulation.[641]

Implications for the legal relevance of industry codes of conduct

And now for the key-question: what are the implications of these approaches for the legal relevance of industry codes of conduct in Dutch private law? These implications differ according to the way in which a code is pulled into the private law sphere. The mere promotion of codes of conduct in EU directives, more specifically, does not lead in itself to a legal role for codes: the regulatory framework is already set by the directive, codes are just optional supporting measures. The European and Dutch use of industry codes of conduct as an alternative or complement to public regulation, by contrast, does lead to a legally relevant regulatory role for industry codes: through such use, the codes gain legal relevance as policy

[640] See section 4.7.2.
[641] In doing so, codes can also have a protective function and a harmonization function.

instruments.[642] The European legislative references to codes of conduct also result in legal relevance, yet in a different respect. The farthest-reaching in this respect is the UCPD, which renders compliance with codes of conduct legally compulsory by qualifying non-compliance with a code as a misleading commercial practice given certain conditions. By thus attributing legal binding force to codes of conduct, the UCPD provides a legal basis for the judicial enforcement of industry codes.[643] The statutory reference to corporate governance codes (Directive on company reporting), the statutorily enshrined possibility to get a privacy code formally approved (Data Protection Directive, the General Data Protection Regulation), and the statutory reference to codes of practice as a yardstick in establishing whether a product can be deemed safe (Product Safety Directive) in turn confer a certain legal status upon codes of conduct. These references can also serve as a reference point for judicial enforcement, albeit in a less direct way than the UCPD reference. Finally, pre-contractual information duties as regards codes of conduct, included in the Time Share Directive, the Services Directive, the E-Commerce Directive and the Consumer Rights Directive, pull industry codes out of the shadow of the law. The latter Directive is the farthest-reaching in this respect, as it not only imposes a duty upon a trader to provide information on relevant codes of conduct in the context of distance and off-premises contracts, but also stipulates that this information is to form an integral part of the contract.

> Turning the perspective around, it can also be said that through the legislative approaches, industry codes impact (European and) Dutch private law in several respects. First of all, when relied upon by the legislator as an alternative to public regulatory intervention, industry codes rather than public regulation constitute the prime source of rules governing the subject matter concerned. Secondly, codes can impact the content of legislation when copied by legislation, as for instance occurred in respect of the European and Dutch mortgage codes (see section 4.4.1.2 and 4.4.2 under c, respectively). Thirdly, when the legislator designates an industry code as a minimum elaboration of an open-ended legal standard, private rules influence the actual application of this legal standard.

Thus, contrary to what the lack of attention for the legislative approach to private regulation in the Dutch private law debate suggests (cf. Chapter 1), the way in which the European and the Dutch legislator perceive and use private regulation does affect the legal relevance of industry codes of conduct in Dutch private law. The legislative references to these codes in Dutch private law legislation (most notably in the DCC) particularly highlight the fact that this relevance might go further than hitherto assumed in Dutch private law literature, as these references are generally not taken into account by Dutch private law scholars discussing the issue.

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[642] Although the policy instrument function is surrounded by a sphere of 'publicness', the codes that have this function remain *private* instruments unless the legislator delegates public regulatory power to the private regulator or otherwise confers a legal status on a code of conduct. Cf. Giesen 2007, pp. 60-62.
[643] Verbruggen 2014a, pp. 288-289. Cf. also Chapter 6, section 6.3.1.9.

5 The approach of the Court of Justice of the European Union

5.1 Chapters 5 and 6: A preview

In the following two chapters, the perspective on industry codes of conduct is changed from that of the legislator to that of the European and Dutch judiciaries (Chapter 5 and 6, respectively). Courts may be confronted with industry codes and other forms of private regulation in their role as enforcers, interpreters and developers of private law. These confrontations might lead to judicial enforcement, interpretation or even review of the private rules subjected to judicial scrutiny.[644] Thus, judges are able to give direction to the role of industry codes in private law by creating possibilities for their use or by imposing restraints on them. In doing so, both the Court of Justice of the European Union and the Dutch judiciary, each at their own level and from their own perspective, are faced with the same, pressing question, as will be shown in the next two chapters: how to deal with a phenomenon that poses serious challenges to the public-private divide on which both the European and the Dutch legal order rest and that fails to fit in with traditional legal concepts?

5.2 Introduction

This chapter takes a European perspective and discusses how the Court of Justice of the European Union (hereafter: the CJEU or the Court)[645] has handled confrontations with private regulation.[646]

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[644] Cafaggi 2012c, pp. 89-95, who sees domestic courts as enforcers, reviewers and interpreters of private regimes.

[645] Given the focus on the CJEU, case law at the General Court will not be systematically dealt with.

[646] Other legal scholars have provided solid building blocks in this respect. See in particular Mataija 2016; Wendt 2013 and Heremans 2012, who both discuss the relation between professional regulation and EU law; Schepel 2002. Mataija (2016), most notably, has already made a rigorous assessment of the application of EU free movement law and competition law to private regulation, of the relation between both fields of law and of the ways in which private regulation has affected these fields, taking stock of the approach of both the CJEU and the European Commission. I have cast the net less widely in this respect by focusing solely on the approach of the CJEU and on the impact of this approach on private regulation. In developing a line of argument relevant to the purposes of this dissertation, I have drawn gratefully on the work of Mataija and other legal scholars.

In this chapter, I will not speak of industry codes of conduct but rather refer to the broader concept of private regulation.[647] This is because of the fact that the Court's case law in respect of private regulation has developed along the lines of categories of private regulation and other types of private action, as will become apparent from the discussion in this chapter. As the term 'industry codes of conduct' does not adequately cover these categories, I decided to use the term 'private regulation' when discussing the case law. Nonetheless, where relevant, I will indicate how the Court's approach plays out in respect of industry codes.

5.2.1 Private regulation and EU law: Two settings

Broadly speaking, confrontations between the CJEU and private regulation can take place in two different settings: 1) the interpretation and application of EU legislation (directives and regulations) and 2) free movement law and competition law. In the first setting, the role of private regulation is that of a substantive argument in the Court's line of reasoning. As such, as an argument, it assumes legal relevance in the application and interpretation of EU legislation. Until now, however, there appear to be only few cases in which private regulation has been assigned such a role. Instead, the vast majority of confrontations take place in the second setting, which comprises cases in which private regulation is on a collision course with the Union's rules on free movement and competition.

With a view to the focus of this doctoral thesis on the legal relevance of industry codes in Dutch private law, at first blush this second setting appears to be the odd man out, in two respects. First of all, EU free movement law and a large part of EU competition law are of a public law nature.[648] Moreover, from a traditionalist perspective, the rules on free movement govern the actions of Member States rather than those of private actors.[649] Secondly, the free movement and competition law cases involving private regulation concern the compatibility of private regulatory arrangements with the rules on free movement and competition. Hence, private regulation is the direct object of scrutiny,[650] rather than one of the arguments used by a court to reach its decision (as is the case in Dutch private law, see Chapter 6). Thus, strictly speaking, the analysis of the case law of the CJEU will not yield insights that pertain directly to the topic of this doctoral thesis, the legal relevance of industry codes in Dutch private law.

However, on further consideration neither observation detracts from the relevance of the second setting for this thesis. In respect of the first remark, this becomes apparent when we consider that the CJEU has extended the scope of the free movement rules to what can be regarded as essentially private law relationships.[651] With EU competition law already governing the actions of private actors, the judgments of the CJEU falling within the second setting do thus have private law relevance. As regards the second remark, two observations

[647] The focus lies on private regulation as defined for the purposes of this doctoral thesis (see Chapter 1, section 1.5.1). Case law concerning other types of private action is only touched upon in so far relevant to establishing the scope of the Court's case law and its approach towards private regulation.
[648] See the introduction to section 5.4.
[649] See section 5.2.2.
[650] State measures relating to private regulation can also be subject to competition law scrutiny; either under Article 106(1) TFEU or under the '*effet utile* doctrine'. See below, section 5.5.2.
[651] As will be detailed in the introduction to section 5.4.

can be made at this point. First of all, the express subjection of private regulation to judicial scrutiny under the rules on free movement and competition implies that private regulatory schemes, such as industry codes of conduct, will have to comply with these rules and the requirements that come with it in order to avoid any breach of the law. Secondly, it has been claimed in legal literature that the CJEU through its approach in effect regulates the way in which private regulatory schemes can be employed.[652] Hence, it can be argued that the Court's free movement and competition law judgments do entail lessons in respect of the legal relevance of industry codes, albeit such lessons are of a fairly specific nature. Therefore, it was deemed worthwhile to take a closer look at the approach of the CJEU to private regulation in the free movement and competition law context as well.

5.2.2 The public and the private sphere in the Treaty

The application of free movement law and competition law to private regulation is by no means a straightforward exercise. The rules on free movement and competition are traditionally perceived as being based on a clear division of labor: while free movement law covers Member State action, competition law governs the conduct of private economic actors.[653] The latter field of law, more specifically, is divided into two sections, namely rules applying to undertakings and rules on State aid, and as such has a public-private dichotomy of its own.[654] However, practice has proven more stubborn than the division between the public and the private sphere established by the TFEU would at first suggest. Public and private modes of governance are becoming increasingly mixed. Private regulators can for instance pursue public interest objectives and the involvement of the State with private regulatory regimes, either through delegation of regulatory powers on private regulators or otherwise, leads to the creation of co-regulatory schemes. Such regulatory hybrids, which can equally hamper free movement and distort competition, blur the aforementioned public-private divide and pose serious challenges to both competition law and free movement law.[655] Yet, in being addressed to private actors, the rules on competition do not square particularly well with private regulatory regimes that bear a public element. Free movement law, in turn, has not been drafted with private regulation in mind: it is addressed to the Member States or, more broadly, public authorities.[656] Thus, the emergence of private regulation has exposed gaps in the application of the Treaty rules: if the public-private divide were followed strictly, private regulation impeding free movement would fall outside the scope of free movement law while

[652] Schepel 2002; Schepel 2005, pp. 320-338; Mataija 2016. I will discuss this issue in section 5.6 of this chapter.
[653] Mataija 2016, pp. 18-19; 44; Sauter & Schepel 2009, pp. 22-25; Schepel 2005, pp. 46-47; Prechal & De Vries 2009, pp. 6, 13; Joined cases C-177/82 and C-178/82 *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV* (1984) ECR 1797, paras 11-14.
[654] More specifically, Articles 101 and 102 TFEU apply to undertakings and associations of undertakings. The rules on State aid (Articles 107-109 TFEU) apply to public actors. Article 106 TFEU addresses both States and undertakings (operating services of general economic interest). See Baquero Cruz 2007, p. 552.
[655] Sauter & Schepel 2009, pp. 19-22; Baquero Cruz 2007, pp. 551-552; Odudu 2006, pp. 47-48; Schepel 2005, pp. 46-47; Prechal & De Vries 2009, pp. 6, 13. For a critical account of the assumption that there is a public-private divide underlying the Treaty, see Mataija 2013, pp. 27-39.
[656] Mataija 2016, pp. 18-19, 44; Sauter & Schepel 2009, pp. 24-25; Baquero Cruz 2007, p. 552.

anti-competitive regulatory hybrids would not be covered by competition law.[657] Accordingly, as the EU's goal of creating a competitive internal market was jeopardized, the CJEU went on a gap-closing exercise,[658] intervening in the regulatory activities of private actors that impede free movement or distort intra-Community competition.

5.2.3 Outline chapter

Building on the starting points set out in the previous subsections, this chapter explores when and how the CJEU has brought private regulation within the realm of the EU law and discusses the implications of the Court's approach.[659] Section 5.3 starts out in this respect by analyzing the judgments in which private regulation has played a role in the interpretation and application of EU legislation. Subsequently, the Court's body of case law in the field of free movement law and competition law involving private regulation is up for discussion (in sections 5.4 and 5.5, respectively). The focus will thereby lie on the personal scope of these fields of EU law, which, from a conceptual perspective, forms the main hurdle the CJEU needs to take when subjecting private rules or semi-private rules to this part of the TFEU.[660] After this, I turn to the argument advanced in legal literature that the CJEU through its approach in the field of free movement and competition in effect conditions the employment of private regulation (section 5.6). Conclusions follow in section 5.7.

5.3 EU legislation

My search for judgments in which the CJEU has referred to private regulatory arrangements in the interpretation and application of EU law yielded only two results:[661] the cases

[657] Odudu 2006, pp. 47-50; Baquero-Cruz 2007, p. 552; Heremans 2012, p. 122.
[658] Heremans 2012, p. 122; Van den Bogaert 2002, p. 123. Cf. Baquero-Cruz 2002, p. 85.
[659] This will be done on the basis of an analysis of the case law referred to in legal literature and a review of this literature. With the aim of identifying relevant judgments not yet included in the literature, I have additionally conducted an extensive search for European case law on private regulation, using the online case law database of the CJEU (<http://curia.europa.eu/>). A first search was conducted in August 2014. This search was updated afterwards so as to include relevant case law published up to 1 July 2016. However, the search, which I in no way claim to be exhaustive and definitive, did not yield results relevant to the purposes of this chapter other than the judgments already referred to in the literature. For the sake of completeness, the following judgments that were found are nonetheless worthy of mention. In Case C-429/02 *Bacardi France SAS v Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and Girosport SARL* (2004) ECR I-6613 and Case C-262/02 *Commission v France* (2004) ECR I-06569, the Court did not specifically address the applicable private rules. Rather, it looked into the conformity with free movement law of the overall public regulatory framework, of which these rules were a part. Case C-119/09 *Société fiduciaire nationale d'expertise comptable v Ministre du Budget, des Comptes publics et de la Fonction publique* (2011) ECR I-2551 revolved around the compatibility of a provision of the French Code of professional conduct and ethics of qualified accountants with Article 24 of the Services Directive. However, with the code provisions being enacted in the form of a decree by the Conseil d'État, the CJEU in effect ruled on national legislation (para 8). In Case T-11/03 *Elizabeth Afar v European Central Bank* (2004) FP-I-A-65;FP-II-267, delivered by the General Court, finally, the Code of Conduct of the European Central Bank was part of the employment law dispute between the Bank and one of its employees.
[660] As a corollary, the relationship between private regulation and the substantive scope of free movement law and competition law will not be addressed. On this relationship, see, e.g., Heremans 2012 and Wendt 2012 (both on private regulation by professional bodies) and Mataija 2016, pp. 57-61, 72-83, 89-92.
[661] A General Court judgment that is worthy of mention at this point is Case T-321/10 *SA.PAR. Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (2013), ECLI:EU:T:2013:372, para

Commission/Luxembourg and *Wilson*, respectively, which were delivered on the same date.[662] In both cases, one of the points of contention was whether the Lawyer's Establishment Directive[663] allows host Member States to subject the establishment of lawyers from other Member States to a prior language test. After having established that the Directive does not allow for entry requirements other than those included in the Directive, the CJEU points out that the Directive entails other rules that in effect compensate for the exclusion of establishment requirements such as a prior language test.[664] The Court in this respect *inter alia* refers to Articles 6 and 7 of the Directive, which stipulate that European lawyers have to comply with the rules of professional conduct of their home Member States as well as with those of the host Member State, subject to disciplinary sanctions and professional liability wherever this may arise. The CJEU continues by stating that:

> "one of the rules of professional conduct applicable to lawyers is an obligation, like that provided for in the Code of Conduct adopted by the Council of Bars and Law Societies of the European Union (CCBE), breach of which may lead to disciplinary sanctions, not to handle matters which the professionals concerned know or ought to know they are not competent to handle, for instance owing to lack of linguistic knowledge".[665]

Thus, as Delimatsis points out, the Court used the professional rules of conduct as a corroborative argument in ruling that there was no need for Member States to impose their own additional barriers to entry: the CCBE Code of Conduct, among other things, already provided the necessary safeguards.[666]

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32 where the General Court referred to a provision of a code of ethics as a corroborative argument in establishing whether the applicant had acted in bad faith when applying for the registration of a trade mark.

[662] Case C-193/05 *Commission v. Grand Duchy of Luxembourg* (2006) ECR I-8673 and Case C-506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg* (2006) ECR I-8643. On these cases, see, e.g., Heremans 2012, pp. 196-198.

[663] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (*OJ* 1998, L 77/36).

[664] Case C-193/05 *Commission v. Luxembourg*, para 41: "the exclusion […] is, however, accompanied in Directive 98/5 by a set of rules to ensure, […] the protection of consumers and the proper administration of justice […]". Similar wordings are used in Case C-506/04 *Wilson*, para 71. Both judgments at this point refer to Case C-168/98 *Grand Duchy of Luxemburg v European Parliament and Council of the European Union* (2000) ECR I-9131, paras 32-33 in which the CJEU had already established this.

[665] Case C-193/05 *Commission v. Luxembourg*, para 44; Case C-506/04 *Wilson*, para 74. Again, both judgments refer to Case C-168/98 *Luxembourg v. Parliament and Council*, where the Court already made mention of the CCBE Code. One of the claims made by Luxembourg in this case was that the Establishment Directive negatively affected the public interest, consumer protection in particular, "by abolishing all requirement of training in the law of the host Member State" (para 30). The Court was of a different opinion and in this respect *inter alia* pointed to Articles 6 and 7 of the Directive. In passing, it points out that "it should be noted that, quite apart from the applicable rules of professional liability, the rules of professional conduct applicable to lawyers generally entail, like Article 3.1.3 of the Code of Professional Conduct adopted by the Council of the Bars and Law Societies of the European Union (CCBE), an obligation, breach of which may incur disciplinary sanctions, not to handle matters which the professionals concerned know or ought to know they are not competent to handle" (Case C-168/98 *Luxembourg v. Parliament and Council*, para 42).

[666] Delimatis 2010, p. 1063. See also Mataija 2016, p. 205.

5.4 Free movement law

With a view to the private law perspective that this doctoral thesis adopts, at first blush a discussion of free movement cases appears a bit odd. Since the vast majority of the rules embodied in the TFEU, including those on free movement and part of the competition law rules, are targeted at the governments of the EU Member States, they are by definition of a public law nature. Provisions with a private law character are hard to find, although present.[667] Correspondingly, we might expect the Treaty to prove rather insignificant for private law relationships and in national private law. The opposite, however, turns out to be true: Community law has become much more relevant in private law than we might have expected,[668] through legislative activity in the field of private law and decisions of the CJEU.[669] It is of particular relevance to this doctoral thesis that the Court has attributed to several of the central provisions of the Treaty 'horizontal effect', that is to say, in the words of Hartkamp, that these provisions "may be directly applied to legal relationships between individuals, in the sense that subjective rights and obligations are created, modified, or extinguished between individuals".[670] The CJEU has held that the rules on free movement of workers, the freedom of establishment and the free movement of services produce such horizontal effect. The horizontality of the free movement of goods provisions has been repeatedly dismissed, although the Court is said to have changed course recently.[671]

This section discusses several landmark cases on the horizontal effect of free movement law (sections 5.4.1 and 5.4.2) and, subsequently, distills the lines that follow on from these cases into a more general overview of the 'private' reach of the free movement provisions (section 5.4.3). It also takes account of the leeway that might be given to private regulators

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[667] In fact, Hartkamp indicates, only Article 81(2) EC (now: Article 101(2) TFEU) and Article 288(2) EC (Article 340 TFEU) bear a private law nature. See Hartkamp 2010, p. 528. Cf. also Whish & Bailey 2012, p. 216.

[668] Davies suggests that free movement law in effect concerns private law relationships: "If a party wishes to enter the market of a certain Member State, that is another way of saying that he or she wishes to conclude contracts with persons within that market. Sale and purchase of goods, services, labour or capital assets take place via contracts. Any restriction on free movement – understood to mean cross-border economic activity – is therefore a restriction of the formation of contracts between domestic and foreign economic actors". See Davies 2013, p. 53.

[669] Hartkamp 2010, p. 528. The influence exercised by the CJEU has developed along three lines. Firstly, the Court has influenced private law through the application of the general principles of community law, most notably the principle of effectiveness. A second line of influence follows on from the case law on the private law directives enacted by the European legislator. Thirdly, the CJEU has interpreted several of the central Treaty provisions as being applicable to horizontal relationships between private actors, i.e., the horizontal effect. See Hartkamp 2010, pp. 528-529. The third line of influence is central to this section.

[670] Hartkamp 2010, p. 529 and at p. 536: "Community law, […], has developed into a legal order that is also a legal order of private law, in which rights safeguarded by the Treaty to a certain extent have also obtained direct effect between citizens". In legal doctrine one can find a further distinction between *direct* and *indirect* horizontal effect. This distinction is a contentious one: while some argue that it should not be upheld, as there is no difference in substance (e.g., Advocate General Maduro in his opinion in *Viking* (C-438/05 (2007) ECR I-10779), para. 40, with further references), others show themselves in favor of distinguishing between both concepts (e.g., Hartkamp 2010, notably pp. 543-548). For the purposes of this section, the definition of Hartkamp quoted above applies. For a further account of the distinction, see, e.g., Hartkamp 2010, pp. 533-538; Asser/Hartkamp *3-I* 2015/42 and 92.

[671] See section 5.4.2.3. As yet, there is no case law on the horizontality of the rules concerning the free movement of capital.

under free movement law by briefly discussing the justification defenses available to these regulators (section 5.4.4). Thereupon, the approach of the CJEU is characterized (section 5.4.5). At this point, it should be noted that the Court's case law on the horizontal applicability of the rules on free movement comprises instances of private regulation as well as other types of private action. As private regulation is the central focus of this doctoral thesis, the latter types of private action are touched upon only briefly.

5.4.1 Free movement of workers, freedom of establishment and the freedom to provide services

The horizontal applicability of the rules on the free movement of workers (Article 45 TFEU), the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU) has been developed through a series of judgments. The ensuing body of case law has stretched the personal as well as the material scope of these provisions,[672] one of the results being that private regulatory actions have been brought within the reach of free movement law.

5.4.1.1 Collective rules adopted by private actors

The development of the Court's theory on the horizontal effect of the free movement rules concerning workers, establishment and services has been set in motion by the judgment delivered in the *Walrave* case at the end of 1974.[673] Here, the Court for the first time attributed horizontal effect to then Articles 7, 48 and 59 of the EEC Treaty (Articles 18, 46 and 56 TFEU). The reason for the dispute to arise was one of the provisions included in the rules for the medium-distance world cycling championships behind motorcycles, adopted by the Union Cycliste Internationale, an international sporting federation. The contested provision, more specifically, stipulated that the pacemaker and the stayer had to be of the same nationality. The CJEU was asked to rule on the compatibility of this nationality requirement with the Treaty provisions on the free movement of workers and on the freedom to provide services (Articles 45 and 56 TFEU) and, alternatively, with the non-discrimination principle laid down in Article 18 TFEU. The Court held that the prohibition of discrimination on the ground of nationality, enshrined in these Articles, "does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services".[674] With this statement, the Court extended the scope of Articles 45 and 56 TFEU to **discriminatory** collective private regulation. Article 49 TFEU, concerning the freedom of establishment, was declared horizontally applicable to private regulatory schemes in a similar fashion. In *Van Ameyde* the Court held that this provision (the then Article 52 of the EEC Treaty) applies to

[672] Karayigit 2011, p. 311.
[673] Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* (1974) ECR 1405.
[674] Case 36/74 *Walrave*, para 17. See also Case 13/76 *Gaetano Donà v Mario Mantero* (1976) ECR 1333. The arguments used by the Court to substantiate its decision are discussed in section 5.4.5.

discriminatory rules aimed at collectively governing the freedom of establishment, irrespective of the source of these rules.[675]

Later, the Court broadened the scope of the horizontal effect of Articles 45, 49 and 56 TFEU from discriminatory collective regulations to **restrictive** collective regulations. In *Bosman*, for example, the Court ruled that Article 45 TFEU applied to transfer rules adopted by football associations, which hampered the free movement of workers by stipulating that a professional footballer whose contract has expired can only be employed by a club of another Member Sate when a fee is paid.[676] In several other cases, the Court equally held that restrictive rules of sporting associations can be subjected to free movement scrutiny under Articles 45 and 56 TFEU.[677] The application of Article 49 TFEU to restrictive private regulation was established in *Wouters*. Part of this case revolved around the question whether a regulation of the Netherlands Bar Association prohibiting Dutch lawyers to participate in a partnership with accountants was compatible with Articles 49 and 56 TFEU. In answering this question, the Court indicated that the *Walrave* formula also applies in respect of these Treaty provisions: "compliance with Articles 52 and 59 of the Treaty [Articles 49 and 56 TFEU, MM] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services".[678]

Finally, it can be pointed at *Ferlini*, in which the question was asked whether the scales of hospital fees fixed unilaterally by the Luxemburg Hospital Group, a private body uniting the Luxembourg hospitals, contravened today's Articles 45 and 18 TFEU. After having dismissed the applicability of Article 45 TFEU, the CJEU held that the scales were discriminatory in nature and thus violated the general principle of non-discrimination enclosed in Article 18 TFEU. The fact that the scales were adopted by private actors again did not constitute a barrier for the Court. With reference to earlier case law on horizontal effect (among others *Walrave* and *Bosman*), it held that Article 18 TFEU "also applies in cases where a group or organisation […] exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty".[679] Strikingly, the Court does not repeat the line it established in earlier cases, in spite of the references to previous rulings. Rather, as Mataija notes, it reformulates its case law in strong terms: key importance was attached to the fact that

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[675] Case C-90/76 *S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI)* (1977) ECR 1091, para 28.

[676] Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* (1995) ECR I-492, paras 68-87.

[677] Article 45 TFEU: Case 176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* (2000) ECR I-2681; Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* (2010) ECR I-2177; Case C-379/09 *Maurits Casteels v British Airways plc.* (2011) ECR I-1379. Article 56 TFEU: Joined Cases C-51/96 and C-191/97 *Christelle Deliège* (2000) ECR I-2549.

[678] Case C-309/99 *J.C.J. Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* (2002) ECR I-1577, paras 120. Eventually, however, the Court did not assess the regulation, as possible restrictive effects were deemed *a priori* justified for the same reasons that justified the anticompetitive effect of the regulation (see para 122 of the judgment). I discuss the competition law element of this case in section 5.5.1.2.2.

[679] Case C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* (2000) ECR I-8081, para 50. On the relation between the general non-discrimination principle and free movement law, see Schepel 2012, pp. 189-190.

the private body could exercise *de facto* power over individuals and could thus intrude on the rights that they enjoyed under free movement law.[680] However, as this argument has never been repeated up until now, the actual significance of the judgment remains questionable.

In sum, after its kick off in *Walrave* the CJEU has settled the horizontal effect of Articles 45, 49 and 56 TFEU in relation to private collective regulation, which includes industry codes of conduct. Restrictive or discriminatory collective private rules relating to the provision of services, employment or establishment, fall within the scope of these Treaty provisions. Consequently, private actors can be held liable under EU free movement law when their collective rule-making activities adversely affect the exercise of the fundamental freedoms guaranteed by Articles 45 (workers), 49 (establishment) and 56 (services) TFEU.[681]

5.4.1.2 Private collective actions and individual private measures

The horizontal effect of the free movement provisions has not been limited to instances of discriminatory or restrictive collective private regulation, as some of the Court's more controversial case law shows.

In *Viking* and *Laval*, the CJEU declared Article 56 TFEU (*Laval*) and Article 49 TFEU (*Viking*) applicable to restrictive collective actions (blockades and a strike, respectively) used by trade unions to pressure an undertaking into signing a collective agreement.[682] In *Viking*, moreover, the Court stated that its previous case law on the horizontal applicability of free movement law provides no indication that "could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers".[683] On the face of it, this statement clearly suggests that free movement law catches all private action and that the Court does away with the *Walrave* line of case law. However, earlier on in its judgment, the CJEU did appear to tie in with a collective regulatory element that was present in the case by noting that "collective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking".[684] This left legal scholars puzzled and divided as to whether *Viking* was to be interpreted as a 'confirmation' or a deviation from *Walrave* and co.[685]

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[680] Mataija 2016, p. 35.

[681] See, e.g., Verbruggen 2014c, pp. 205-207; Karayigit 2011, p. 314; Opinion Advocate General Trstenjak in Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein* ECLI:EU:C:2012:176, para 34. See also Case 36/74 *Walrave*, para 17.

[682] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* (2007) ECR I-11767; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (2007) ECR I-10779.

[683] Case C-438/05 *Viking*, para 65.

[684] Case C-438/05 *Viking*, para 36.

[685] For a taste of the discussion, see, e.g., Chalmers, Davies & Monti 2010, pp. 801-802; Schepel 2012, p. 187, supporting the 'deviation' reading, and Heremans 2012, p. 130; Verbruggen 2014c, pp. 206-207 arguing that the 'confirmation' reading is correct.

Earlier, the CJEU had already extended the scope of Article 45 TFEU to discriminatory private actions in individual contractual relations. In its decision in *Angonese*, the Court ruled that the non-discrimination principle included in Article 45 TFEU applied to the requirement of an Italian private banking undertaking that job applicants should be in possession of a language certificate proving their proficiency in both German and Italian. It based this decision on two main arguments. First of all, the Court noted that the non-discrimination principle of Article 45 TFEU does not specifically address Member States, but is rather drafted in general terms. Thereupon, it relied on the *Walrave* formula to establish that the prohibition of discrimination applies to public as well as private collective regulations.[686] Secondly, the CJEU referred to the *Defrenne* case, where it had ruled that Article 157 TFEU, stipulating equal pay for men and women, applies to agreements regulating paid labor collectively and to individual contractual relations alike. Decisive in this respect was the mandatory nature of the article. It made no difference that this provision was addressed to Member States.[687] This argument was held *a fortiori* applicable to Article 45 TFEU as this provision, like Article 157 TFEU, constitutes a specific application of the general non-discrimination principle of Article 18 TFEU. Private actors are therefore also subject to Article 45 TFEU's prohibition to discriminate.[688] With regard to the freedom to provide services (Article 56 TFEU) *Haug-Adrion* must be mentioned. Till now, the Court has never repeated the grounds it gave in this isolated case, where it held that discriminatory contractual provisions drafted by private actors, in this case contractual conditions included in the general terms and conditions of a private insurance company, could interfere with the freedom to provide services (Article 56 TFEU).[689]

Thus, in certain instances, restrictive collective actions and discriminatory actions in individual contractual relations may also fall within the scope of free movement law, albeit that the body of case law from which this horizontal effect follows does not seem to be as firmly established as the one on private regulation. Going by the scholarly debates in legal literature on this point, the actual implications of the aforementioned rulings for the reach of free movement law are not entirely clear.[690]

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[686] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* (2000) ECR I-4139, paras 29-33.

[687] Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (1976) ECR 455, paras 31, 37 and 39.

[688] Case C-281/98 *Angonese*, paras 34-36. So far, *Angonese* has been confirmed in Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* (2008) ECR I-5939 and in Case C-172/11 *Georges Erny v Daimler AG - Werk Wörth* ECLI:EU:C:2012:399. In these rulings, it was reiterated that the prohibition of discrimination laid down in Article 45 TFEU "applies not only to the actions of public authorities, but also to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals" (*Erny*, para 36).

[689] In doing so, the Court *inter alia* referred to the fact that Article 56 TFEU forms a substantiation of the general non-discrimination principle ex Article 18 TFEU (cf. Case C-281/98 *Angonese*). See Case 251/83 *Eberhard Haug-Adrion v Frankfurter Versicherungs-AG* (1984) ECR 925, paras 14-18.

[690] See the discussion on *Viking*, *supra* n 685. Furthermore, it has been argued that *Ferlini*, *Haug Adrion* and *Raccanelli* did entail a collective, public element and hence do not imply that free movement law also applies to individual private (contractual) action. See, e.g., Davies 2012; Heremans 2012, p. 129; Prechal & De Vries 2009, pp. 15-16; Mataija 2016, p. 37, who however shows himself more hesitant as to the decisiveness of this element.

5.4.2 Free movement of goods (Articles 34 and 35 TFEU)

In its landmark decision in *Dassonville*, the CJEU ruled that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade" qualify as "measures having equivalent effect to quantitative restrictions" within the meaning of the rules on the free movement of goods.[691] With this judgment already hinting at the scope of free movement rules on goods being limited to Member States, it might not come as a surprise that the CJEU is said to have thus far refrained from applying these rules to private actors.[692] The Court has rejected the idea of horizontal effect on several occasions (section 5.4.2.1). This is however not to say that private action that impedes the free flow of goods between Member States never falls within the scope of Articles 34 and 35 TFEU (section 5.4.2.2). Some have even argued that the CJEU has begun to turn the tide in its recent *Fra.bo* judgment (section 5.4.2.3).

5.4.2.1 No horizontal effect

An important case situated early in the string of judgments on the horizontal applicability of the rules on the free movement of goods is *Vlaamse reisbureaus*. In this case, the Court held that "[Articles 34 and 35 TFEU, MM] concern only public measures and not the conduct of undertakings".[693] In *Süllhofer* the CJEU repeated that Articles 34 et seq. TFEU seek to ensure the free movement of goods and, to that end, pursue the elimination of Member State measures that form an obstacle in this respect. It added that agreements between undertakings fall within the scope of competition law, which seeks to maintain effective competition.[694] The Court confirmed its previous rulings in *Sapod Audic*. After having established that the disputed requirement arose from a contract between private parties, the Court held that the requirement could, accordingly, not "be regarded as a barrier to trade for the purposes of Article 30 of the Treaty [Article 34 TFEU, MM], since it was not imposed by a Member State but agreed between individuals".[695]

These decisions of the Court have founded the prevailing view in legal doctrine that free movement law in the field of goods lacks direct horizontal effect.[696] Private actions cannot be disciplined under this part of the Treaty, notwithstanding the fact that States and private actors

[691] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* (1974) ECR 837, para 5.
[692] See, e.g., Cherednychenko 2006, pp. 37-38; Oliver & Enchelmaier 2007, pp. 661-663; Van den Bogaert 2002, p. 133 and, while criticizing the approach of the Court, Verbruggen 2014c, pp. 207-213; Krenn 2012. A different position towards the difference between goods and the other freedoms is taken by Mataija 2016, pp. 41-42; Milner-Moore 1995, p. 5 and Davies 2012, p. 824, all arguing that this difference is not as strong as the aforementioned traditional positions suggest.
[693] Case 311/85 *VZW Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (1987) ECR 3801, para 30.
[694] Case 65/86 *Bayer v Süllhofer* (1988) ECR 5249, para 11. See also Joined cases C-177/82 and C-178/82 *Van de Haar*, paras 11-14.
[695] Case C-159/00 *Sapod Audic v Eco-Emballages SA* (2002) ECR I-5031, para 74.
[696] Oliver & Enchelmaier 2007, pp. 661-663; Hartkamp 2010, pp. 538-539; Oliver & Roth 2004, pp. 422-423; Van Harten & Nauta 2013, pp. 678-680; Verbruggen 2014c, pp. 207-208. The rejection of the horizontal applicability of Articles 34 and 35 TFEU has not always been that clear. See Krenn 2012, pp. 179-181 and Milner-Moore 1995, pp. 6-8 on earlier cases concerning intellectual property rights and unfair competition.

can be well-matched when it comes to creating obstacles to the free movement of goods. The rationale behind the Court's approach at this point has been said to lay in the fact that, as the CJEU pointed out itself in *Süllhofer*, private agreements that create such obstacles can be assessed under competition law (Articles 101 and 102 TFEU), which thus appears to function as a safety net in this respect.[697] Again, however, case law has not been entirely unequivocal, as the *Dansk Supermarked* case illustrates. Here, the Court considered that "it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods".[698] Although this statement may be interpreted as lending horizontal effect to the rules on the free movement of goods,[699] the general perception is that it is an isolated statement that the Court has "scrupulously ignored" in its later case law.[700]

5.4.2.2 Private action covered by Article 34 TFEU: State responsibility and state involvement

However, as Verbruggen points out, some nuance should be put on the claim that all private restrictions fall outside the scope of Article 34 TFEU. Two situations can be distinguished in this respect.[701]

i. State responsibility

Spanish strawberries and *Schmidberger* represent the first situation. In these cases, the free movement of goods was restricted by French farmers blocking the border between France and Spain, and by an environmental protection organization that blocked the Brenner motorway for its protest, respectively. In its judgments, the Court brought to the table the principle of Community loyalty, enshrined in Article 4(3) TEU, which, in combination with Article 34 TFEU, requires Member States "to take all necessary and appropriate measures to ensure that that fundamental freedom [i.e., free movement of goods, MM] is respected on their territory".[702] As France and Austria failed to take adequate measures to remove the aforementioned 'physical' obstacles, given the circumstances of the case, they were, accordingly held responsible for the restrictive private actions.[703] Although it was the eventual inaction on the side of the Member States that was held contrary to the free movement

[697] Oliver & Enchelmaier 2007, pp. 661-663; Prechal & De Vries 2009, p. 18; Verbruggen 2014c, p. 208. Krenn 2012, p. 182 states that the fact that the CJEU draws a clear contrast between both fields of law "suggests that it considers the latter [i.e., competition law, MM] as the systematic counterpart of Article 34 TFEU for private actors". See also Van den Bogaert 2002, p. 140. Critical of the said rationale behind the Court's approach are Schepel 2012, pp. 179-180; Hartkamp 2010, pp. 539-540; Karayigit 2011, pp. 329-335; Verbruggen 2014c, pp. 210-213; Dawes 2009. The Court's stance is welcomed by Oliver & Enchelmaier 2007, pp. 662-664, even though they do not rule out the possibility that the *Walrave* line of case law is transposed to the field of goods.
[698] Case 58/80 *Dansk Supermarked A/S v A/S Imerco* (1981) ECR 181, para 17; Mataija 2016, pp. 38-39.
[699] Opinion Advocate General Geelhoed in Case C-253/00 *Muñoz v Frumar* (2002) ECR I-7289, para 44.
[700] Sauter & Schepel 2009, p. 99, footnote 8. See also Schepel 2012, p. 179; Oliver & Enchelmaier 2007, pp. 661-663; Van den Bogaert 2002, pp. 130-131.
[701] Verbruggen 2014c, pp. 208-209.
[702] Case C-265/95 *Commission v France ('Spanish strawberries')* (1997) ECR I-6959, para 32; reiterated in Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (2003) ECR I-5659, para 59.
[703] Verbruggen 2014c, pp. 209-210; Schepel 2005, pp. 45-46.

provisions,[704] the judgments make clear that "the actions of private individuals can, under certain conditions, be measured against an obligation on the Member States to protect the guarantees of the fundamental freedoms and so, indirectly, against those fundamental freedoms".[705] However, neither case has altered the prevailing opinion in legal doctrine, namely that the free movement provisions on goods do not discipline private activities.[706]

ii. Private action with a strong public element

The second situation arises when the activities that constitute an obstacle to the free movement of goods are undertaken by a private law body that is, in one way or another, linked to the State. Faced with the question whether free movement law applied to the activities of such semi-private or semi-public bodies, the Court responded through a broad interpretation of the concept of 'Member State'.[707] The decisive criterion in extending this concept so as to capture the aforementioned types of private bodies is the degree of State influence. If this influence is 'considerable', then the activities of the private bodies can constitute a 'State measure' for the purposes of Articles 34 and 35 TFEU.[708] In several instances, applying this yardstick, the CJEU scrutinized the activities of both organizations directly or indirectly controlled by the State and professional bodies on which the State has conferred regulatory power.[709]

An example of a case concerning the first type of organizations is *Buy Irish*, where the activities of a private law body were brought within the scope of Article 34 TFEU. This was because the Irish government had appointed the board of directors of the body, subsidized its activities, and set out the aims and broad outline of the campaigns conducted by the body.[710] The Court proceeded in a similar fashion in the cases of *Apple and Pear Development Council* and *Commission v Germany*. Here, the 'considerable degree of State influence' was reflected in the fact that the private law bodies concerned were established by the State (through a ministerial decision and the law, respectively), which had also conferred regulatory

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[704] Hartkamp 2010, pp. 535, 541; Shuibhne 2012, p. 367.
[705] Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, para 31. Hartkamp 2010, p. 535 marks these cases as instances of indirect horizontal effect. Similarly, Karayigit 2011, p. 328; Dawes 2009, p. 647.
[706] Sauter & Schepel 2009, p. 99, state, with reference to other examples, that "these cases result in not a great deal more than some tinkering at the margins".
[707] Verbruggen 2014c, p. 209; Snell 2002, pp. 218-219. See also Sauter & Schepel 2009, pp. 43-45; Mataija 2016, pp. 32-34; Heremans 2012, pp. 123-125.
[708] Sauter & Schepel 2009, p. 45. This implies that the notion of 'Member State' "does in general not apply to 'purely' private measures, i.e. measures taken by private individuals or companies" (Guide to the application of Treaty provisions governing the free movement of goods (2010) of the European Commission, p. 10, available at <http://ec.europa.eu/DocsRoom/documents/104/attachments/1/translations/en/renditions/pdf>, accessed 1 July 2016). At the same time, "a person or institution need not be formally classified as exercising official authority or be a public body for the measures taken by that person or institution to be classified as an action taken by a Member State, to which the fundamental freedoms apply" (Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, para 29).
[709] This distinction is drawn in the Guide to the application of Treaty provisions governing the free movement of goods (2010) of the European Commission, p. 10 and by Advocate General Trstenjak her Opinion in *Fra.bo*, ECLI:EU:C:2012:176, para 29. See also Snell 2002, pp. 220-221; Heremans 2012, pp. 124-125.
[710] Case 249/81 *Commission v Ireland ('Buy Irish')* (1982) ECR 4005, para 15, 23-28.

authority upon these bodies.[711] Furthermore, the Court held in *Hennen Olie* that measures taken by a body that, although formally not part of the State administration, is to a significant extent controlled and directed by public authorities, constituted a State measure within the meaning of Article 35 TFEU.[712] It likewise subjected the professional rules of conduct to judicial scrutiny under the free movement rules. In *Royal Pharmaceutical Society* and *Hünermund*, more specifically, it was held that "measures adopted by a professional body on which national legislation has conferred powers", such as enacting rules of professional conduct and imposing disciplinary sanctions, indeed qualify as a measure under Article 34 TFEU when capable of affecting cross-border trade.[713] Both disputes were caused by rules of professional conduct of a pharmacist' association, which were eventually found to fall within the scope of Article 34 TFEU. In *Royal Pharmaceutical Society*, which involved a private law association recognized by legislation, the Court took account of the association's regulatory powers, of the fact that it held a monopoly in granting access to the profession of pharmacist and of the fact that the Society statutorily enjoyed broad disciplinary powers. In *Hünermund*, the public law association in question enjoyed similar powers, with the exception of the power to impose the sanction of exclusion from the profession. This however did not stop the CJEU from bringing its rules within the ambit of Article 34 TFEU.[714]

Thus, through an extensive interpretation of the term 'Member State', the CJEU has brought semi-private bodies and their (regulatory) activities within the orbit of the rules on the free movement of goods. The mere fact that such bodies are of a private law nature or have private law features does not *per se* rule out the application of these rules, provided that the level of State involvement is considerable.[715] However, no strict set of criteria defines said level of involvement by the State. Rather, as Sauter and Schepel indicate, the CJEU has approached the matter by simply accumulating "as much evidence as possible concerning the State's involvement in the creation, financing and regulation of the organisations in question",[716] without establishing the weight of the formal and factual criteria it uses.[717] If the required, considerable threshold of State involvement is met, the activities performed by the semi-private body are considered State measures and attributed to the State. Conversely, when the necessary link with the State is missing or not significant enough to meet the Court's

[711] Case 222/82 *Apple and Pear Development Council v K.J. Lewis and others* (1983) ECR 4083; Case C-325/00 *Commission v Germany* (2002) ECR I-9977. Cf. Sauter & Schepel 2009, p. 44; Mataija 2016, pp. 32-33.
[712] Case C-302/88 *Hennen Olie BV v Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten and State of the Netherlands* (1990) ECR I-4625, paras 13-15.
[713] Joined cases C-266/87 and C-267/87 *The Queen v Royal Pharamaceutical Society of Great Britain* (1989) ECR 1295, para 13-16 (quotation para 13); Case C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg* (1993) ECR I-6787, paras 12-16 (quotation para 15).
[714] Schepel & Sauter 2009, pp. 44-45; Heremans 2012, pp. 124-125; Schepel 2005, p. 43. See also Joined cases C-266/87 and C-267/87 *Royal Pharamaceutical Society*, para 16; Case C-292/92 *Hünermund*, paras 14-16.
[715] Sauter & Schepel 2009, p. 45; Chalmers, Davies & Monti 2010, p. 758 ("the link between state and organisation [should be, MM] demonstrably real"); Snell 2002, pp. 219-221.
[716] Sauter & Schepel 2009, p. 44. See also Schepel 2005, pp. 42-44; Verbruggen 2014c, p. 209; Snell 2002, p. 220.
[717] Schepel 2005, p. 43. Heremans 2012, pp. 125, 131 deduces from the Court's case law that decisive indicators of the 'public nature' of the private law body are the presence of some degree of public law recognition of the body and whether the body holds certain (delegated) disciplinary and/or regulatory powers.

threshold, these activities continue to fall outside the reach of Articles 34 and 35 TFEU.[718] Thus using the technique of extensive interpretation, the Court has, as Heremans notes, in effect kept within the confines of the personal scope of these Treaty provisions, not attempting to horizontally expand the scope of these Treaty provisions in the sense that they can be applied directly to semi-private bodies.[719]

5.4.2.3 Fra.bo

This conclusion brings us to the case that marks the most recent development in the field of the free movement of goods: *Fra.bo*. The dispute in *Fra.bo* was caused by the decision of a German private law certification body (DVGW) to withdraw, and subsequently refuse extension of, the certificate for the copper fittings manufactured and sold by Fra.bo, an Italian company. Yet, certification by an accredited certifying body was required under German law when bringing products to the German market. The DVGW played a pivotal role in this respect as German law attributed a presumption of conformity to the certificates that it issued: products certified by this organization were presumed to comply with the legal requirements of German product safety legislation. Against this backdrop, Fra.bo claimed that the decision of DVGW constituted a violation of the Treaty provisions on the free movement of goods, referring among other things to the presumption of conformity which, according to Fra.bo, rendered the distribution of its products in Germany without a DVGW certificate virtually impossible. DVGW objected it was not bound by Articles 34 et seq. TFEU given its private law nature.[720]

In the first part of its judgment, the Court establishes that DVGW is a non-profit, private law body and that there are no indications of considerable State involvement with the DVGW: the German government neither financed its activities, nor did it have power to exert decisive influence over these activities.[721] Accordingly, the matter for the CJEU to decide was "whether, in the light of inter alia the legislative and regulatory context in which it operates, the activities of a private-law body such as the DVGW has the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State".[722] The Court answered this question in the affirmative: the certification activities of the DVGW did indeed have such effect. In doing so, it first of all pointed at the fact that German law provides that the certificates DVGW issued grant a presumption of compliance to the certified products. Secondly, the Court noted that the required certificate could in fact only be issued by DVGW. The argument of DVGW and the German government that an alternative certification procedure existed was dismissed: this procedure was considered too burdensome and too costly to constitute a viable alternative. Thirdly, the CJEU took account

[718] Karayigit 2011, p. 328; Krenn 2012, p. 201; Mataija 2016, pp. 32, 34; Verbruggen 2014c, p. 209; Heremans 2012, p. 125.
[719] Heremans 2012, pp. 125, 138.
[720] Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein* (2012) ECLI:EU:C:2012:453, paras 3-14, 28. This case has a Dutch 'equivalent': the *Knooble* case, which is discussed in Chapter 6, section 6.4.1.3.
[721] Case C-171/11 *Fra.bo*, paras 21-24. Cf. the case law discussed above, under 5.4.2.2.
[722] Case C-171/11 *Fra.bo*, para 26.

of the view of the referring court that the lack of a DVGW certificate in practice considerably restricts the marketing of the products in question on the German market.[723] All this led the Court to conclude that "in such circumstances, it is clear that a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings".[724] Accordingly, the certification activities of DVGW were found to fall within the scope of the Treaty: "Article 28 EC [Article 34 TFEU, MM] must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body".[725]

By thus framing its decision in rather context-specific terms, the CJEU seem to have carefully moved around the issue of horizontal effect. Unlike the Advocate General,[726] the Court, strikingly, neither mentioned the concept itself, nor referred to *Walrave* and progeny which have brought collective private regulation within the scope of the rules on free movement of persons, establishment and services. Rather, it explicitly focused on the effect and functioning of the German certification body in the applicable regulatory and legislative context.[727] Be that as it may, the net result of the Court's ruling is that the personal scope of Article 34 TFEU can under certain circumstances be extended to private law bodies that are in a different position than the bodies featuring the case law discussed in the previous subsection.[728] And it is precisely at this point that the *Fra.bo* judgment distinguishes itself from earlier case law in the field of the free flow of goods. Whereas the Court has previously held that private activities are only caught by Articles 34 to 36 TFEU - in the guise of a 'State measure' - insofar as a considerable level of State involvement did take place, this was not a necessary condition in the current judgment. In fact, the Court explicitly established that no such involvement was present in *Fra.bo.* Instead, the CJEU has focused on the *de facto* power of the body to take regulatory decisions that may restrict market access, "in the same manner

[723] Case C-171/11 *Fra.bo*, paras 26-30. As regards the third 'circumstance', the Court added that although the legal regulation from which it followed that only products "supplied in accordance with the recognised rules of technology" may be used "merely lays down the general sales conditions as between water supply undertakings and their customers, from which the parties are free to depart, it is apparent from the case-file that, in practice, almost all German consumers purchase copper fittings certified by the DVGW" (para 30).

[724] Case C-171/11 *Fra.bo*, para 31.

[725] Case C-171/11 *Fra.bo*, para 32.

[726] Advocate General Trstenjak explicitly fits the facts of the case within the framework of horizontal direct effect. Considering that DVGW had the *de facto* competence to determine, through its activities, which products could enter the German market, Trstenjak concludes that the activities of DVGW fell within the ambit of the rules on the free movement of goods. In her view, an extension of the scope of the free movement rules to private law associations with *de facto* rulemaking competence does not give rise to fundamental objections. In fact, the main arguments for the horizontal applicability of Articles 45, 49 and 56 TFEU (see section 5.4.5 below) equally apply in the current case, Trstenjak argues. See Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, paras 42-50.

[727] Shuibhne 2012, p. 368; Van Harten & Nauta 2013, pp. 688-689; Van Harten & Nauta 2012, pp. 329, 332; Verbruggen 2014c, pp. 207-208; Schepel 2013a, pp. 189-190; Hoyer 2013, p. 342; Van Gestel & Micklitz 2013, pp. 158-160. Schepel explains this lack of references by arguing that the Court was in effect concerned with the legal regulation that encouraged DVGW certification, rather than with the activities of DVGW. See Schepel 2013a, pp. 190-191.

[728] Van Harten & Nauta 2013, p. 689; Van Gestel & Micklitz 2013, p. 159; Schepel 2013a, p. 188.

as do measures imposed by the State"[729].[730] In doing so, the Court stepped outside the 'formal' confines of Article 34 TFEU by directly applying the provision to the activities of DVGW. It is thus not without reason that several scholars have submitted that *Fra.bo* does represent the cutting-edge in the Court's case law on the scope of the rules on the free movement of goods, but in a nuanced and case-specific way.[731] And indeed, with *Fra.bo* the Court has widened the personal scope of Article 34 TFEU. However, as a corollary of its context-specific approach, it still has not unequivocally attributed horizontal effect to the rules on the free movement of goods.

5.4.3 Summary of the Court's case law in terms of types of private regulation

The case law of the CJEU discussed in the previous sections displays a contentious distinction between the free movement rules on workers, establishment and services on the one hand and those on the free movement of goods on the other. Whereas the horizontality of the provisions concerning the first category of freedoms is settled case law,[732] the latter category is commonly said to be denied this effect, albeit that the CJEU might have slightly changed course in this respect with its ruling on *Fra.bo*. This is however not the only distinction that the Court has drawn in its case law. Also within these two categories, the approach of the Court, which has to be deduced from a tangle of cases, varies. It is therefore with good reason that Krenn has labeled the Court's theory on the horizontal applicability of free movement law "a jigsaw puzzle".[733] With a view to the topic of this doctoral thesis, it is worthwhile to put the pieces of this puzzle together following the overview drawn up by Mataija, who has categorized the Court's case law on the basis of its regulatory nature.[734] Besides the category of purely private relationships, comprising *Angonese*, *Raccanelli*, and *Haug Adrion* (all concerning discriminatory private action), the following two regulatory categories can be distinguished for the purposes of this doctoral thesis.[735] Industry codes of conduct can fall

[729] Case C-171/11 *Fra.bo*, para 26. Schepel argues, with a view to the fact that the wordings used in the different language versions of the judgments differ, that the meaning of the phrase quoted should not be taken so far as to apply Articles 34 to 36 TFEU to any private action that restricts the free movement of goods in a way similar to State measures. He deems this interpretation "highly unlikely". See Schepel 2013a, pp. 188-189. It seems as if this phrase has led Van Gestel and Micklitz to argue that the Court has stressed the quasi-statutory nature of DVGW, thus avoiding the thorny question on the horizontal applicability of Articles 34 et seq. TFEU. See Van Gestel & Micklitz 2013, pp. 159-160.

[730] Van Gestel & Micklitz 2013, pp. 159-160; Van Harten & Nauta 2013, pp. 688-690; Van Harten & Nauta 2012, p. 334; Shuibne 2012, p. 368; Mataija 2016, pp. 41, 247. Cf. Case C-171/11 *Fra.bo*, para 26.

[731] E.g., Van Harten & Nauta 2013; Shuibhne 2012; Van Gestel & Micklitz 2013; Mataija 2016, pp. 41-42; De Vries & Van Mastrigt 2013, pp. 262-263. Hoyer 2013, p. 342, by contrast, has less trouble concluding that with *Fra.bo*, the CJEU has established the horizontal applicability of Article 34 TFEU in general.

[732] Likewise, the Court has held that Articles 18 (*Ferlini*) and 157 (*Defrenne*) TFEU can be applied to private action.

[733] Krenn 2012, p. 178.

[734] Mataija 2016, pp. 52-62, with the remark that the distinctions between the categories "are not watertight and should be seen as heuristic devices only" (at p. 32).

[735] Mataija distinguishes a fourth category, within which *Dansk Supermarked* falls: private action based on restrictive legislation. According to Mataija, this is a rather specific category as in the cases falling within this category the Court has not, unlike in the cases in the other categories, imposed obligations on private actors under free movement law. Rather, it prevents private parties in question from relying on the rights ensuing from

within either of the two categories, depending on whether public authorities have been involved with the code (co-regulation) or not.

The first category is formed by co-regulatory schemes, such as the ones at dispute in *Buy Irish, Apple and Pear Development Council, Commission v. Germany, Royal Pharmaceutical Society* and *Hünermund*. Here, the involvement of the State with the regulatory regimes operated by private regulators has proven of pivotal relevance under the Treaty provisions concerning the free movement of goods. For, under these provisions the private nature of a measure has been reason for the Court to refrain from free movement scrutiny. If, by contrast, an explicit and considerable link can be established between the State and a private regulatory body, the Court has shown willing to stretch the reach of Articles 34 and 35 TFEU on the basis of a broad interpretation of the notion of 'Member State'.[736] In *Fra.bo*, the CJEU went down a different route, directly subjecting a private law regulatory body to the rules on the free movement of goods, that is to say, without fitting it into the straitjacket of a 'Member State'. What matters here is whether this body, in view of *inter alia* the legislative context in which it operates, in practice holds the regulatory power to restrict market access through its measures.[737]

The second category comprises instances of purely private regulation or self-regulation, where the State is either absent or does not play a decisive role.[738] It follows from *Walrave* and related judgments that discriminatory as well as non-discriminatory, restrictive private rules can fall within the scope of Articles 45, 49 and 56 TFEU when they are aimed at collectively regulating issues pertaining to employment, establishment or the provision of services. The source of the rules, private or otherwise, is irrelevant in this respect.[739]

5.4.4 Justification defenses

A public or private measure that falls within the personal scope of the free movement rules and involves a cross-border element only falls foul of said rules when it restricts a fundamental freedom. Simplified and broadly speaking, there is a 'restriction' within the meaning of the Treaty when a measure is either discriminatory or "is capable of hindering or rendering less attractive the exercise of the fundamental freedoms guaranteed by the Treaties"[740].[741] States can rely upon several justification defenses to legitimize their *prima facie* restrictive measures. A necessary condition for a successful invocation of these defenses is that the measure at issue passes the proportionality test.[742] Which defenses can be relied

legislation that restricts free movement. See Mataija 2016, pp. 38-39. On purely private relationships: Mataija 2016, pp. 36-38.

[736] Mataija 2016, pp. 32-34, stating that this link "is the reason why horizontal direct effect in this group of cases has traditionally been the easiest to accept" (at p. 32).

[737] See in this respect Case C-171/11 *Fra.bo*, paras 26 and 31.

[738] Mataija 2016, p. 34.

[739] Mataija 2016, pp. 34-36.

[740] Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, para 36.

[741] For a more detailed account, see, e.g., Barnard 2013 pp. 71-107 (goods) and 234-270 (other freedoms).

[742] This test consists of two prongs: an assessment of the suitability of the measure to reach the goals set and an assessment as to whether the measure is the least restrictive means that can be employed in this respect. See Heremans 2012, p. 169, with further references.

upon depends on the nature of the restriction. When discriminatory measures are concerned, States can only benefit from the written grounds of justification listed by the free movement provision in question. In case of non-discriminatory restrictive measures, States can also rely upon these written grounds, but can alternatively seek recourse to the open-ended category of unwritten justifications formulated by the CJEU.[743] For the latter to succeed, the measures in question have to meet the following four conditions: "they must be applied in a nondiscriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".[744]

With a view to the horizontal effect of the free movement provisions, the question arises whether private actors whose measures qualify as barriers to free movement can equally seek recourse to these written and unwritten justification defenses. At first sight, it appears rather unlikely that this question is to be answered in the affirmative, since these defenses have been developed to justify the conduct of Member States.[745] But then again, the fact that the free movement provisions have originally been drafted to cover Member State conduct has not withheld the CJEU from extending the scope of these provisions to private conduct. The Court shed light on the matter in its ruling in the *Bosman* case, from which it follows that private actors can rely on the justifications listed in the Treaty as well as on the unwritten justification defenses.[746]

As several legal scholars have pointed out, since both types of justification require a link between the conduct in question and the public interest,[747] we can question whether private actors will be able to successfully invoke them as a defense. After all, private actors generally pursue objectives related to their own private interests, rather than to the public interest.[748]

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[743] Asser/Hartkamp *3-I* 2015/64; Schepel 2013b, pp. 1215-1216.

[744] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (1995) ECR I-4165, para 37. The origins of this rule of reason exceptions lie in the field of the free movement of goods, where the Court in *Cassis de Dijon* spoke of "mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer". See Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979) ECR 649, para 8. The exceptions include general interests of a non-economic nature, such as consumer protection, environmental protection, protection of culture, the improvement of working conditions and protection of the plurality of the media. See Asser/Hartkamp *3-I* 2015/64; Roth & Oliver 2004, p. 435, with references to the Court's case law.

[745] Asser/Hartkamp *3-I* 2015/64; Hartkamp 2010, p. 547; Cherednychenko 2006, p. 42; Oliver & Roth 2004, p. 427; Snell 2002, pp. 231-232; Heremans 2012, pp. 142-143.

[746] More specifically, the Court held that "there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question" (Case C-415/93 *Bosman*, para 86, repeated in Case C-350/96 *Clean Car Autoservice GesmbH v Landeshauptmann von Wien* (1998) ECR I-2521, para 24). In *Bosman* itself, unwritten justifications were invoked (see paras 105-114 of the judgment). See also Schepel 2013b, pp. 1215-1216; Mataija 2016, pp. 61-62.

[747] In fact, the CJEU has ruled that grounds of an economic nature cannot be accepted as 'imperative requirements in the general interest' that justify the restriction of a fundamental freedom. See Case C-260/04 *Commission v Italy* (2005) ECR-I 7083, para 35.

[748] See, e.g., Cherednychenko 2006, pp. 42-43; Schepel 2013b, pp. 1215-1216; Hartkamp 2010, pp. 547-548; Roth & Oliver 2004, p. 429; Snell 2002, pp. 231-232; Van Leuken 2015, pp. 165-168. See also Schepel 2012, p. 196. Cf. on the official authority exception of Articles 51 and 62 TFEU, Case 2/74 *Reyners v Belgium* (1974) ECR 631, where CJEU interpreted this exception very strictly and held that "the most typical activities" of lawyers "cannot be considered as connected with the exercise of official authority" (para 52). With respect to

However, where collective private regulation is concerned, it is not inconceivable that public interest goals are pursued (cf. the functions identified in Chapter 3). This would allow the private regulator to benefit from the written or unwritten justification defenses.[749] In fact, Schepel submits, the CJEU has shown itself rather generous in this regard and has accepted different 'public interest defenses' to justify restrictive private regulations.[750] Mataija even suggests that the CJEU tends to take a more deferential stance towards private regulators; the Court has allowed them to justify restrictions that Member States would not have been able to justify.[751] Van Leuken, on the other hand, states that the deference shown by the Court at this point has not led to a substantial 'private law' expansion of the grounds of justification.[752]

Against this backdrop, the Court's decision to permit private regulators to benefit (solely) from the existing 'public interest justifications' has given rise to scholarly pleas for the creation of new avenues for justification, tailored to the private (law) nature of the measures concerned.[753] In her Opinion in *Fra.bo*, Advocate General Trstenjak suggests that private regulators might invoke grounds of justification other than the prevalent written and unwritten grounds and advances three alternative justification defenses.[754] First of all, a private regulator might argue that the restrictive effects of its regulatory scheme are justified on the basis of 'special grounds in the private interest'. The CJEU has shown itself receptive to such pleas in previous cases, provided that the principle of proportionality was met.[755] Secondly, there is the notion of 'objective factors', to which the CJEU has referred in *Angonese*. In this case, the Court held that the restriction of the free movement of workers by private individuals "could

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notaries, see, e.g., Case C-47/08 *European Commission v Belgium* (2011) ECR I- 4105. On these rulings, see Heremans 2012, pp. 158-164.

[749] Schepel 2013b, p. 1216; Schepel 2012, p. 197; Krenn 2012, p. 212.

[750] Schepel 2013b, p. 1216 and Schepel 2012, p. 197, footnote 125. See also Mataija 2016, pp. 61-62.

[751] Mataija 2016, pp. 61-66.

[752] Van Leuken 2015, pp. 168-171.

[753] See for instance Hartkamp 2010, pp. 547-548; Schepel 2012, pp. 197-199; Schepel 2013b. Roth & Oliver 2004, pp. 427-429 advocate that an entirely different approach to the horizontal effect issue is needed. The fact that private actors cannot put up the principle of private autonomy as a shield against liability under free movement law is considered particularly troublesome in this respect (see, e.g., Cherednychenko 2006, pp. 41-43; Roth & Oliver 2004, pp. 423, 427). At the same time, however, as Van Leuken (2015, p. 165) indicates, the practical relevance of the horizontal effect of free movement law would cease to exist if the principle of party autonomy could *a priori* justify infringements of the free movement rules. In the same vein, Cherednychenko points out that in order to attain the objective of free movement law, i.e., the protection and furthering of private autonomy with a cross-border element, a certain restriction of private autonomy through horizontal effect is necessary. Accordingly, the problem does not so much lie in the restriction of private autonomy per se, but rather in the "unlimited binding effect of the fundamental freedoms on private parties" which results from the limitation of the justifications to 'public interest one', Cherednychenko argues (2006, pp. 41-43). Mataija at this point coins the concept of 'regulatory autonomy', which "involves deferring to private regulators by granting them a wide margin of discretion […] to pursue a legitimate policy by means of their own choosing". The granting of such autonomy however comes at the expense of the private autonomy argument losing force at the justification stage (Mataija 2016, p. 63). Cf. also Mataija 2016, pp. 48-50 and Krenn 2012, pp. 213-214.

[754] Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, paras 38, 56 and 57. On the three routes, see also De Vries & Van Mastrigt 2013, pp. 270-272 and Van Harten & Nauta 2012, pp. 334-335.

[755] Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, para 38 and footnote 26, with reference to Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* (2010) ECR I-2177 and Case C-415/93 *Bosman*. In the former case, the encouragement of the recruitment and training of young football players was considered a legitimate objective of the restrictive private rule (see para 37 of the judgment). In the latter case, the Court accepted as legitimate the "aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players" (para 106).

be justified only if it were based on objective factors unrelated to the nationality of the persons concerned and if it were in proportion to the aim legitimately pursued".[756] However, Trstenjak concedes, it remains unclear whether this justification also applies to collective private regulation restricting free movement.[757] Thirdly, a private regulator might, given its private law nature, seek recourse to the fundamental rights protected by the EU Charter of Fundamental rights. In applying the principle of proportionality, a fair balance would have to be struck between free movement law and these fundamental rights, Trstenjak points out. A private regulator attempting to evade liability under the free movement rules would thus have to provide evidence that there is a clash between these rules and one or more fundamental rights in its particular case.[758] At present, all this is however for a large part still in the future; it remains to be seen whether the CJEU will actually show itself willing to go down these paths.[759]

5.4.5 The approach of the CJEU

As was already noted at the outset of this chapter, free movement law is formally intended to cover the actions of Member States, while private action falls within the scope of the rules on competition. Practice has challenged this traditional public-private divide through private regulation and regulatory hybrids, and therewith induced the CJEU to decide upon the boundaries of this divide. If the conventional division between the public and the private sphere of the Treaty would be taken as a starting point in this respect, the nature of the actor performing the contested activities (public or private) would function as an entry criterion for judicial scrutiny under free movement law (and competition law). Given the private or semi-private nature of the actors that featured in the case law discussed above, this criterion arguably would have led the CJEU to an *a priori* rejection of judicial scrutiny of the activities of these actors in the vast majority of cases, because of the private or semi-private nature of the parties in question. Indeed, in the context of the free movement of goods the CJEU has clung on quite firmly to this formal approach, with only the recent *Fra.bo* ruling displaying a cautious move in a different direction. In the field of workers, services and establishment, by contrast, the CJEU went down another route, gradually evolving its case law along the lines of the developments in practice.[760] But how exactly did the CJEU go about the free movement cases concerning *private regulation*?

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[756] Case C-281/98 *Angonese*, para 42.
[757] Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, paras 39, 56.
[758] Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, para 56. Cf. Krenn 2012, pp. 212-123, pointing at *Schmidberger* (freedom of expression and freedom of assembly), and *Viking* and *Laval* (right of collective action). For a more extensive discussion, see Van Leuken 2015, pp. 171-197.
[759] Van Harten & Nauta 2012, pp. 334-335. As Hartkamp notes, the Court usually only establishes the horizontal effect of the free movement rules in respect of the private measure concerned, without expressing its opinion on the consequences. It seems that the Court considers this to be a matter for national law, Hartkamp indicates. However, it is clear that a violation of EU free movement law can lead to nullity of a private measure. See Asser/Hartkamp *3-I* 2015/61.
[760] Mataija 2016, pp. 5-12, 18-19, 27-31; Semmelmann 2012, p. 55; Sauter & Schepel 2009, pp. 2, 22-25; Hatzopoulos 2013, p. 467.

i. Workers, establishment and services

Case law shows that the reasons are threefold for attributing horizontal effect to Articles 45, 49 and 56 TFEU.[761] The first reason pertains to the effectiveness or *effet utile* of EU law. Considering that private measures can also raise an obstacle to free movement, the CJEU has pointed out that free movement law would fail to reach its objective of market integration by removing barriers to the free movement of workers, establishment and services, if the reach of Articles 45, 49 and 56 TFEU would be limited to impediments to the fundamental freedoms caused by Member States.[762] Put differently, the aforementioned Treaty provisions would fail to reach full effect when States would be prohibited from obstructing free movement, while equally restrictive private measures would be allowed.[763] The second rationale behind the horizontal applicability of this part of free movement law lies in the uniform application of Community law.[764] Whereas some Member States employ legislation or other forms of public regulation to govern issues related to cross-border workers, services and establishment, other Member States leave this to private actors. Accordingly, a limitation of the prohibition to impede free movement to acts of public actors would lead to the risk of creating inequality in the application of free movement law.[765] The third reason is formed by the general wording of Articles 45, 49 and 56 TFEU, which neither refer to nor exclude private actors.[766] In fact, these provisions lack a specific addressee.[767] With respect to Article 56 TFEU, more specifically, the Court has indicated that its wordings are general in nature and that as such, it does not draw a distinction between public or private restrictions.[768] In a similar vein, it held that the non-discrimination principle enshrined in Article 45 TFEU "is worded in general terms and is not addressed specifically to the Member States or to bodies governed by public law".[769]

These three rationales reflect the concern that the aim of removing barriers to free movement law and the ultimate goal of creating an internal market (cf. Article 3(3) TEU) could be undermined if restrictive or discriminatory private actions would fall outside the scope of free movement law. This has led the Court to gear its approach towards this goal,

[761] Karayigit 2011, pp. 317-318 additionally refers to the mandatory nature of the fundamental freedoms. De Vries & Van Mastrigt 2013, pp. 264-266 likewise mention this argument and also refer to the power that private organizations can exercise over other individuals. Schepel 2004, p. 664 shows himself more wary of the idea of the mandatory nature of the Treaty provisions as an argument for their horizontal applicability.

[762] Case 36/74 *Walrave*, para 18. See also Sauter & Schepel 2009, p. 101; Mataija 2016, p. 29; Karayigit 2011, p. 318; Van Leuken 2015, pp. 110-114. The Court has repeated this argument on several occasions, see, e.g., Case C-415/93 *Bosman*, para 83; Case C-309/99 *Wouters*, para 120; Case C-281/98 *Angonese*, para 32; Case C-94/07 *Raccanelli*, para 44; Case C-341/05 *Laval*, para 98; Case C-438/05 *Viking*, para 57.

[763] De Vries & Van Mastrigt 2013, p. 264; Karayigit 2011, p. 318; Prechal & De Vries 2009, pp. 13-14.

[764] Karayigit 2011, pp. 320-322; Caro de Sousa 2013, p. 483.

[765] Case 36/74 *Walrave*, para 19, reiterated by the Court in Case C-415/93 *Bosman*, para 84; Case C-281/98 *Angonese*, para 33; Case C-438/05 *Viking*, para 34. Mataija refers to this as the 'anti-circumvention argument': Member States are not allowed to circumvent the application of free movement law by delegating its activities to private actors (Mataija 2016, p. 29).

[766] Karayigit 2011, pp. 317-318; Caro de Sousa 2013, p. 483; Van Leuken 2015, p. 109.

[767] Van Leuken 2015, p. 109.

[768] See Case 36/74 *Walrave*, para 20.

[769] Case C-94/07 *Raccanelli*, para 42. See also Case C-281/98 *Angonese*, para 30. In the latter case, the CJEU also referred to the fact, as established in *Defrenne* in relation to Article 157 TFEU, that "certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down" (*Defrenne*, para 31).

rather than to follow the traditional interpretation of free movement law as encompassing the public sphere only. Building on the aforementioned rationales, the CJEU has extended the scope of free movement law to restrictive and discriminatory instances of private collective regulation (Articles 45, 49 and 56 TFEU), discriminatory actions in contractual relations (Article 45 TFEU) and restrictive collective actions (Articles 49 and 56 TFEU). As already follows from the foregoing, the Court's reference point in attributing horizontal effect to these Treaty provisions has not been the nature of the source of the contested measure. Rather, the Court has adopted an approach that has been labeled in legal literature as 'functional'.[770] That is to say that it first and foremost looks beyond the formal legal status of the actor in question to the contested measure itself and assesses whether this measure constitutes a restriction of a fundamental freedom or whether it violates the non-discrimination principle.[771] As Prechal and De Vries submit, the CJEU is developing its case law into a direction where the "question of whether there is an obstacle to free movement or a discriminatory act contrary to the Treaty is separated from the question of whether the actor at the origins of the restriction is a person bound by the relevant Treaty prohibitions".[772] In determining whether there is an impediment to free movement, it is apparently deemed irrelevant who is at the source of this impediment, Prechal and De Vries note.[773] As Heremans puts it: "the Court shifted its focus from the type of actor to the nature of the action".[774]

As regards collective regulation by private bodies, more specifically, it has been suggested that the Court's readiness to bring this type of private action within the scope of free movement law has been motivated by the resemblance that it bears to State regulation, because of its collective, regulatory nature.[775] In the words of Schepel: "it could be argued that the Court is entertaining a functional understanding of 'collective regulation': what seems to matter here is the naked fact of regulatory power, not the source it derives from. The idea is clearly one of functional equivalence to public regulatory authority, the realisation that large chunks of modern economic life are regulated by private governance regimes of various descriptions such as, indeed, trade unions, bar associations and sporting federations".[776] At

[770] See, e.g., Sauter & Schepel 2009; Mataija 2016, p. 28; Verbruggen 2014c, p. 216; Odudu 2010, p. 131. See also Schepel 2012, p. 185.
[771] Mataija 2016, pp. 28, 54-55; Schepel 2013b, p. 1214; Snell 2002, p. 226; Karayigit 2011, p. 326; Schepel 2012, p. 185. Some scholars in this respect argue that the CJEU seems to be concerned with whether private actors are capable of effectively impeding free movement, i.e., with the *effect* of the contested measure. See, e.g., Schepel 2013b, p. 1214 (with the caveat that his assessment is not based on a clear positive statement of the Court); Schepel 2012, p. 187, 200; Sauter & Schepel 2009, p. 102; Mataija 2016, pp. 54-67; Snell 2002, p. 226; Caro de Sousa 2013, pp. 498-499. That is however not to say that the CJEU has adopted a full-fledged effects-based approach, as already follows on from the restraint that the CJEU seems to exercise in attributing horizontal effect to free movement law outside the context of private regulation. See in this respect Verbruggen 2014c, pp. 206-207, 216; Davies 2012, pp. 813-821; Opinion Advocate General Trstjenak in *Fra.bo*, ECLI:EU:C:2012:176, para 34; Heremans 2012, p. 130.
[772] Prechal & De Vries 2009, p. 7, with the caveat that the case law of the Court does show some inconsistencies. See also De Vries & Van Mastrigt 2013, p. 252; Odudu 2010, p. 830.
[773] Prechal & De Vries 2009, p. 9. See also De Vries & Van Mastrigt 2013, p. 254; Case 36/74 *Walrave*, para 20.
[774] Heremans 2012, p. 122. Similarly: Odudu 2006, p. 48.
[775] E.g., Schepel 2004, p. 665 (more nuanced: Schepel 2012, pp. 185-187); Verbruggen 2014c, pp. 206-207; Odudu 2010, p. 834; De Vries & Van Mastrigt 2013, pp. 259-260; Davies 2012, p. 812; Roth & Oliver 2004, p. 425; Van den Bogaert 2002, pp. 125-126.
[776] Schepel 2012, p. 185.

the same time, however, the extension of the reach of the free movement rules to other types of private action together with the Court's statement in *Viking*[777] has led some legal scholars to doubt as to whether this State-like, collective regulatory nature is decisive in subjecting private action to free movement scrutiny.[778] Be that as it may, for the purposes of this doctoral thesis it is relevant that the CJEU has, through its functional approach, lent full horizontal effect to Articles 45, 49 and 56 TFEU in relation to private regulation: it is by now settled case law that private collective regulatory measures, which include industry codes of conduct, that are of a discriminatory nature or impede free movement fall within the scope of these Treaty provisions.[779] Or, as Van den Bogaert has phrased it: "public and private regulation are put on the same footing by the Court of Justice".[780]

ii. Goods

In the context of the free movement of goods, by contrast, the CJEU has shown far more reluctant to extend the scope of Articles 34 and 35 TFEU to private action. In fact, in the case law predating the *Fra.bo* ruling, the Court expressly rejected all arguments pertaining to the horizontality of these provisions with reference to the public scope of these provisions. Here, thus, the private origins of a measure still do constitute a barrier for free movement scrutiny, reflecting the Court's formal approach as to this part of the Treaty. In search for the rationales behind this approach, there is very little to build on: in this respect, the CJEU has only pointed at the strict division of labor between the rules on the free movement of goods and competition law. Private action that creates obstacles to the free flow of goods falls within the orbit of the latter.[781]

However, with a view to the relation between Articles 34 and 35 TFEU and private regulation, two observations can be made that qualify the statement private action is not caught by the rules on the free movement of goods.[782] First of all, the Court has not been held back by its formal approach in stretching the notion of 'Member State' as to encompass

[777] I.e., that its previous case law on the horizontal effect of the fundamental freedoms provides no indication that "could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers" (Case C-438/05 *Viking*, para 65).

[778] Schepel 2012, pp. 186-187, arguing that it is an indication "of what the court is really looking for: the ability to obstruct free movement" (p. 187). See also Schepel 2013b, p. 1214; Sauter & Schepel 2009, p 102. Snell 2002, p. 226 submits that the Court's use of the words 'rules' and 'regulating' does have "a quasi-Statal ring", but is nonetheless to be considered "a red herring and should not be given weight". Differently: Verbruggen 2014c, p. 207 ("the regulatory dimension of activities governed by private law remains pivotal"); Opinion Advocate General Trstenjak in *Fra.bo*, ECLI:EU:C:2012:176, para 34 ("As, however, the horizontal effect concerns private individuals only in the context of a well-defined rule-making activity, it is limited in its impact"); Davies 2012, pp. 813-821. Cf. also the discussion touched upon in n 685 above.

[779] Mataija 2016, pp. 54-55; Davies 2012, p. 821. As has been discussed in section 5.4.1.2 above, the horizontal scope of these provisions less unequivocal when it comes to other types of private action. For some reflections on the future development of the Court's case law on the horizontal effect of free movement law, see Van Leuken 2015, pp. 118-121, 137-141.

[780] Van den Bogaert 2002, p. 125.

[781] Case C- 65/86 *Süllhofer*, para 11; Case 311/85 *Vlaamse Reisbureaus*, para 30.

[782] Outside the regulatory context, it can in this regard be pointed at the Court's rulings *Schmidberger* and *Spanish Strawberries*. See Verbruggen 2014c, pp. 209-210.

private law regulatory bodies that meet a considerable threshold of public involvement.[783] As a result of this extensive interpretation, what does fall within the scope of Articles 34 and 35 TFEU are semi-private regulatory schemes involving a strong public element. Industry codes of conduct might qualify as such. Conversely, once the involvement of the State is not considerable enough to meet the required threshold, there is sufficient reason for the Court to return to its formal approach and to preclude what it now perceives as private bodies from scrutiny under these provisions. So, this functional approach still holds formal elements, namely the decisive force that is attributed to the involvement of the State and the fact that it is ultimately the State that is held responsible. It is therefore, in the words of Sauter and Schepel, best qualified as a "limited functionalist approach".[784] Secondly, it has been submitted that the ruling of the Court in *Fra.bo* has shed a new light on the prevailing opinion on the horizontal scope of application of Article 34 TFEU, albeit in a rather case-specific way. Despite the absence of considerable State involvement and contrary to the 'public threshold' line of case law just mentioned, the Court held that Article 34 TFEU was directly applicable to the activities of the regulatory body, focusing on the *de facto* power to restrict the free movement of goods in a State-like way. Herewith, the CJEU has adopted a more functional approach under the free movement of goods, which possibly signifies a first, yet cautious step towards a horizontal extension of this part of EU free movement law in relation to private regulatory activities, including industry codes of conduct.

5.5 Competition law

Private regulatory schemes may have adverse effects on intra-Community competition. The regulatory nature of a measure can be indicative of a degree of market power that warrants competition law scrutiny. As a result, instances of private regulation could qualify as agreements caught by the cartel prohibition of Article 101 TFEU.[785] Additionally, private regulators holding a dominant position could fall foul of Article 102 TFEU, which prohibits the abuse of such a position.[786] This section discusses how the CJEU has brought private regulation within the scope of Articles 101 and 102 TFEU.[787] Following the approach taken by Mataija, a distinction will be drawn according to the actor that is challenged: the private regulator itself or the State.[788] Accordingly, section 5.5.1 investigates how the Court responds when private regulators are called to account under EU competition law. Section 5.5.2, in turn, focuses on the approach adopted by the Court when the State is challenged in relation to restrictive private regulation. Again, the discussion is limited to several landmark cases marking the Court's overall approach.

[783] Sauter & Schepel 2009, p. 45; Verbruggen 2014c, p. 209; Snell 2002, pp. 219-221; Heremans 2012, pp. 123-125.
[784] This qualification is used by Sauter & Schepel 2009, p. 98.
[785] Maher 2011, pp. 122, 132 submits that the fact that cartels are prone to competition law does not mean that they cannot perform important regulatory functions themselves.
[786] Mataija 2016, pp. 89-92.
[787] The Treaty provisions on State aid (Articles 107, 108 and 109 TFEU) will not be considered.
[788] Mataija 2016, p. 84, stating that this is the more conventional distinction.

5.5.1 Private regulators and EU competition law

5.5.1.1 Articles 101(1) and 102 TFEU - Personal scope I: Undertakings

The first hurdle that the Court has to take when faced with a case of allegedly anti-competitive private regulation is the personal scope of Articles 101(1) and 102 TFEU, which is limited to "agreements between undertakings, decisions by associations of undertakings and concerted practices" (Article 101 TFEU) and undertakings holding a dominant position (Article 102 TFEU), respectively. Accordingly, in order to fall within the personal scope of these Treaty provisions, a private regulator would have to be classified as an 'undertaking' (Article 101 and 102 TFEU) or as an 'association of undertakings' (Article 101 TFEU).[789] With the Treaty remaining silent as to the definition of both concepts, for the answer to the question of what exactly constitutes an 'undertaking' and an 'association of undertakings', respectively, the case law of the CJEU has to be searched through.

It has been well established that "every legal entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed"[790] qualifies as an undertaking, whereby 'economic activity' denotes the activity of offering goods and services on a market[791]. As the notion of 'undertaking' is thus founded on the exercise of an economic activity, the national legal status and classification of an entity are irrelevant in deciding whether it qualifies as an undertaking. What matters is the nature of the activities performed by the entity concerned: activities that classify as economic are covered by competition rules, public interest tasks are not. As a corollary of this again functional approach, provided that their activities are economic in nature, both private (non-State) and public (State) bodies may constitute an undertaking within the meaning of Articles 101 and 102 TFEU.[792]

Two categories of activities are excluded from the definition of 'economic activity'. The first category comprises the activities of actors that perform an exclusively social function, based on the principle of solidarity and subjected to State supervision. These activities do not belong to the sphere of economic activities. Consequently, the actors performing them are not considered undertakings within the meaning of Articles 101 and 102 TFEU, and are thus sheltered against antitrust scrutiny.[793] The second category includes activities that are "by

[789] The meaning of the notion of 'undertaking' is the same under Article 101 TFEU and Article 102 TFEU. See Jones & Sufrin 2014, p. 127.
[790] Case C-41/90 *Höfner and Elsner v Macroton* (1991) ECR I-1979, para 21.
[791] Case 118/85 *Commission v Italy* (1987) ECR I-2599, para 7; Case C-35/96 *Commission v Italy* (*CNSD)* (1998) ECR I-3851, para 36. The fact that the nature of a body is non-profit as well as the fact that it pursues non-economic objectives are irrelevant in this respect, the Court held in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (1999) ECR I-5751, paras 79 and 85.
[792] Sauter & Schepel 2009, pp. 75-79; Chalmers, Davies & Monti 2010, p. 964; Jones & Sufrin 2014, pp. 127-129; Wendt 2013, pp. 90-91, 394; Mataija 2016, pp. 85-86. See also Case 123/83 *Bureau national interprofessionnel du cognac (BNIC) v Guy Clair* (1985) ECR 391, para 17. A wide array of actors, ranging from individuals to collecting societies, has already been held to constitute an undertaking under EU competition law. See, with further references, Jones & Sufrin 2014, p. 128.
[793] Joined Cases C-159 and 160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* (1993) ECR I-637, paras 18-19; Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* (2009) ECR I-1513, paras 43-68; Case C-437/09 *AG2R*

their nature, their aim and the rules to which they are subject" connected with the exercise of powers that "are typically those of public authority".[794] Actors engaging in such activities can be considered to perform public authority functions in the public interest rather than economic activities.[795] However, the fact that an actor is held to exercise government prerogatives does not always entirely disqualify it from competition law scrutiny. On the contrary, as AG Jacobs notes, "the notion of 'undertaking' is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules".[796] This implies that EU competition law continues to govern the activities of the actor concerned that "can be severed from those in which it engages as a public authority"[797]. Hence, each activity has to be assessed and classified individually. Consequently, an entity may act as an undertaking in some of its activities and not in others.[798] Yet, if the economic and public authority activities are deemed to be inseparable, all activities are qualified as 'public authority' and as such all fall outside the scope of the competition rules.[799]

A pertinent question when it comes to the relation between private regulators and EU competition law is whether the mere setting of rules constitutes an economic activity. In itself, arguably, it will not.[800] What does this imply for industry-level associations (e.g., trade associations and professional bodies), the type of private regulator that this doctoral thesis is concerned with? An industry association limiting itself to regulation, without performing any economic activities, would not meet the Court's definition of an undertaking.[801] This would immediately sideline Article 102 TFEU, since the scope of this provision is limited to undertakings.[802] Article 101(1) TFEU, by contrast, has a broader scope and also applies to

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Prévoyance v Beaudout Père et Fils SARL (2011) ECR I-937, paras 53-65; Jones & Sufrin 2014, pp. 131-133; Sauter & Schepel 2009, pp. 85-90. The mere fact that the aim of the contested activity is social is insufficient to exempt this activity from competition law scrutiny. See Semmelmann 2008, p. 24; Jones & Sufrin 2014, p. 133.

[794] Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* (1994) ECR I-43, para 30. See also case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* (1997) ECR I-1547, para 22; Monti 2007a, p. 486.

[795] Monti 2007a, p. 486; Sauter & Schepel 2009, pp. 83-90; Mataija 2016, pp. 87-88. Again, it is the nature of the activity that is decisive in this respect and not the status of the actor.

[796] Opinion Advocate General Jacobs in Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* (2001) ECR I-8089, para 72.

[797] Case T-128/98 *Aéroports de Paris v Commission of the European Communities* (2000) ECR II-3929, para 108, affirmed in Case T-155/04 *SELEX Sistemi Integrati SpA v Commission*, (2006) ECR II-4797, para 54; Case C-82/01 P *Aéroports de Paris v Commission* (2002) ECR I-9297, para 74; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* (2008) ECR I-4863, paras 24-25; Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich*, ECLI:EU:C:2012:449, para 37.

[798] Monti 2007a, p. 486; Maduro 2010, p. 3; Mataija 2016, p. 86; Jones & Sufrin 2014, pp. 136-137.

[799] Case T-155/04 *SELEX*, para 54; Case C-138/11 *Compass-Datenbank*, para 38; Case C-82/01 P *Aéroports de Paris v Commission*, paras 74-75; Case C-49/07 *MOTOE*, paras 24-25. See also Sauter & Schepel 2009, pp. 79-80.

[800] Wendt 2013, pp. 152-153; Odudu 2006, pp. 30-33. However, as Sauter and Schepel note, there can be an economic aspect to a regulatory task: "where the entity involved combines certain regulatory powers with the offering of related goods and services on the market, the exercise of such regulatory powers may in itself constitute a business activity". Then the antitrust rules do apply. See Sauter & Schepel 2009, pp. 93-94.

[801] Mataija 2016, p. 86, footnote 103; Wendt, pp. 152-153.

[802] Article 102 TFEU however remains applicable when a private regulatory body that limits itself to regulatory activities, and hence is not an economic operator itself, can be considered the "emanation" of its members and "therefore operates on this market through its members", the General Court found in Case T-193/02 *Laurent*

associations of undertakings. When an industry-level private regulator qualifies as such, its private regulatory measures can be caught by Article 101(1) TFEU in the guise of a decision by an association of undertakings, even if the private regulator does not perform economic activities itself.[803] After all, the CJEU has held that when the rules set by a private regulator have an economic impact or influence the economic conduct of its members, these rules fall within the sphere of economic activity covered by Article 101(1) TFEU.[804] This brings to the table the question as to when a private regulator qualifies as an association of undertakings.

5.5.1.2 Article 101(1) TFEU - Personal scope II: Private regulators as associations of undertakings

5.5.1.2.1 General

Neither the Treaty nor the CJEU have provided a definition of 'associations of undertakings'. Advocate General Léger in this respect indicates that "as a general rule an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general".[805] In establishing whether a private regulatory body qualifies as an association within the meaning of Article 101(1) TFEU, two steps have to be taken.[806] First, it has to be established whether the members or actors represented by the body concerned can be considered undertakings.[807] If so, it has to be ascertained, as a second step, whether the private regulatory body can be regarded as an association of undertakings. Like the notion of an undertaking, this concept is a relative one: a private regulator may qualify as an association of undertakings with respect to some of its activities, but not with respect to others.[808] For the

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Piau v Commission (2005) ECR II-209, para 116. On the application of Article 102 TFEU to professional rules of conduct, see Wendt 2013, pp. 318-390.

[803] Delimatsis 2010, p. 1081; Wendt 2013, pp. 152-153.

[804] Case C-309/99 *Wouters*, paras 63; Joined Cases C-96/82 to 102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *IAZ International Belgium and Others v Commission* (1983) ECR 3369, para 20; Case C-71/74, *Nederlandse Vereniging voor de Fruit- en Groentenimporthandel, Nederlandse Bond van Grossiers in zuidvruchten en ander geimporteerd fruit (Frubo) v Commission* (1975) ECR-563, para 30 and Joined Cases C-209/78 to 215/78 and C-218/78 *Heintz van Landewyck SARL and Others v Commission* (1980) ECR 3125, para 88. See also Whish & Bailey 2012, p. 91; Wendt 2013, pp. 186, 191-193; Cafaggi 2007, pp. 186-189; Delimatsis 2010, p. 1081; Vossestein 2002, pp. 853-854.

[805] Opinion Advocate General Léger in Case C-309/99 *Wouters*, para 61, with reference to M. Waelbroek & A. Frignani, *Commentaire J. Megret, Le Droit de la CE, Vol 4, Concurrence*, Éditions de l'Université de Bruxelles, Bruxelles, 1997, 2nd ed., para. 128.

[806] As follows from, for example, Case C-309/99 *Wouters*, paras 45 and 50.

[807] See section 5.5.1.1. It suffices that a number of members classifies as an undertaking, as follows from Case T-23/09 *Conseil national de l'Ordre des pharmaciens (CNOP) v Conseil central de la section G de l'Ordre national des pharmaciens (CCG)* (2010) ECR II-5291, paras 74-78. Customs agents (*CNSD*); medical specialists (*Pavlov*), lawyers (*Wouters*), football clubs (*Piau*) and chartered accountants (*OTOC*) have for instance been held to be undertakings. The fact that entities perform regulated activities of a complex and technical nature does not derogate from this qualification (see, e.g., Joined Cases C-180 to 184/98 *Pavel Pavlov And Others v Stichting Pensioenfonds Medisch Specialisten* (2000) ECR I-6451, para 77 and Case C-309/99 *Wouters*, para 49). Associations that are composed of associations of undertakings also fall within the scope of Article 101(1) TFEU (Wendt 2013, pp. 190-191).

[808] See Wendt 2013, p. 185; Whish & Bailey 2012, p. 92; Vossestein 2002, p. 853; Van de Gronden & Mortelmans 2002, pp. 454-455. Cf. Joined Cases C-209/78 to 215/78 and C-218/78 *Van Landewyck*, para 88.

purposes of this doctoral thesis, it is particularly relevant whether a private regulatory body falls within the scope of Article 101(1) TFEU when performing its regulatory activities. The CJEU has adopted a functional starting point in this respect: the legal framework within which a private regulator operates and the national classification given to that framework are irrelevant for the application of Article 101(1) TFEU. Accordingly, an eventual public law status of a regulatory body does not render the provision inapplicable.[809] Rather, as indicated at the end of section 5.5.1.1, what matters is whether the regulatory activities influence or are intended to influence the market behavior of the body's economically active members.[810] That is to say, as Wendt points out, that these activities not only concern the economic activities of these members, but also determine the market conduct of these members.[811] Wherever this occurs, the private regulator is considered an association of undertakings.

> For the sake of completeness, it should be noted that - as a final step in establishing the applicability of Article 101(1) TFEU - it subsequently has to be ascertained whether the private regulatory activities qualify as a decision by an association of undertakings. This occurs on the basis of a broad interpretation of the notion of 'decision', as Advocate General Mengozzi points out: it "covers any measure, even if it is not binding, which, regardless of what its precise legal status may be, constitutes the faithful reflection of the association's resolve to coordinate the conduct of its members".[812]

5.5.1.2.2 State involvement

When purely private regulation is concerned, the CJEU will usually not have to go to extraordinary lengths in qualifying the private regulator as an association of undertakings.[813] However, when the State is in some way involved with the regulatory scheme at issue, as is for instance the case when the State confers regulatory powers upon a private law body and entrusts it with certain public interest tasks, the qualification exercise becomes more

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[809] Case C-35/96 *CNSD*, para 40, with reference to Case 123/83 *BNIC/Clair*, para 17.
[810] Wendt 2013, pp. 193-197.
[811] Wendt 2013, pp. 193-194. Accordingly, rules that concern the non-economic activities of the members are not caught by Article 101(1) TFEU, thus Wendt 2013, p. 193. However, as the Court held in *OTOC*, the fact that private rules "do not have any direct effect on the economic activity of the members of that professional association does not affect the application of Article 101 TFEU, where the infringement of which that professional association is accused concerns a market on which it itself carries on an economic activity" (Case C-1/12 *Ordem dos Tecnicos Oficiais de Contas (OTOC) v Autoridade da Concorrênci* (2013) ECLI:EU:C:2013:127, para 59). This has led Van Cleynenbreugel to conclude that "a mere alignment of interests" between the professional association and its members "suffices presumably to place decisions by that association within the scope of Article 101(1) TFEU". See Van Cleynenbreugel 2014, p. 1404 who in this context also refers to Case T-111/08 *MasterCard and Others v Commission* (2012) ECLI:EU:T:2012:260. On this case, see Van Cleynenbreugel 2014, pp. 1401-1403.
[812] Opinion Advocate General Mengozzi in Case C-382/12 P *MasterCard and Others v Commission* (2014) ECLI:EU:C:2014:42, para 33. Cf. Case C-136/12 *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v Consiglio nazionale dei geologi (CNG)* (2013) ECLI:EU:C:2013:489, para 47: "the fact that the Code of Conduct is binding on geologists and that it is possible to impose penalties on them in the event of non-compliance with that code must lead to the conclusion that the rules laid down therein constitute a decision under Article 101 TFEU". For a detailed analysis of the notion of decision in relation to professional regulation, see Wendt 2013, pp. 193-17.
[813] Cf. Mataija 2016, p. 84.

complicated. Often, such bodies not only represent the collective interests of their members, but also pursue public interest goals.[814] The ensuing hybrid nature of the regulatory body and its regulatory activities challenge the private scope of Article 101(1) TFEU, giving rise to the question whether the private or semi-private regulator should be perceived as an association of undertakings when adopting regulation or rather as a public body falling outside the scope of Article 101(1) TFEU.[815] The CJEU first shed light on the matter in its judgment in the *Wouters* case, which formed the blueprint for its later judgments in *OTOC* and, to a lesser extent, in *CNG*.[816] The setting of these cases is similar: all are concerned with the applicability of Article 101(1) TFEU to a professional regulatory body with regulatory powers that has links with the State, and in all three cases the professional body itself was called to account.[817] Given that *Wouters* constitutes the leading case here, this section concentrates on this case, making references to *OTOC* and *CNG* where appropriate.

The *Wouters* case

Wouters revolved around the allegedly anti-competitive Regulation on Joint Professional Activity 1993, adopted by the Netherlands Bar Association, which prohibited multidisciplinary partnerships between lawyers and accountants. The CJEU takes several steps in order to arrive at an answer to the question whether the Netherlands Bar Association qualified as an association of undertakings when it adopted the disputed Regulation. First of all, the Court turns to its line of case law on 'exclusively social functions' and 'governmental prerogatives' and applied it to the notion of 'association of undertakings',[818] concluding that the Netherlands Bar Association when adopting its Regulation neither fulfilled an exclusively social function nor exercised governmental prerogatives.[819] Rather, it acted as "the regulatory body of a profession, the practice of which constitutes an economic activity".[820]

Secondly, the Court brings into play two criteria stemming from the body of case law on the liability of Member States in respect of restrictive private regulation (the *effet utile* doctrine): the composition of the regulatory body and the legal obligation to observe public

[814] Opinion Advocate General Mengozzi in *MasterCard*, ECLI:EU:C:2014:42, paras 34-35. See also Wendt 2013, pp. 211-212.
[815] Case C-309/99 *Wouters*, para 56; Verschuur 2010, pp. 69-70; Heremans 2012, p. 255; Wendt 2013, pp. 199, 211-212, Schepel 2002, p. 31.
[816] Case C-309/99 *Wouters*; Case C-1/12 *OTOC* and Case C-136/12 *CNG*.
[817] *Wouters* concerned the Regulation on Joint Professional Activity 1993 of the Bar of the Netherlands, *OTOC* was about the Training Credits Regulation of the Portuguese Order of Chartered Accountants and *CNG* revolved around the code of conduct of the Italian National Association of Geologists. When co-regulatory schemes are concerned, both the private regulator and the Member State can be held responsible. The way in which the CJEU proceeds when the application of EU law to a Member State is at issue (*effet utile* doctrine) is described in section 5.5.2.
[818] Case C-309/99 *Wouters*, para 57: "the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity […] or which is connected with the exercise of the powers of a public authority". See also Case C-1/12 *OTOC*, para 40 and Case C-136/12 *CNG*, paras 41-44. Thus, the applicability of this line of case law is not limited to the notion of undertaking. See Whish & Bailey 2012, pp. 140-141; Heremans 2012, p. 254; Van de Gronden & Mortelmans 2002, p. 453. Cf. Wendt 2013, pp. 201-211.
[819] Case C-309/99 *Wouters*, para 56
[820] Case C-309/99 *Wouters*, para 56. In *OTOC* and *CNG*, the Court likewise refrained from applying these exceptions to the professional body in question. See Case C-1/12 *OTOC*, para 46; Case C-136/12 *CNG*, para 44.

interest criteria.[821] These criteria entail that a body does **not** qualify as an association of undertakings within the meaning of Article 101(1) TFEU "where, on the one hand, it is composed of a majority of representatives of the public authorities and, on the other, it is required by national legislation to observe various public-interest criteria when taking its decisions".[822] The rationale behind this approach lies in the public interest, coupled with the private scope of Article 101(1) TFEU. When the two criteria are met, a body can be considered to act in the public interest, rather than in the interest of the economic actors that it represents.[823] With competition law being concerned with private, economic interests, this would carry the regulations adopted by this body into the realm of the State and outside the scope of Article 101(1) TFEU.[824] Accordingly, competition law liability can be evaded.

> Before taking a closer look at how the two criteria played out for the Netherlands Bar Association, it should be noted that their scope of application is limited. The criteria have been developed with respect to bodies that have been invested with public regulatory authority or pursue public interest objectives, such as the Netherlands Bar Association, and can, accordingly, only be applied to bodies that operate in such a context "of a mixture between public and private interests and powers"[825].[826] Since these criteria have been developed in cases concerning State liability, I will elaborate on them in section 5.5.2.2.

For the Netherlands Bar Association, the criteria were of no avail. As regards the composition requirement, the CJEU pointed out that "the governing bodies of the Bar are composed exclusively of members of the Bar elected solely by members of the profession" and that the Dutch government did not have a say in these appointments.[827] Furthermore, the CJEU established that the Netherlands Bar Association was not under a legal obligation to observe public interest criteria when adopting measures such as the disputed Regulation.[828] As a final remark, it is noted that the Regulation "does not fall outside the sphere of economic activity",

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[821] Case C-309/99 *Wouters*, paras 60-62. These criteria have as such been formulated in Case C-35/96 *CNSD*, paras 39-44 (repeated in Joined Cases C-180 to 184/98 *Pavlov*, para 37), where the Court deduced them from previous '*effet utile* case law'. See also Wendt 2013, pp. 211-212; Schepel 2002, pp. 44-45, Sauter & Schepel 2009, p. 114; Opinion Advocate General Léger for Case C-309/99 *Wouters,* paras 61-70. In *OTOC*, the Court also applied these criteria (Case C-1/12, paras 49-55). In *CNG*, by contrast, the Court based its argument that the professional body was an association of undertakings solely on the 'exclusively social functions' and 'governmental prerogatives' line of case law. See Case C-136/12, paras 42-45.

[822] Opinion Advocate General Léger for Case C-309/99 *Wouters*, para 70, with reference to Case C-35/96 *CNSD*. See also Wendt 2012, p. 212 and the *effet utile* judgments referred to in section 5.5.2.2.

[823] Wendt 2013, pp. 212-213, 216.

[824] Wendt 2013, pp. 211-212, 216, 221; Heremans 2012, p. 255. Cf. Schepel 2002, p. 44.

[825] Opinion Advocate General Mengozzi in *MasterCard*, ECLI:EU:C:2014:42, para 35.

[826] Opinion Advocate General Mengozzi in *MasterCard*, ECLI:EU:C:2014:42, para 34 stressing that it cannot be inferred from the Court's case law at this point "that the two criteria referred to below are intended to apply irrespective of the body in question". Cf. Case C-382/12 P *MasterCard and others v Commission* (2014) ECLI:EU:C:2014:2201, para 75. The cases in which these criteria have been applied by the Court involved regulatory bodies with public ties, i.e., bodies "that are involved in the process of adopting rules, alongside the competent public authorities, to regulated certain aspect of various sectors of the economy" (Wendt 2013, p. 211), such as certain professional bodies and tariff committees. Castillo de la Torre 2005, p. 426 speaks of "institutionalized settings", with the framework for the public-private cooperation provided by law.

[827] Case C-309/99 *Wouters*, para 61. Similarly: Case C-1/12 *OTOC*, para 47.

[828] The law only stipulated that the regulations were to be "in the interest of the proper practice of the profession". See Case C-309/99 *Wouters*, para 62. See also Case C-1/12 *OTOC*, paras 49-52.

given its influence on the conduct of the members of the Bar.[829] These findings led the CJEU to qualify the Netherlands Bar Association as an association of undertakings within the meaning of Article 101(1) TFEU.[830] The Court brings to mind that this is not altered by the fact that the Bar operates on a public law basis: neither (the national classification given to) the legal framework within which a private regulator carries out its regulatory tasks nor an eventual public law status of the regulator preclude the application of Article 101(1) TFEU.[831]

Thus, with the caveat that *Wouters* (and *OTOC*) concerned professional regulatory bodies, it can be concluded that the CJEU takes the public interest as its yardstick when tackling the 'qualification issue' that arises from the co-regulatory nature of a regulatory regime. In other words, when a regulatory body acts or can be deemed to act in the public interest, competition law liability under Article 101(1) TFEU can be evaded.[832]

5.5.1.3 Justification defenses

The previous section has shown that private regulators, when exercising their regulatory activities, in principle fall within the orbit of Article 101(1) TFEU as 'undertakings of associations'. Consequently, a private regulator can be held liable under Article 101(1) TFEU when its regulations restrict intra-Community competition.[833] However, the fact that private regulation is found restrictive or distortive of competition does not necessarily imply that it is prohibited under EU competition law. As will follow from the brief discussion in this section, private regulators have several grounds for justification at their disposal.[834] A pertinent question in the context of this doctoral thesis is whether these shields against competition law liability take account of the regulatory nature of private regulation and the fact that this aspect

[829] Case C-309/99 *Wouters*, para 63. See also case C-1/12 *OTOC*, paras 40-45.
[830] Case C-309/99 *Wouters*, para 64. The same conclusion was reached in Case C-1/12 *OTOC*, para 59.
[831] Case C-309/99 *Wouters*, para 66, with reference to Case 123/83 *BNIC/Clair*, para 17 and Case C-35/96 *CNSD*, para 40. See also Case C-1/12 *OTOC*, para 48.
[832] Wendt 2013, pp. 211-212, 216, 221; Heremans 2012, p. 255; Schepel 202, p. 44. Cf. section 5.5.2.2 with regard to the *effect utile* doctrine. Noticable in this respect is the distinction drawn by the CJEU in *Wouters* between two approaches: "The first is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings. The second approach is that the rules adopted by the professional association are attributable to it alone" (Case C-309/99 *Wouters*, paras 68-69). In the latter case, Article 101(1) TFEU can be applied.
[833] For an illustrated explanation of how private rules may be found to restrict competition, see Wendt 2013, pp. 280-292 (on professional regulations). See also Mataija 2016, pp. 89-92.
[834] An exemption is also in place when the anti-competitive actions are not attributable to the private entities performing them. As this defense relates to the topic of antitrust liability of the State, I will discuss it below in section 5.3.2.3. For the sake of completeness, it should be noted that the CJEU has excluded collective bargaining agreements, aimed at improving the conditions of work and employment, from the scope of EU competition law (see Case C-67/96 *Albany*; Joined cases C-115, 116, 118, and 119/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (1999) ECR I-6025; Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* (1999) ECR I-6121 and Case C-222/98 *Hendrik van de Woude v Stichting Beatrixoord* (2000) ECR I-7111). The argument for doing so was found in a teleological interpretation of the Treaty. In *Pavlov*, the Court has applied a *de minimis* threshold in order to exclude the pension scheme set up by medical specialists from competition law scrutiny. See Sauter & Schepel 2009, pp. 90-91, 116-19.

is not always necessarily coupled with considerations of economic efficiency. Private regulation can also seek to attain public interest objectives, especially, but not necessarily, when hybrid, co-regulatory schemes are concerned.[835] Does this shelter a private regulator from competition law scuritiny?

5.5.1.3.1 Article 101(3) TFEU, the objective justification under Article 102 TFEU and Article 106(2) TFEU

In case of an infringement of Article 101(1) TFEU, private regulators might seek recourse to Article 101(3) TFEU. The conditions for exemption listed in this provision are linked with pro-competitive aims, such as efficiency and the correction of market failure.[836] Non-competition arguments, which might be of prime relevance when private regulation is concerned, can only be taken into account when they relate to efficiency and other economic interests. As such, Article 101(3) TFEU is not overly receptive to the justification of measures that do not have pro-competitive aims or do not show efficiency gains.[837]

When compliance with Article 102 TFEU is at stake, private actors might rely on the objective justification test, developed by the CJEU. This test, in the words of Mataija, exonerates conduct that "can be explained by the 'legitimate business interests' of the dominant undertaking, as long as the restraint is proportionate to them".[838] However, like Article 101(3) TFEU, this test does not allow much room for public-policy based arguments pertaining to non-economic interests.[839]

Private regulation that qualifies as a 'service of general interest' might benefit from Article 106(2) TFEU, which stipulates that competition law can only be applied to undertakings entrusted with the operation of services of general economic "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".[840] However, the scope of the Treaty provision is limited to public undertakings and private undertakings that have been entrusted with the provision of such

[835] Semmelmann 2008, p. 30 refers to *Wouters* as an example of private regulation having "both a competition-related element (the proper functioning of a profession for the benefit of the consumer) and a noncompetition element (the sound administration of justice)".
[836] Article 101(3) lists four cumulative conditions that have to be met in order for anti-competitive conduct to be exempted from Article 101(1) TFEU: the conduct (1) should contribute "to improving the production or distribution of goods or to promoting technical or economic progress", (2) "while allowing consumers a fair share of the resulting benefit", (3) it should not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives" and (4) it should not "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question". See also Mataija 2016, p. 97.
[837] Mataija 2016, pp. 97-100; Monti 2002, pp. 1077-1078; Buttigieg 2009, pp. 134-136; Schweitzer 2007, pp. 5-13; Schepel 2002, p. 38. Cf. Communication from the Commission, Commission guidelines on the application of Article 81(3) of the Treaty, *OJ* 2004/C 101/97, para 42.
[838] Mataija 2016, p. 100 (with further references).
[839] Mataija 2016, p. 100, who nonetheless speculatively remarks that "it may be, however, that a case dealing with private regulation pursuing a legitimate public policy objective in a proportionate way – whether as part of a co-regulatory scheme or not – could lead the Court to soften its approach" (at p. 119).
[840] However, "the development of trade must not be affected to such an extent as would be contrary to the interests of the Union", as the last sentence of Article 106(2) TFEU provides.

services by the State.[841] Taking into account that the proportionality test that constitutes a prerequisite for applying the exemption is rather strict, it becomes apparent that Article 106(2) TFEU will be of avail only to certain co-regulatory schemes.[842]

5.5.1.3.2 The *Wouters* test

Private regulators might also profit from the peculiar, and rather controversial, test that the CJEU developed in its judgment in *Wouters* to prevent their restrictive rules from falling under the cartel prohibition of Article 101(1) TFEU. In this case, the Court found that the contested Regulation on Joint Professional Activity 1993 of the Netherlands Bar Association, prohibiting lawyers affiliated with the Bar Association to engage in multi-disciplinary partnerships, had a restrictive effect on trade between Member States. However, this did not automatically render the Bar Association liable under Article 101(1) TFEU:

> "not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) of the Treaty [Article 101(1) TFEU, MM]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, […]. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."[843]

This assessment led to CJEU to conclude that the Regulation in question could "reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned" and that "the objectives pursued by the 1993 Regulation cannot […] be attained by less restrictive means".[844] Therefore, the anti-competitive effects of the Regulation did not appear to "go beyond what is necessary in order to ensure the proper practice of the legal profession", the Court held.[845] Consequently, the Regulation was not held to infringe Article 101(1) TFEU. The inherent restriction test[846] or public interest test[847] that the Court has thus formulated in *Wouters*, and repeated and clarified in its subsequent rulings in *Meca Medina*, *OTOC* and *CNG*,[848]

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[841] Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* (1974) ECR 313, para 20; Case C-49/07 *MOTOE*, para 45. See also Sauter & Schepel 2009, pp. 187-189; Mataija 2016, p. 101.
[842] Mataija 2016, pp. 101-102. For a more detailed account, see for instance Sauter & Schepel 2009, pp. 164-192. On the relation between the three grounds for justification mentioned in this section, see Mataija 2016, pp. 102-103.
[843] Case C-309/99 *Wouters*, para 97.
[844] Case C-309/99 *Wouters*, paras 107-108.
[845] Case C-309/99 *Wouters*, para 109.
[846] Mataija 2016, p. 92; Sauter 2014, p. 329.
[847] Sauter & Schepel 2009, pp. 91-93.
[848] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* (2006) ECR I-6991, paras 42-55; Case C-1/12 *OTOC*, paras 93-108; Case C-136/12 *CNG*, paras 53-57. In *ONP*, the activities of the professional body in question (the Ordre national des pharmaciens, ONP) were found to have failed the *Wouters* test. See Case T-

consists of three stages. A regulation with anti-competitive effects can be justified when (1) it pursues *legitimate objectives*,[849] (2) the restrictive effects that it produces are *inherent* in the pursuit of these objectives and (3) the restrictions imposed by the regulation are *proportionate*, i.e., do not go beyond what is necessary to ensure the pursuit of these objectives.[850]

The *Wouters* test has been and still is open to quite some scholarly debate. Thus far, legal scholars have failed to reach agreement on the actual meaning of the test.[851] Arguably, however, what the Court's case law does show is that non-economic interests can play a role in the context of Article 101(1) TFEU, namely in the guise of legitimate public interest objectives pursued by private regulators. Even more so, these public, non-economic interests may justify private regulatory measures with anticompetitive effects, provided that the criteria of the *Wouters* exception are met. In such cases, public interest considerations may take precedence over the purely economic interests covered by Article 101 TFEU and accordingly sideline the cartel prohibition.[852] By thus conditionally giving leeway to regulatory restrictions in the public interest,[853] the Court can be said, as Van de Gronden submits, to acknowledge the role that private regulators play in attaining certain public interest goals.[854] It is unclear, however, whether all forms of private regulation could benefit from the test. The fact that *Wouters, OTOC* and *CNG* all concerned professional regulations, adopted by a body that had been vested with regulatory powers by national legislation suggests that the boundaries of the scope of application of the test have to be drawn with professional

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90/11 *Ordre national des pharmaciens (ONP) and Others v Commission* (2014) ECLI:EU:T:2014:1049, paras 343-350.

[849] The Court does not define which objectives can be considered as such. According to Davies "it is hardly controversial to suggest that it is public interest objectives that it has in mind, rather than objectives serving the interests of the undertakings in question" (Davies 2009, p. 567). This indeed seems to be the prevailing opinion in legal literature. See, e.g., Mataija 2016, pp. 92-96; Rousseva 2005, pp. 40-41; Monti 2002, pp. 1086-1090; Sauter & Schepel 2009, pp. 92-93. Cf. Opinion Advocate General Mazák in Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* (2011) ECR I-9419, para 35.

[850] Sauter & Schepel 2009, pp. 92-93; Mataija 2016, pp. 92-94; Rousseva 2005, pp. 40-41; Monti 2007a, pp. 113-115; Sauter 2014, p. 329.

[851] Monti argues that the Court has introduced a 'European rule of reason' in *Wouters* (Monti 2002, pp. 1086-1090). O'Loughlin 2003, pp. 67-69 also submits that the Court takes a certain rule of reason approach. See in this respect also Callery 2011; Semmelmann 2008, p. 30. Similarly, Sauter & Schepel 2009, pp. 92-93. Other scholars point, in a more or less similar vein, at the fact that the Court has balanced the negative effects on competition against non-economic interests (Van de Gronden & Mortelmans 2002, pp. 458-459) and pro-competitive effects (Nazzini 2006, pp. 525-526). Loozen, by contrast, has forcefully rejected the 'rule of reason interpretation' of the *Wouters* case (Loozen 2010, pp. 175-211; Loozen 2007; Loozen 2006). In response to Loozen 2007, Houdijk speaks in favor of a public interest rule of reason (Houdijk 2008). The General Court has rejected the existence of a rule of reason under Article 101(1) TFEU in Case T-112/99 *Métropole télévision (M6) and Others v Commission* (2001) ECR II-2459, para 72. Cf. Whish & Bailey 2012, pp. 135-136, submitting that the General Court rejected the 'US-style rule of reason'. For an overview of possible interpretations of the *Wouters* test, see Heremans 2012, pp. 318-329.

[852] See Rousseva 2005, pp. 41-42; Opinion Advocate General Mazák in Case C-439/09 *Pierre Fabre*, para 35; Sauter & Schepel 2009, p. 119; Monti 2007a, p. 113; Dashwood et al. 2011, p. 750 ("This balancing is not a purely competition-led inquiry"); Whish & Bailey 2012, p. 131. As Rousseva rightly remarks, this will only be the case in more exceptional instances where the principle of proportionality will have to be applied strictly (Rousseva 2005, p. 42).

[853] See in this respect also Van de Gronden 2006, p. 127; Mataija 2016, pp. 95-96; Callery 2011, pp. 48-49.

[854] Van de Gronden 2006, pp. 119-120. Likewise: O'Loughlin 2003, pp. 68-69.

regulation, encompassing a public element. However, in *Meca Medina* the Court subjected the restrictive anti-doping rules of the International Swimming Federation (FINA) to the *Wouters* test, which they passed.[855] These rules are of a different nature than professional rules of conduct, yet also in this case the rules entailed a public interest element. With a view to said element, which was present in all four cases in which the test has thus far been applied, it is questionable whether purely private regulatory regimes, lacking such an element, could successfully resort to the test.[856]

As a final note, it can be observed that matters are further complicated by the fact that the Court in *API* referred to the *Wouters* test with regard to the question as to whether a national *legislative* measure could be exempted form Article 101(1) TFEU (cf. section 5.5.2.2 on the *effet utile* doctrine). However, the CJEU explicitly refrained from applying the test, indicating that there was no need to consider whether case law in which the test was formulated (references are made to *Meca Medina* and *CNG*) applied to the legislation at issue.[857]

5.5.2 States, State measures and private regulation under EU competition law

As a result of the functional approach set out in section 5.5.1, the presence of a public element in a private regulatory scheme does not *a priori* keeps this scheme out of the reach of the competition rules for a lack of fit with the definitions of an 'undertaking' and an 'association of undertakings'. In these cases, private regulators can still be held liable for violating these rules, as the previous section has shown. Conversely, Member States can also fall foul of competition law when adopting anticompetitive measures; the public origins of a measure do not deprive it from its effect on competition.[858] On several occasions, States have been challenged under competition law for effectively contributing to restrictive activities of private actors. As these cases in effect center upon State measures rather than private regulation, it appears a bit odd to be taking closer look at the responsibilities of the State for restrictive private regulation under EU competition law. Yet, it is relevant for the purposes of this doctoral thesis for two reasons.

First of all, as Chapter 4 has set out, private regulation has become part and parcel of European and national legislative policies.[859] The Court's case law in this respect contains valuable lessons on how legislators should proceed when leaving regulation to economic operators in order to avoid collision with competition law. Following on from that, the second reason why it is worthwhile to explore this topic further lies in that part of the body of case law concerning the useful effect doctrine (discussed in section 5.5.2.2 below). From the judgments at this point we learn that public regulation only falls within the orbit of Articles

[855] See Case C-519/04 *Meca Medina*, paras 40-60.
[856] Whish & Bailey 2012, pp. 132-13. Semmelmann 2008, pp. 46-47 argues that *Wouters* was an exceptional case that should not serve as an example in other fields. This implies, with a view to matters of accountability, that private actors cannot invoke non-competition goals to justify restrictive action. Public interest exceptions are valid only to the extent that they translate into efficiency gains, Semmelmann submits.
[857] See Joined Cases C-184/13-C-187/13, C-194/13, C-195/13 and C-208/13 *API and Others* (2014) ECLI:EU:C:2014:2147, paras 48-49. See also Mataija 2016, pp. 107-108.
[858] Wendt 2013, p. 394.
[859] In the context of competition law: Baquero Cruz 2007, p. 552.

101 or 102 TFEU when the restrictive actions on the side of undertakings provoked by it are 'private' enough. The interesting point of view then arises when the issue is reversed. Then the question is, as Schepel has pointed out, under which conditions "private parties can be considered 'public' enough to merit immunity from competition law".[860] I explore this perspective further in section 5.6. This section, as a starter, focuses on how State measures that are linked with a private or semi-private regulatory scheme, can be challenged under Article 106(1) TFEU (section 5.5.2.1) and Articles 101 and 102 TFEU (section 5.5.2.2).

5.5.2.1 Obligations under Article 106(1) TFEU

The first source of competition law liability of a State can be found in Article 106(1) TFEU, which covers State measures concerning "public undertakings and undertakings to which Member States grant special or exclusive rights". The provision directly addresses Member States by providing that in case of the aforementioned types of undertakings "Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109".[861] In the case law of the CJEU, Article 106(1) TFEU is mostly combined with Article 102 TFEU, thus covering instances in which a State has adopted a measure that leads to the creation or reinforcement of a dominant position of the type of undertakings covered by the provision.[862] In this respect, the Court has held in its *Höfner* judgment that "the simple fact of creating a dominant position […] by granting an exclusive right within the meaning of Article 90(1) [Article 106(1) TFEU, MM] is as such not incompatible with Article 86 of the Treaty [Article 106 TFEU, MM]".[863] What is needed for an infringement of Articles 106(1) and 102 TFEU is that the mere exercise of the rights granted to an undertaking leads to the abuse of the undertaking's dominant position or where these rights create an environment that triggers such abuse.[864]

An interesting argument has in this respect been made in the literature with regard to the Court's decision in *MOTOE*. In this case, the Greek Road Traffic Code was found to have infringed Articles 102 and 106(1) TFEU for granting the Greek Motorcycling Federation (ELPA) the right to decide upon applications for authorization to organize motorcycling events. This created a situation of conflict of interest: ELPA itself also organized and commercially exploited the very same events for which it was granted the right to authorize the organization. The CJEU held that the granting of the aforementioned right to ELPA

[860] Schepel 2002, p. 31.
[861] Although its wordings suggests otherwise, the scope of Article 106(1) TFEU is not limited to infringements of competition law, but extends to the rules on the free movement of goods, workers, services and establishment. See Whish & Bailey 2012, p. 223; Wendt 2013, p. 404.
[862] Whish & Bailey 2012, p. 227.
[863] Case C-41/90 *Höfner*, para 29.
[864] Case C-49/07 *MOTOE*, para 49. Cf. Case C-260/89, *ERT v DEP* (1991) ECR I-2925, paras 36-37; Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* (1991) ECR I-5889, para 17; Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* (1994) ECR I-5077, para 18. For a categorization and a more detailed account of the circumstances under which a Member State may be held liable under Article 106(1) TFEU, see, e.g., Whish & Bailey 2012, pp. 229-235, with further references.

without restricting that right in any way, i.e., "without that power being made subject to restrictions, obligations and review", could lead to a distortion of competition.[865] The Court's reference to the lack of 'restrictions, obligations and review' has been taken as an argument that a Member State may use an escape route: liability under Articles 102 and 106(1) TFEU might be avoided when the rights granted are made subject to control mechanisms.[866]

5.5.2.2 Effet Utile Doctrine

With the scope of Article 106(1) TFEU confined to 'public undertakings or undertakings to which Member States grant special or exclusive rights', the foregoing leaves us with the question whether State measures concerning ordinary undertakings that have a negative impact on the competition process can also be subjected to competition law. By raising this question, we once again enter the context of Articles 101 and 102 TFEU. Unlike Article 106(1) TFEU, these sections are directed towards undertakings rather than the Member State itself. Yet, do they also entail obligations for Member States? The answer lies in the principle of Community loyalty enshrined in Article 4(3) TEU, which *inter alia* stipulates that Members State should "refrain from any measure which could jeopardise the attainment of the Union's objectives". In the context of competition law, more specifically, the CJEU has held in *INNO v ATAB* that this principle involves Members States refraining from "adopting or maintaining in force measures that could deprive [the competition rules of their, MM] effectiveness".[867] When coupled with Articles 101 and 102 TFEU, this obligation not to divest these competition rules from their useful effect implies, in the words of Wendt, "that Member States may not enable private undertakings to escape from the application of these two prohibitions".[868] A decade later, the Court specified its *effet utile* doctrine in *Van Eycke* by setting out how Article 101 TFEU can be stripped of its useful effect:

> "It must be pointed out in that regard that Articles 85 and 86 of the Treaty [101 and 102 TFEU, MM] per se are concerned only with the conduct of undertakings and not with national legislation. The Court has consistently held, however, that Articles 85 and 86 [Articles 101 and 102 TFEU, MM] of the Treaty, in conjunction with Article 5 [Article 4(3) TEU, MM], require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case,

[865] Case C-49/07 *MOTOE*, para 53, The Court however fails to substantiate what exactly qualifies as 'restrictions, obligations and review'.
[866] Mataija 2016, pp. 109-111; Miettinen 2009, pp. 147-149. Cf. Whish & Bailey 2012, p. 232-233, who with reference to Case C-67/96 *Albany* (paras 116-121) state that "the Court would be less likely to find an infringement of Article 106(1) where provisions exists for judicial review of the decisions made by an apparently conflicted undertaking". Mataija submits that the Court's reference at this point is reflective of the fact that the institutional design and governance criteria of the co-regulatory scheme mattered for the Court, as it could have prevented the conflict of interest. See Mataija 2016, pp. 110-111 and section 5.6 below. Similarly: Miettinen 2009, pp. 147-149; Whish & Bailey 2012, pp. 232-233.
[867] Case C-13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* (1977) ECR 2115, para 31 (in the context of Article 101 TFEU). See also Sauter & Schepel 2009, p. 104.
[868] Wendt 2013, p. 396. She describes the relation between the principle of Community loyalty and Articles 101 and 102 TFEU as follows: "Article 4(3) TEU is the correct legal basis, while Articles 101 and 102 TFEU are the yardstick to ascertain the concrete content of the general negative integration duty of Member States" (at p. 403).

the Court has held, *if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 [Article 101 TFEU, MM] or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere*."[869] (emphasis added, MM)

Thus, there are three situations in which a Member State, intertwining public and private governance, can fall foul of its obligations under Article 4(3) TEU in conjunction with Article 101 TFEU[870].[871] First of all, States are not allowed to **require or favor** anti-competitive conduct of an undertaking or association of undertakings. In establishing whether a State measure indeed initiates a violation of the competition rules, it is essential that the measure concerned was "intended to require or favour the adoption of new restrictive agreements or the implementation of new practices".[872] Likewise, States should refrain from adopting measures intended to **reinforce the effects** of the anti-competitive conduct of economic actors. The CJEU has ruled in this respect that "legislation may be regarded as intended to reinforce the effects of pre-existing agreements, decisions or concerted practices only if it incorporates either wholly or in part the terms of agreements concluded between undertakings and requires or encourages compliance on the part of those undertaking".[873] This description pertains to situations in which a State merely rubberstamps the content of private rules, for instance by declaring the rules universally binding or by including this content in public regulation, thus lending the private rules an official appearance.[874] Thirdly, Member States are

[869] Case C-267/86 *Pascal Van Eycke v ASPA NV* (1988) ECR 4769, para 16. The useful effect doctrine has been further developed through a string of cases, predominantly in relation to Article 101 TFEU (Whish & Bailey 2012, p. 217), constituting a fiercely discussed body of case law. For the purposes of this section, I will not go into the details of the doctrine, but rather limit myself to a very brief overview of the main elements of the doctrine as it stands today. For a taste of the discussion, see, e.g., Sauter & Schepel 2009, pp. 104-128; Schepel 2002; Wendt 2013, pp. 394-434; Verschuur 2010; Baquero Cruz 2007, pp. 580-585, all with further references.

[870] As Wendt indicates, the *Van Eycke* formula only concerns Article 101 TFEU. The yardstick for assessing State measures under Article 102 TFEU has been set out in *Spediporto* (Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Sr* (1995) ECR I-2883) and is not entirely congruent with the standard formulated in *Van Eycke*. See Wendt 2013, pp. 410-416. For the sake of simplicity, I will however confine myself to Article 101 TFEU, the more so since the Court has thus far not held a State liable under Article 102 TFEU (Wendt 2013, p. 416).

[871] Wendt 2013, p. 407 notes that these three prongs "describe a distinguishable type of situation".

[872] Case C-267/86 *Van Eycke*, para 17. See also Wendt 2013, p. 408; Heremans 2012, pp. 269-270.

[873] Case C-267/86 *Van Eycke*, para 17. See also Wendt 2013, p. 408. In effect, the distinction between the first and the second prong boils down to the moment at which the contested State measure is enacted: the first prong concerns instances in which undertakings or associations of undertakings are induced or compelled by the measure to engage in anti-competitive behavior, while under the second prong, this behavior pre-existed the measure. See Wendt 2013, p. 400; Verschuur 2010, p. 63; Neergaard 1999, pp. 387-388.

[874] Verschuur 2010, pp. 75-96 (with examples from case law); Wendt 2013, p. 408; Heremans 2012, p. 268; Case C-35/96 *CNSD*, para 59. An example in this respect is *Vlaamse Reisbureaus*. In this case, the Belgian legislator in a Royal Decree incorporated the Code of Conduct of the Union of Belgian Travel Agents, which was binding on the members of the Union. One of the Code's provisions prohibited travel agents to pass on some of the commission that they received to their customers. The CJEU established that this prohibition was 'implemented' in practice through a system of agreements amongst travel agents and between travel agents and tour operators entailing the prohibition. This practice prevented competition on prices and was therefore contrary to Article 101(1) TFEU. By turning the Code of Conduct into a legislative provision, the Royal Decree was found to reinforce the effect of these agreements as it had granted them a permanent character and rendered it impossible for the parties to rescind the contested rule.

not allowed to deprive their legislation of its official nature by **delegating** regulatory authority to private traders to take decisions that affect the economic sphere. In these cases, the legislator "allows economic operators to assume the Member State's responsibility of public authority to interfere with the functioning of markets".[875]

So, how then does the Court go about establishing whether one of these three scenarios applies? Initially, the assessment deployed in this respect consisted of two stages: an anti-trust analysis and a delegation test.[876]

1) Antitrust analysis

As at least the first and the second prong of the *Van Eycke* test require a direct link between the contested State measure and the anti-competitive conduct of the economic actors,[877] the first stage concerns an anti-trust analysis under Article 101 TFEU. That is to say that it needs to be established whether the private or hybrid regulatory body acts as an association of undertakings when adopting the restrictive measures. As already briefly set out in section 5.5.1.2.2, the Court has developed two criteria in this respect, building on the rationale that measures pursuing the public interest should be shielded from competition law scrutiny:[878] the composition of the regulatory body and the existence of a legal obligation to observe public interest criteria.

i. Composition of the regulatory body

The rationale behind the composition requirement relates to the assumption that regulatory bodies dominated by representatives of undertakings in the sector directly or indirectly further the private interests of these economic operators, rather than the public interest. This assumption can be refuted when the bodies are composed of a majority of members that can be presumed to act in the public interest.[879] It follows from the Court's case law that a strong argument can be made in this respect when the body consists of independent experts (as in *Reiff*), of a majority of representatives of public authorities (*Spediporto*) or when the

[875] Wendt 2013, p. 409.

[876] Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* (1993) ECR I-5801; Sauter & Schepel 2009, pp. 114-115; Schepel 2002.

[877] Here, we arrive at a rather contentious issue: the reach of the *effet utile* doctrine. The discussion revolves around the question whether a direct link between the State measure and the anti-competitive conduct of the undertaking or association of undertakings was needed for the doctrine to apply or whether it would suffice that the measure itself divested Article 101 TFEU from its useful effect. In *Meng,* the CJEU established that Articles 4(3) TEU and Article 101 TFEU "do not, in the absence of any link with conduct on the part of undertakings of the kind referred to in Article 85(1) [Article 101(1) TFEU, MM] of the Treaty, preclude State rules which prohibit […]" (Case C-2/91, *Criminal proceedings against Wolf W. Meng* (1993) ECR I- 5751, para 22). See also C-245/91, *Criminal proceedings against Ohra Schadeverzekeringen NV* (1993) ECR I-5851. With this ruling, the Court however clarified only part of the issue: the judgment is considered to require such a direct link under the first and second prong of the *Van Eycke* test, yet obscurity still exists as to whether the third prong, the delegation test, also requires such a link. This lack of clarity is caused by the fact that the CJEU in *Meng* and *Ohra* held that there was no anti-competitive conduct, yet still applied the delegation test. This suggests that under the third prong no link is required (Schepel 2002; Sauter & Schepel 2009, pp. 104-109; Verschuren 2010, pp. 97-101). However, the Court has never found delegation if there was no anti-competitive private conduct. See Schepel 2002, p. 48, arguing that is impossible for the CJEU to do so; Heremans 2012, p. 270; Sauter & Schepel 2009, p. 113.

[878] Wendt 2013, pp. 211-212, 216, 221; Heremans 2012, p. 255; Schepel 2002, p. 44. See also section 5.5.1.2.2.

[879] Wendt 2013, pp. 212-213. See also Heremans 2012, pp. 259-260, 272. Cf. Odudu 2006, pp. 46-52.

economic operators whose interests are furthered are in the minority (*DIP*).[880] Conversely, professional associations whose governing bodies were solely composed of representatives of the profession, without the government having a say in their appointment, have been held not to meet the composition requirement.[881] In *Librandi*, the CJEU however clarified that the composition requirement is not essential and only holds indicative force. Necessary and sufficient for shielding the body from Article 101(1) TFEU scrutiny is the fact that it must observe public interest criteria defined by law.[882] The CJEU thereby clarified that 'public interest' denotes that "the interests of the collectivity had to prevail over the private interests of individual operators".[883]

ii. Legal obligation to observe public interest criteria

This brings us to the second and, following on from *Librandi*, the seemingly main criterion, namely that when taking decisions and adopting regulatory measures, the regulatory body should be under the obligation to observe public interest criteria defined by law.[884] These criteria should be precise enough to ensure that the body does in fact operate in the public interest.[885] Then, the body is again presumed to be acting in the public interest, rather than in the interest of the economic actors it represents.[886] In *CNSD*, for instance, the Court held that the national legal rules in question lacked a rule "obliging, or even encouraging" the regulatory professional body "to take into account public-interest criteria". Thus, "nothing in the national legislation concerned prevents the CNSD from acting in the exclusive interest of the profession".[887] In a similar vein, in *API* the Court held that the national legislation in question entailed neither guiding principles to be observed by the regulatory body, nor

[880] See Case C-185/91 *Reiff*, para 17; Case C-96/94 *Spediporto*, para 23; Joined cases C-140, 141 and 142/94 *DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chiogga* (1995) ECR I-3257, para 17. For a more detailed assessment and critical reflections on this sometimes little realistic stance of the CJEU, see, e.g., Wendt 2013, pp. 212-261; Schepel 2002, pp. 44-47.

[881] See Case C-35/96 *CNSD*, para 42 (Italian National Council of Customs Agents). Cf. Case C-309/99 *Wouters*, para 61 (the Netherlands Bar Association), Case C-1/12 *OTOC*, para 47 (Portuguese Order of Chartered Accountants).

[882] Case C-38/97 *Autotrasporti Librandi Snc di Librandi F. & C. v Cuttica spedizioni e servizi internationali Srl* (1998) ECR I-5955, para 34. See also Sauter & Schepel 2009, pp. 114-115; Schepel 2002, pp. 44-47; Wendt 2013, pp. 215-216; Szoboszlai 2006, pp. 78-79. Nevertheless, as Schepel notes, when arguments pertaining to the composition requirement are present, the CJEU readily seizes the opportunity to refer to them (Schepel 2002, p. 46). Heremans and Castillo de la Torre note that in *Pavlov* the Court again seem to suggest that both criteria continue to apply cumulatively (Heremans 2012, p. 273; Castillo de la Torre 2005, p. 427). However, in its recent *API* ruling, the Court again followed the *Librandi* line of case law. See *API*, ECLI:EU:C:2014:2147, paras 31 and 34.

[883] Case C-38/97 *Librandi*, para 40.

[884] E.g., Case C-96/94 *Spediporto*, para 24; Case C-35/96 *CNSD*, para 43; Case C-38/97 *Librandi*, para 34. See also Wendt 2013, pp. 216-220, pointing out (at p. 220) that a mere legal reference to 'the general interest' will not suffice in this respect.

[885] See *API*, ECLI:EU:C:2014:2147, para 41; Heremans 2012, p. 272.

[886] Wendt 2013, p. 216.

[887] Case C-35/96 *CNSD*, paras 43 and 41, respectively. Also in *Wouters*, the national legislation for lawyers was held to fall short in this respect, as it only required that the regulations adopted by the Bar of the Netherlands "should be in the interest of the proper practice of the profession". See Case C-309/99 *Wouters*, para 62. Cf. also Case C-1/12 *OTOC*, paras 49-52, where the CJEU added that the private regulatory body was granted "a wide discretion as to the principles, the conditions and methods which the compulsory training scheme for chartered accountants must follow" (para 50) and that the regulation had been adopted without input of the State.

provisions that could prevent its members from acting in their own interests. Furthermore, it was found that only vague legal references were made to the public interest (*in casu* the protection of road safety) and that the law left "a very large margin of discretion and independence" to the members of the regulatory body in performing their activities.[888] Accordingly, the Court held that "in those circumstances, the national legislation at issue in the main proceedings does not contain either procedural arrangements or substantive requirements capable of ensuring, that, when establishing minimum operating costs, the Osservatorio [the regulatory body in question, MM] conducts itself like an arm of the State working in the public interest".[889]

Thus, the CJEU uses the public interest as a yardstick in assessing whether semi-private regulators can be considered an association of undertakings within the meaning of Article 101(1) TFEU. When the regulatory activities of the regulator are at least subjected to legally enshrined public interest criteria, the regulator can be deemed to act in the public interest and hence falls outside the personal scope of Article 101(1) TFEU.[890] As a corollary, the scenarios as outlined by the first and the second prong of the *Van Eycke* test cannot materialize.

2) Delegation test

The delegation test (the third prong of the *Van Eycke* test) forms the second stage, which essentially asks whether the State has retained the power to reject, amend, approve or review the measures taken[891].[892] Noticeable in this respect is the judgment of the Court in *Arduino*. Here, the CJEU first found that neither the composition requirement nor the public interest criteria requirement were met. Still, however, the Court held that it did not appear "that the Italian State has waived its power to make decisions of last resort or to review implementation of the tariff".[893] Therefore, the Court held that the Italian legislator had neither delegated regulatory power to the private body, *nor* required, encouraged or reinforced the private anti-

[888] *API*, ECLI:EU:C:2014:2147, paras 35-37 (quotation para 37).
[889] *API*, ECLI:EU:C:2014:2147, para 38.
[890] Wendt 2013, pp. 211-212, 216, 221; Heremans 2012, p. 255; Schepel 2002, p. 44-47. See also section 5.5.1.2.2
[891] Sauter & Schepel 2009, pp. 114-115; Schepel 2002, p. 48; Szoboszlai 2006, pp. 76-77; Mataija 2016, pp. 106-107; Maduro 2010, pp. 7-8. In *CNSD* (Case C-35/96), the Italian legislator was found to have delegated regulatory power to the tariff board, as it was responsible for the supervision of the board, yet had no powers to intervene in the appointment either of the members of the tariff board, or the members of the Departmental Councils supervising the activities of the custom agents. In a similar fashion, the CJEU found in *API* (ECLI:EU:C:2014:2147) that there was a case of delegation since there was neither public oversight nor consultation of other bodies or public associations before the measures came into effect.
[892] However, Schepel argues, this does not imply that the CJEU will shield all measures that are formally approved by the State from competition law scrutiny. Like the anti-trust analysis, which encompasses the first and the second prong of the *Van Eycke* standard, the delegation test requires an element of public interest. See Schepel 2012, p. 48.
[893] Case C-35/99 *Criminal proceedings against Manuele Arduino, third parties: Diego Dessi, Giovanni Bertolotto and Compagnia Assicuratrice RAS SpA* (2002) ECR I-1529, para 39. Cf. Joined Cases C-94/04 and 202/04 *Federico Cipolla v Rosaria Fazari, née Portolese (C-94/04) and Stefano Macrino and Claudia Capoparte v Roberto Meloni (C-202/04)* (2006) ECR I-11421, para 49. In brief, the Italian State had to approve the draft tariff and it was open to judicial review.

competitive conduct.[894] The formulation used in this judgment suggests that CJEU is satisfied that a State has lived up to its obligations under the *effet utile* doctrine, i.e., under all three prongs of the *Van Ecyke* test, when it retains the power to supervise and control the activities of the private entities in last resort.[895]

5.5.2.3 Liability?

Once a Member State is found to have fallen foul of its obligations under the *effet utile* doctrine, it is bound to disapply the contested legal rule that caused this breach. Yet, the State will not be held liable for infringements of Articles 101 and 102 TFEU resulting from the anticompetitive private activities. With these provisions being directed at undertakings or associations of undertakings, it are the private economic operators that face liability for the restrictive effects of their activities.[896] However, this is not by definition the case. Private undertakings are freed from competition law scrutiny if the legislative measure concerned rules out the possibility for these undertakings to act autonomously. More specifically, the CJEU has decided in *Ladbroke* that Articles 101 and 102 TFEU "apply only to anti-competitive conduct engaged in by undertakings at their own initiative". If the anti-competitive actions are "required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part", the undertakings concerned do not fall within the scope of Articles 101 and 102 TFEU.[897] The same holds when "the conduct was unilaterally imposed on them by the national authorities through the exercise of irresistible pressure".[898] Thus, when such a strong link between restrictive private conduct and public regulation can be established, the decisive yardstick for exemption is the room for maneuver that private actors enjoy within the legal framework set by the State: are they still able to compete or restrict competition at their own initiative or does the framework compel them to perform their tasks in an anti-competitive

[894] Case C-35/99 *Arduino*, para 43. See also Joined Cases C-94/04 and 202/04 *Cipollla*, para 52; Case 250/03 *Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano* (2005) ECR I-1267, paras 30-38. Cf. Case C-225/09 *Edyta Joanna Jakubowska v Alessandro Maneggia* (2010) ECR I-12329. At issue was a statutory obligation on the Italian Bar Councils to remove lawyers from their register in certain circumstances. The CJEU held that there was no delegation because the bar councils had "no influence over the automatic adoption, prescribed by the law, of the decisions to remove from the register" (para 50). Thereupon, it established that "for similar reasons" the first and the second prong of the *Van Eycke* test did not materialize either (para 51).
[895] See, e.g., Mataija 2016, p. 107; Sauter & Schepel 2009, pp. 114-115; Szoboszlai 2006, pp. 76-78; Baquero Cruz 2007, p. 576. For critical remarks, see, e.g., Verschuur 2010, p. 111; Wendt 2013, pp. 423-435, 442-443.
[896] Neergaard 1999, pp. 388-389; Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* (2001) ECR I-8055, paras 48-49, 56, 58.
[897] Joined cases C-359/95 P and C-379/95 P *Commission v Ladbroke Racing Ltd* (1997) ECR I-6265, paras 33-34 (quotation para 33). Conversely: "if a national law merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC and may incur penalties" (Case C-198/01 *CIF*, para 56).
[898] Case T-387/94 *Asia Motor France and others v Commission* (1996) ECR II-961, para 65.

fashion?[899] However, invocations of this defense are not likely to succeed: with the defense being "narrowly applied", they "almost invariably fail", according to Whish and Bailey.[900]

5.5.3 The approach of the CJEU

Private regulation, including industry codes of conduct, can be as restrictive and distortive of intra-Community competition as the economic activities of private actors that are traditionally caught by EU competition law. Not surprisingly, private regulatory arrangements have been subject to judicial scrutiny in EU competition law cases. However, the subjection of private regulatory arrangements to the rules on competition is not as straightforward as the foregoing perhaps suggest. First of all, these rules are concerned with economic activities, whereas regulation is not in and of itself economic in nature.[901] Secondly, private regulation is not always solely concerned with economic interests; it can also pursue public interest objectives. Thirdly, not all private regulatory schemes are entirely private in nature. Schemes can also bear a hybrid character, due to a certain degree of public influence. As a consequence of these regulatory, hybrid features, not all private regulations square well with the personal scope of Articles 101(1) and 102 TFEU. Hence, the CJEU was confronted with a problem similar to the one it faced under free movement law: what approach to adopt? Under a formal approach, based on a strict public-private distinction, competition law scrutiny might not even be an option, notwithstanding the anti-competitive effects of the rules at dispute. However, as follows from this section, the Court steered a different course and, as in the free movement context, adopted a functional approach with formal elements.

The functional nature of the Court's approach under EU competition law is reflected in the definition of the concepts 'undertaking' and 'associations of undertaking', which mark the personal scope of Articles 101 (both concepts) and 102 (undertaking) TFEU.[902] The concept of 'undertaking' centers upon the performance of economic activities, while the notion of 'association of undertakings', building on the concept of an undertaking, generally focuses on the impact of the (regulatory) measures on the economic conduct of the members of the association.[903] In defining these concepts, the national legal status and classifications of an entity are entirely immaterial.[904] For the industry-level private regulators on which this doctoral thesis focuses, such a functional approach implies that they can be subjected to competition law scrutiny under Article 101(1) TFEU as 'associations of undertakings', even though regulation is not an economic activity *per se*.

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[899] Whish & Bailey 2012, pp. 137-138; Neergaard 1999, pp. 389-390; Verschuur 2010, pp. 64-69; Sauter & Schepel 2009, pp. 120-124, 128; Wendt 2013, pp. 435-439.
[900] Whish & Bailey 2012, p. 137. See also Wendt 2013, pp. 435-436.
[901] Wendt 2013, pp. 152-153; Odudu 2006, pp. 30-33; Sauter & Schepel 2009, pp. 93-94.
[902] Sauter & Schepel 2009, pp. 76-77; Odudu 2006, pp. 33, 45-52.
[903] E.g., Wendt 2013, pp. 193-197; Case C-1/12 *OTOC*, para 59.
[904] Case 123/83 *BNIC v Clair*, para 18. Cf. Case C-309/99 *Wouters*, para 66 and Sauter & Schepel 2009, p. 77. The Court has extended this functional approach with its decision that the different activities performed by a single entity need to be assessed on their own merits. The fact that some of its activities involve the exercise of public power does not free the remaining activities that can be decoupled from the 'public activities' from competition law scrutiny. See Case T-128/98 *Aéroports de Paris*, para 108; Sauter & Schepel 2009, p. 79.

However, State involvement with a 'private' regulatory scheme can carry the scheme outside the reach of EU competition law. Here, the formal elements in the Court's approach, which do build on the traditional public-private divide, become visible. In cases where the private or semi-private regulator itself is called into account, these formal elements are first of all reflected in the fact that entities performing an exclusively social function or exercising activities that belong to the prerogatives of the State, are shielded against competition law scrutiny.[905] Secondly, the rulings of the CJEU in *Wouters* and progeny show that competition law leeway can be given to *professional* private regulatory regimes influenced by the State when these regimes can be deemed to operate in the public interest.[906] Thirdly, the *Wouters* test also adds a formal element to the Court's approach in offering an escape-route for *prima facie* restrictive or distortive regulatory measures which pursue legitimate public interest objectives. By the same token, formal elements play an important part in the *effet utile* cases revolving around the accountability of the State. Also in these cases, the answer to the question whether restrictive private or semi-private measures fall within the scope of EU competition law depends on whether the certain public interest related criteria are met (i.e., composition of the regulatory body, presence of legal public interest requirements, State control in last resort).[907]

Thus, on the one hand, the Court has stretched the scope of EU competition law by delineating the personal scope of Articles 101(1) and 102 TFEU in functional terms, taking account of the nature of activities rather than the status of the actor performing them.[908] Consequently, neither instances of purely private regulation, nor hybrid regulatory arrangements are *a priori* excluded from competition law scrutiny. On the other hand, the Court's approach still embodies a formal element in that, broadly speaking, State involvement as well as the presence of a public interest dimension can make private regulation fall outside the realm of EU competition law. The CJEU has thus not stretched its functional approach, which also applies to (self-regulatory and co-regulatory) industry codes of conduct to the full[909].[910]

[905] See with respect to the notion of 'undertaking' Joined Cases C-159 and 160/91 *Poucet*, paras 17-18 and Case C-364/92 *SAT Fluggesellschaft*, para 30 and with respect to the concept of 'association of undertakings' Case C-309/99 *Wouters*, para 57, Case C-1/12 *OTOC*, para 40 and Case C-136/12 *CNG*, paras 41-44.
[906] See section 5.5.1.2.2.
[907] See section 5.5.2.2.
[908] Cf. Odudu 2006, p. 48.
[909] Sauter & Schepel 2009, pp. 128, 215; Odudu 2006, p. 33, noting that "whilst the question of whether an activity is regulatory remains functional, there is increased reliance on institutional factors to assist in the determination". With the notion of 'institutional factors', Odudu refers to the criteria developed under the *effet utile* doctrine.
[910] It follows from Case C-309/99 *Wouters* (paras 66-70) that (one of) the rationale(s) behind this approach lies in the principle of national institutional autonomy. This principle entails that "Community law respects the institutional structure of the Member States. In other words, unless (secondary) Community law provides otherwise, it is for the Member States themselves to determine how they fulfil their Community obligations, which organs will be made responsible for the implementation and application of Community law (directly or otherwise), and what procedures will be followed" (Jans et al. 2007, p. 18). See also Wendt 2013, p. 220.

5.6 Regulation of private regulation through the Court's case law

The Court's functional approach has enabled judicial scrutiny of the rule-making activities of private actors under EU free movement and competition law, which can result in private law sanctions in case infringements are found. Under Dutch private law, an infringement of a fundamental freedom may for instance lead to an obligation to pay damages[911] and may constitute a basis for claims for undue payment or unjustified enrichment.[912] Legal acts contravening a fundamental freedom would be null and void (Article 3:40 DCC).[913] In the competition law context, it can in this respect be pointed at Article 101(2) TFEU, which declares agreements or decisions that fall foul of the cartel prohibition null and void. Moreover, the Court has held that "any individual can claim damages for loss caused to him by contract or by conduct liable to restrict or distort competition", provided that there is "a causal relationship between that harm and an agreement or practice prohibited" under Article 101 TFEU.[914] Furthermore, infringements of Articles 101 and 102 TFEU can lead to liability arising from a wrongful act.[915]

However, as already indicated in the introduction to this chapter, strictly speaking, nothing much can be inferred from the free movement and competition law cases as regards the legal relevance of industry codes of conduct and other forms of private regulation in European (private) law. Rather, the cases are relevant in another respect: the approach of the Court in effect determines the latitude for private regulation. First of all, this is visible in the net result of the approach. Falling into the realm of free movement and competition law, private regulators have to ensure that their regulatory arrangements neither hamper nor obstruct the free flow of persons, services and goods nor must they distort competition, in

[911] Hartkamp 2010, p 530; Cherednychenko 2006, p. 37; Hoyer 2013, pp. 343-344. At least, in theory since the Court has thus far not provided for remedies for private actors under free movement law (De Vries & Van Mastrigt 2013, p. 267). See in the competition law context case C-453/99, *Courage Ltd v Bernard Crehan* (2001) ECR I-6297; Cases C-295/04-298/04, *Manfredi v Lloyd Adriatico* (2006) ECR I-6619. However, Hoyer argues, the arguments that the CJEU advanced in opening up the possibility to claim damages for the infringement of Article 101 TFEU (see Case C-453/99, *Courage v Crehan*, paras 26 and 27; Cases C-295/04-298/04 *Manfredi*, paras 60, 90-91) also go for free movement law. See Hoyer 2013, p. 344. In Dutch law, this right to damages can be derived from Article 6:162 DCC on unlawful acts. For more details, see Hoyer 2013, pp. 344-345.

[912] Hartkamp 2010, pp. 531-532. Since the CJEU has until now not ruled on such consequences, it appears that it is up to the courts of the Member States to deliver a judgment in this respect. See Hoyer 2012, p. 343. Cf. Hartkamp 2010, p. 530, remarking that it is unclear whether these consequences follow on from EU law or from national law.

[913] Hartkamp 2010, p 530; Cherednychenko 2006, p. 37; Hoyer 2013, pp. 343-344.

[914] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (2006) ECR I-6619, paras 58-61 (quotation paras 60-61, with reference to Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* (2001) ECR I-6297, para 26). See also Asser/Hartkamp *3-I* 2015/45. See also Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (*OJ* 2014, L 349/1), which concerns the possibility to claim damages for infringements of Articles 101 and 102 TFEU. The Directive has to be implemented by the end of 2016. In the Netherlands, the Directive will be implemented in Book 6 of the Dutch Civil Code (in (new) Articles 6:193k-6:193t) and in the Code of Civil Procedure (*inter alia* in (new) Articles 844-850).

[915] Asser/Hartkamp *3-I* 2015/48 and 74 et seq. See also Van Leuken 2015, pp. 27-35.

order to avoid liability for violation of free movement and competition law.[916] Secondly, the 'regulatory' element of the approach of the CJEU is reflected in the arguments that the Court has advanced to keep certain private regulatory schemes, namely those which entailed an element of State involvement, out of the reach of the rules on competition. It has been submitted in legal literature that these arguments in effect constitute (procedural) good governance criteria that private regulatory schemes have to meet in order to fall outside the scope of these rules. As a result, the Court, either deliberately or as an unwitting consequence of its general approach, implicitly 'regulates' the use of private regulation.[917]

Schepel has made this argument in the context of the *effet utile* doctrine, analyzing "the conditions under which private parties can be considered "public" enough to merit immunity from competition law".[918] Key in this respect is the 'public interest', understood in the definition of the CJEU in *Librandi*.[919] That is to say that private regulatory arrangements are "to be protected from antitrust if they can make a plausible claim to put the "public interest" over narrow private interests".[920] According to Schepel, the antitrust analysis as well as the delegation test that the CJEU applies under the *effet utile* doctrine in effect center upon this key element, whereby both tests locate the public interest in procedural elements. Under the antitrust analysis, more specifically, the Court since *Librandi* focuses on the existence of the procedural obligation to observe public interest criteria, whereby it uses the composition requirement as a supplementary argument.[921] According to Schepel, this process requirement "transforms antitrust into a kind of administrative law for private regulation. And what antitrust protects here is not a competitive market; what antitrust protects is democratic governance".[922] As regards the delegation test, Schepel argues that the public interest likewise forms the rationale behind the Court's quest for final responsibility of the State for the measure in question. State bodies can be assumed to act in the public interest and, hence, a measure can be shielded from competition law scrutiny if the State has retained the power to supervise and control the activities of the semi-private or semi-public regulatory body in the final instance. Yet, a mere stamp of public approval is insufficient in this respect.[923] Building on the notion of public interest as defined in *Librandi*, Schepel claims that deference will only

[916] See Van Driel 1989, pp. 196-196, 230-231. See in this respect also the 2003 Interinstitutional Agreement on Better lawmaking *OJ* 2003, C 321/01, recital 17, stipulating that self-regulation and co-regulation "must ensure swift and flexible regulation which *does* not affect the principles of competition or the unity of the internal market".
[917] Schepel 2005, pp. 320-338; Schepel 2002; Mataija 2016.
[918] Schepel 2002, p. 31. See also Schepel 2005, pp. 320-336, where the argument made in 2002 is repeated.
[919] As already cited above in section 5.5.2.2: "the interests of the collectivity had to prevail over the private interests of individual operators" (Case C-38/97 *Librandi* para 40).
[920] Schepel 2002, p. 50. Cf. the rationale behind the antitrust analysis, discussed in section 5.5.1.2.2 above and Odudu 2006, p. 50: "Competition is protected in the public interest and Article 81 EC [101 TFEU, MM] operates to ensure that those pursuing a *private* interest do not harm the *public* interest".
[921] Schepel 2002, pp. 45-46, noting that "the Court is in effect putting its faith in the idea that procedural guarantees can discipline financially interested parties to serve the public interest" (p. 46). See also Wendt 2013, p. 216.
[922] Schepel 2002, p. 46.
[923] Schepel 2002, pp. 48-49.

be given to "decisions taken in the advancement of the collective good".[924] Against this backdrop, he submits that the delegation test "locates the "public interest" not in public institutions but in procedures that ensure democratic governance".[925] All this eventually leads Schepel to conclude that the Court in effect applies one single procedural public interest test to assess the compatibility of regulatory measures with EU competition law. With this test, the Court in effect regulates the use of private regulation.[926] In my understanding of Schepel's argument, this implies that the assessment under the effect utile doctrine in fact boils down to the question whether there are procedural requirements or safeguards (i.e., a legal obligation to observe public interest criteria, supplemented with the composition requirement, and State supervision and control in last resort) to ensure that the regulatory body pursues the public interest, rather than its own private interests.[927] If this question is answered in the affirmative, private regulation passes the public interest test.[928] As a result, the semi-private or semi-public regulator, together with the State, escapes competition law liability. Herewith, the CJEU in effect imposes certain good governance criteria upon private regulatory schemes deployed by the State (co-regulatory schemes). In the words of Schepel: "albeit very implicitly, the Court has fashioned a public interest test that transforms Community law into a rudimentary set of procedural norms of good governance for private regulation".[929]

Mataija in a similar vein argues that the CJEU tends to concentrate on institutional and procedural characteristics when assessing a private regulatory scheme under EU competition law.[930] He states that the Court has thus adopted a "relatively light touch approach"[931]: through its broad interpretation of the personal scope of the competition rules, the CJEU has shown willing to bring private regulation within the realm of competition law, yet at the same time has focused its assessment on institutional and procedural characteristics, lending considerable leeway to private regulatory arrangements that respect these criteria of good governance.[932] Mataija, whose study on the relation between private regulation and EU free movement law and competition law has a broader scope than the study conducted in this

[924] Schepel 2002, p. 48, adding that "the appropriate demand is for "public-regarding" regulation, not for public regulation".
[925] Schepel 2002, p. 49.
[926] Schepel 2002, pp. 33, 50-51; Schepel 2005, p. 321. Schepel thereby highlights the contradictory relationship between the antitrust analysis and the delegation test. See also Sauter 2015, p. 11. Baquero Cruz opposes the claim that the CJEU fashions a procedural test, even though, instead of the current tests, he would be in favor of the Court applying such a test under the *effet utile* doctrine. See Baquero Cruz 2007, pp. 558-590.
[927] Cf. Heremans 2012, pp. 260-261, who also indicates that this means that the Court does not engage in a substantive assessment of whether the contested measure serves the public interest. Rather, she notes with Schepel, the assessment focuses on the question whether sufficient procedural safeguards are present to ensure that "the state can be seen as the ultimate author of the resulting measures" (Heremans 2012, p. 261).
[928] Wendt 2013, pp. 223-226 notes that the CJEU does not delve into the actual effectiveness of the public safeguards. Cf. also Schepel 2002, pp. 44-47. What does follow from the Court's case law in this respect is that mere rubber-stamping does not suffice as such a safeguard. See section 5.5.2.2
[929] Schepel 2002, p. 51, adding that "it is a set of norms that recognizes that the legitimacy of economic self-regulation depends on the procedures that ensure the meaningful participation of all concerned parties rather than on hierarchical structures of formal political accountability". See also Schepel 2005, pp. 335-338 (at p. 335: "there is now in EC competition law a set of procedural public interest criteria, however rudimentary, that provides at least a normative framework for the public regulation of private governance regimes").
[930] Mataija 2016, pp. 92, 113, 261.
[931] Mataija 2016, p. 261.
[932] Mataija 2016, pp. 260-261.

chapter, signals the same development under free movement law. Here, the Court equally focuses on procedural issues, such as the composition of the decision-making bodies and transparency, when assessing the proportionality of the disputed regulation in the context of its justifiability.[933] More generally, Mataija finds that "broadly speaking, if some benchmark of procedural fairness is achieved, it is less likely that the Court of Justice would enter into a substantive re-assessment of the private regulator's decision".[934] Against the backdrop of these observations, Mataija concludes that the CJEU and the European Commission can use and have used competition law and free movement law as tools of re-regulation or meta-regulation of private regulation. This influences the ways in which private regulators fulfill their regulatory roles, and the organization and structure of their regulatory schemes.[935] In conceptual terms, these practices lead to what Mataija calls a shift from private autonomy to "regulatory autonomy". This concept "involves deferring to private regulators by granting them a wide margin of discretion […] to pursue a legitimate policy by means of their own choosing".[936] This means that the CJEU will generally not engage with the substance of the private measures: at that point, private regulators are, to a large extent, granted deference as long as they meet the required standards of good governance and fair procedure.[937] However, the price to be paid for this deference is that there are only few instances in which private regulatory measures will be fully excluded from EU free movement law and competition law, Mataija indicates.[938]

Although it is difficult to ascertain whether one can speak of a strategy of the CJEU,[939] case law does suggest that the Court attaches significance to the question whether private regulatory schemes meet certain good governance standards and can hence be considered to act in the public interest, rather than the private interest. This is relevant in several respects. First of all, it entails valuable lessons for States wishing to rely upon private regulation in pursuit of their policy objectives. After all, the *effet utile* doctrine in EU competition law makes clear that in order for States to escape competition law liability, it is essential that such co-regulatory schemes meet the governance requirements of the CJEU. Vice versa, private regulators are equally freed from competition law scrutiny if these requirements are met. Secondly, following on from the approach of the Court, the imposition of good governance criteria can contribute to the democratic legitimacy of private regulatory arrangements, as Schepel and Mataija submit.[940] At this point, the *Wouters* test may also be recalled. With the caveat that the actual scope of the test remains rather opaque, the deference shown by the CJEU to restrictive private regulatory measures adopted in the pursuit of legitimate public

[933] Mataija 2016, p. 64.
[934] Mataija 2016, p. 65.
[935] Mataija 2016, pp. 18, 260. Mataija uses the definition of Coglianese and Mendelson to describe what meta-regulation refers to: "ways that outside regulators … seek to induce targets to develop their own internal, self-regulatory responses to public problems". See Mataija 2016, p. 18, with reference to C. Coglianese & E. Mendelson, 'Meta-regulation and self-regulation', in: M. Cave, R. Baldwin & M. Lodge (eds), *The Oxford handbook of regulation*, Oxford: Oxford University Press 2010, p. 150.
[936] Mataija 2016, p. 63.
[937] Mataija 2016, pp. 260-261.
[938] Mataija 2016, pp. 63, 260.
[939] Schepel 2002, p. 51 indicates that the CJEU has "very implicitly" applied a public interest test.
[940] Schepel 2002, p. 32; Mataija 2016, p. 17.

interests might stimulate private regulators to start operating in the public interest, rather than in their own private interests. The same observation applies as regards the free movement grounds of justifications, which equally entail an element of public interest.

In sum, the partially functional approach of the CJEU has led to the creation of a legal framework for the use of private regulation. Broadly speaking, this framework consists of the free movement rules and competition rules, the requirements of which private regulators will have to meet in order to be shielded against liability. More specifically, this framework imposes certain good governance criteria on private regulation, particularly on co-regulatory schemes operating in a closely interwoven public-private environment (cf. the criteria formulated in *Wouters* and under the *effet utile* doctrine). In this chapter, this meta-regulatory approach most visibly comes to the fore in the context of competition law. Mataija has argued that a similar approach is visible under free movement law.[941] This meta-regulatory legal framework might have both positive and negative effects, as Mataija notes. While it might deter private regulators from adopting regulatory measures, at the same time it imposes checks and balances on private regulation. As such, EU competition law and free movement law not only protect the market against distortions or restrictions caused by private regulation, but may also address some of the drawbacks of private regulation, such as its legitimacy and its effectiveness in attaining public interest goals, Mataija argues.[942]

5.7 Concluding remarks

Thus far, the vast majority of European judicial confrontations with private regulation have occurred in the context of free movement law and competition law. From a conceptual perspective, these are not obvious routes for the CJEU to go down in respect of private regulatory schemes. This is because, as I set out in the introductory section to this chapter, in many ways such schemes do not always readily fit the public-private divide on which the Treaty is conventionally said to rest. In order to bring private regulation within the ambit of free movement law and competition law, the CJEU adopted a functional approach, adapting the Treaty rules to the practice of private regulation.[943] This has resulted in a "privatization of free movement law" and a "publicization of competition law".[944] Put in the more concrete context of this doctoral thesis, the Court's functional approach has brought collective private regulation, which includes industry codes of conduct, within the realm of EU free movement law, and private regulation in general and co-regulation in particular within the realm of EU competition law. However, the formal boundaries have not ceased to exist: the Court's

[941] Mataija 2016, pp. 64-65.
[942] Mataija 2016, pp. 4-5, 17, 264. As regards the effectiveness of private regulation in attaining public interest goals, it can be pointed to the suggestion of Monti to use Article 101 TFEU as a tool to encourage self-regulatory measures by traders in the consumer interest. See Monti 2007b, pp. 310-312.
[943] Mataija 2016, p. 17.
[944] Baquero-Cruz 2002, p. 87 and Mataija 2016, p. 18, both with reference to Waelbroeck, 'Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE', in: F. Caportorti et al. (eds), *Du droit international au droit de l'intégration: liber amicorum Pierre Pescatore*, Baden-Baden: Nomos 1987.

approach in both fields of law still holds some formal elements.[945] Mataija puts it as follows: "Insofar as EU law accepts a public-private distinction, it is a functional one. It is not so much about *ex ante* classifications of actors as public or private in an abstract, 'objective' sense, but rather a form of *ex post* justification for limiting the reach of its disciplines on a case by case basis".[946]

The key question in the context of this doctoral thesis is how the approach of the CJEU impacts industry codes of conduct. As noted at the outset of this chapter, strictly speaking, the approach does not tell us much about the legal relevance of industry codes as such, since it is the restrictive potential of this type of regulation that is central to the free movement law and competition law cases. Nonetheless, the approach of the Court has important consequences for industry codes of conduct and other forms of collective private regulation: it has resulted in a European legal framework for private regulation. First of all, as a result of the CJEU's functional approach, free movement law and competition law demarcate private regulators' intra-Community room for maneuver. Their regulatory activities are to remain within the limits of these fields of law, subject to liability under national civil law. Secondly, the approach of the Court has led to the 'imposition' of certain good governance requirements in the sense that private regulators can escape free movement law and competition law scrutiny when these requirements are met. Although present under both free movement law and competition law,[947] in this chapter the approach was most visible in the discussion of the rulings of the CJEU in competition law cases.[948] More specifically, in line with the arguments of Schepel and Mataija,[949] the discussion of this case law showed that where co-regulatory regimes are concerned, private regulators (i.e., at least professional organizations following *Wouters* and related judgments) and States (following the *effet utile* doctrine) can escape competition law liability when certain procedural good governance requirements (most notably pertaining to the composition of the regulatory body, a legal obligation to observe public interest criteria and the presence of State supervision and control in last resort[950]) are met.

[945] Sauter & Schepel 2009, p. 128.
[946] Mataija 2016, p. 17.
[947] Mataija 2016.
[948] For an account of this practice under EU free movement law, see Mataija 2016.
[949] Schepel 2002; Mataija 2016.
[950] See Case C-309/99 *Wouters* (discussed in section 5.5.1.2.2) and the body of *effet utile* law discussed in section 5.5.2.2.

6 The approach of the Dutch civil courts

6.1 Introduction

Like the CJEU, Dutch civil courts[951] have been confronted with industry codes and other forms of private regulation. These confrontations have provoked different judicial responses.[952] A small case law analysis that Giesen conducted in 2008[953] suggests that the approach of district courts and courts of appeal in this respect is more hesitant than that of the Supreme Court. Whereas some lower courts do refer to private regulation in reaching their decision, other courts disregard the private rules invoked by the litigants. By employing it more generously than in the past, the Supreme Court, by contrast, as Giesen observes, appears to have given a clear field for the use of private regulation. Subsequently, Giesen concludes that the approach of the Supreme Court 'unmistakably' implies that judges can make use of industry codes of conduct and other forms of private regulation, albeit the Court has not yet explicitly stated that this is the case.[954]

In this chapter, I will pick up where Giesen left off in 2008, implicitly asking whether the observations he made still reflect the current state of affairs. How does the Dutch judiciary deal with industry codes of conduct in civil law cases and what (legal) relevance do judges attach to these codes?[955] These questions will be answered on the basis of a comprehensive analysis of the Dutch judicial responses to industry codes of conduct. The design of the search for relevant case law will be set out in section 6.2. After this, the results of the case law analysis will be presented, starting with a discussion of decisions of the lower courts (section 6.3). This discussion will be followed by an analysis of the judgments of the Supreme Court (section 6.4).[956] Conclusions are drawn in section 6.5.

[951] I.e., the Civil Chamber of the Supreme Court (*Hoge Raad*), courts of appeal (*gerechtshoven*) and district courts (*rechtbanken*).
[952] See Giesen 2008, p. 785; Giesen 2007, especially Chapters 3 and 4; Vranken 2005, pp. 87-94.
[953] The analysis covers the period 1 February 2007 – May 2008 and includes 15 judgments (of which 6 have been delivered by a district court, 3 by a court of appeal and 6 by the Supreme Court).
[954] Giesen 2008, pp. 785-787, 790-791.
[955] In line with the focus of this doctoral thesis, this chapter concentrates on private law. Other fields of law as well as disciplinary proceedings embodied under either private or public law have been left out.
[956] The English translations of the quotations from Dutch case law in this chapter are my own, unless indicated otherwise.

Again, like in Chapters 4 and 5, I need to make some remarks about the terminology applied in this chapter. The case law discussed in this chapter involves a wide array of private regulatory measures. Although not all of these measures go by the name of 'industry code of conduct', many of them can be subsumed under the definition of industry codes that this doctoral thesis applies (see Chapter 1, section 1.5.2), since they encompass rules of conduct. However, a few measures may (partially) fall outside the scope of this definition. Nonetheless, since it is possible to speak of industry codes without obscuring the scope of Dutch civil case law, I will use the term industry codes of conduct. Yet, the observations made in this chapter apply equally to other forms of private regulation.

6.2 Design case law search

The starting point for the case law analysis, which comprises judgments of both the lower courts (district courts and courts of appeal) and the Supreme Court, are the different judgments discussed in private law literature. However, the analysis could not be built solely on a literature review, since the case law analyses conducted by other private law scholars are limited, both time-wise and scope-wise. The latest, more general analysis of case law is the one conducted by Giesen, which stems from 2008 and covers only a short time-span.[957] Furthermore, the existing analyses tend to focus on the case law of the Supreme Court.[958] The limited nature of the case law analyses present in Dutch private law literature necessitated an additional search for relevant case law. With a view to the time span already covered by the literature, this search focused on judgments published between 1 May 2008 and 1 July 2016.[959] This combination of a review of the judgments referred to in Dutch private law literature (including judgments delivered before 1 May 2008) and my own search for relevant case law eventually resulted in 30 Supreme Court rulings, 43 court of appeal rulings and 112 district court decisions analyzed or referred to in this chapter. In line with the focus of this doctoral thesis on industry codes of conduct, I took as the focal point of the search judgments concerning this form of private regulation. However, by involving literature concerning other types of industry-level private regulation and by using several broad search queries, I cast the net wider.[960] Corporate codes of conduct, codes adopted by the government and codes of conduct enacted as a regulation by regulatory authorities drawn from the profession pursuant

[957] Giesen 2008, who stresses that his overview is by no means a fully-fledged sample survey.
[958] Cf. Giesen 2007; Vranken 2005; Kristic, Van Tilburg & Verbruggen 2009. Giesen 2008 forms an exception in this regard.
[959] The initial search covered the period 1 May 2008 – 31 October 2014. It was updated afterwards so as to include relevant case law published until 1 July 2016. The choice for 1 May 2008 was motivated by the fact that Giesen's analysis, which is the latest general review of Dutch civil case law at this point, covers case law until May 2008.
[960] The search was limited to cases published in the online database of the Netherlands Judiciary (<http://uitspraken.rechtspraak.nl/>), with the caveat that not all judgments are published in this database. Judgments which only made mention of private rules, i.e., without the court going into their relevance or applying the rules, were not included in the sample. The following search queries were used: gedragscode(s); gedragsregel(s); beroepscode(s); beroepsregel(s); ethisch (encompassing: ethische (gedrags)code(s); ethische (gedrags)regel(s)); zelfregulering; 79 RO; private regulering; private regelgeving; private regel(s); alternatieve regelgeving; alternatieve regulering; conduct (encompassing: code(s) of conduct and rule(s) of conduct); ethics (encompassing: code(s) of ethics and rule(s) of ethics); ethical (encompassing: ethical code(s) and ethical rule(s)).

to their public regulatory power, such as the Accountants Code of Conduct Regulation (*Verordening gedrags- en beroepsregels accountants*), were left out of the case law search.

It should be emphasized that this chapter by no means provides an exhaustive overview of the use of industry codes in Dutch civil case law. Even though I sought to conduct a search as systematic and thorough as possible, relevant cases might have slipped through the cracks. Nonetheless, by combining a literature review with an analysis of my own inventory of case law from both the Supreme Court and the lower courts,[961] this chapter provides a broader overview and analysis of Dutch civil case law involving industry codes of conduct than the analyses hitherto conducted in Dutch private law literature.

6.3 District courts and courts of appeal

This section describes how district courts and courts of appeal deal with industry codes, drawing a distinction between judgments in which these codes were relied upon by the courts (section 6.3.1) and judgments where they were disregarded in part or in whole (section 6.3.2).

6.3.1 Judicial application of industry codes of conduct

For reasons of clarity, the case law discussed in this section has been arranged loosely into groups, based on the subject matter covered by the private rules concerned.

6.3.1.1 General

A first judgment that can be mentioned is the *Batco* case, where private regulation was one of the viewpoints on which the court founded its decision. In this case, the parent company of the corporation under scrutiny accepted as a guideline for its business policy the OECD Guidelines for Multinational Enterprises. The Enterprise Division of the Amsterdam Court of Appeal took account of the relevant norms of the OECD Guidelines in classifying the contested corporate decision as a case of mismanagement, stating that the aforementioned acceptance of the OECD Guidelines "was not without meaning".[962] In a similar vein, the North-Netherlands District Court referred to the Good Manufacturers Practice (GMP) rules applicable in the animal food industry. Whereas the claimant had argued that the question whether these rules had been violated was irrelevant to the assessment of his conduct, the district court held a different view: "although the GMP regulation does not include legal rules,

[961] Where applicable, references will be made to publications in which the judgment concerned is discussed.
[962] Hof Amsterdam (Enterprise Division) 21 June 1979, *NJ* 1980/71 (*Batco*), para 6. See also Giesen 2007, p. 72. Earlier in its ruling (under d), the court referred to the following statement of the chairman of BAT industries (quotation derived from the judgment): "The standards they [OECD Guidelines, MM] set are very much in line with our own established policies in these matters and we certainly support their efforts to have them applied widely". Eijsbouts argues that the scope of this ruling extends beyond the area of company law as the Guidelines can play a similar role in elaborating the standard of due care in Article 6:162 DCC. See Eijsbouts 2010, p. 90. Cf. for the financial sector Rb. Limburg 10 September 2014, ECLI:NL:RBLIM:2014:7819, para 3.14 where a violation of the Code of Conduct of the Belgian trade association for the financial sector (Febelfin) constituted one of the reasons for the court to decide that the contested behavior of the bank was unlawful.

it has nonetheless significance in being a self-regulatory system adopted by and applying to the industry. It can, as is the case here, be used as a point of reference in elaborating the standards of due care for feed producers"[963].

Another example of a case in which an industry code of conduct was deployed in relation to the standard of due care can be found in a ruling of the Arnhem Court of Appeal involving the Code of Conduct for real estate agents affiliated with *VBO Makelaar*, a trade association for real estate agents and appraisers. In this case, the appellants claimed that the real estate agents involved were guilty of a conflict of interest and therefore acted negligently and unlawfully. In substantiating their claim, the appellants called upon a provision of the Code that concerned conflicts of interest. The court commenced its assessment of the claim by establishing that the real estate agents had not contested the fact that they were bound to the Code. Thereupon, it scrutinized the behavior of the real estate agents on the basis of the Code. Whereas the real estate agents in this respect advocated a restrictive interpretation of the applicable rules, the court was of the opinion that the present case was also covered by the Code. It concluded that there was an undesirable conflict of interest. Since the real estate agents had not adapted their behavior accordingly, the disputed conduct was negligent to such an extent that it should be qualified as unlawful, the court concluded, thus founding its decision on the Code.[964] The Arnhem Court of Appeal adopted a similar approach in another case involving private rules. The cause of this lawsuit was the damage that the plaintiff had suffered as a result of a car tire that exploded while being inflated by a car mechanic. The plaintiff sued the garage employing the mechanic and claimed that it had committed an unlawful act by disregarding the safety rules. The plaintiff in this respect referred to a brochure of the industry association, which set out the dangers of inflating a car tire and the precautionary measures to be taken in that regard. Considering the defendant had disputed neither the contents of the brochure nor his familiarity with its contents, the court took account of said brochure in establishing whether there was a case of hazardous negligence (*gevaarzetting*).[965]

The Code of Conduct for claim organizations (*Claimcode*), in turn, has been used by courts in establishing whether a claim organization is entitled to initiate a collective action on the basis of Article 3:305a DCC. Article 3:305a(2) DCC, more specifically, stipulates that in order for a claim organization to be entitled, the legal claim brought by the organization should sufficiently safeguard the interests of the persons to whose benefit the claim is brought to court. With reference to the fact that the Dutch legislator has indicated that the *Claimcode* constitutes a relevant viewpoint in assessing whether this is the case,[966] courts have relied upon the principles of this code of conduct to establish the entitlement of a claim organization. The East-Brabant District Court in this respect, for instance, considered that even though the *Claimcode* is not a legal precondition for the entitlement of a claim

[963] Rb. Noord-Holland 23 April 2014, ECLI:NL:RBNHO:2014:3627, para 4.24. Identical: Rb. Noord-Holland 20 May 2015, ECLI:NL:RBNHO:2015:11544, para 4.14.
[964] Hof Arnhem 11 August 2009, ECLI:NL:GHARN:2009:BJ5405, paras 18, 21.
[965] Hof Arnhem 7 February 2009, ECLI:NL:GHARN:2009:BK4834, notably paras 4.4-4.5, 4.7-4.9. See also Jansen *GS Onrechtmatige daad*, artikel 6:162 BW, no. 85.4, referring to this judgment.
[966] See *Parliamentary Papers II* 2011/12, 33 126, no. 3, pp. 12-13.

organization to bring a claim, the aforementioned reference of the legislator has given the Code an indirect legal basis in Article 3:305a(2) DCC. The court furthermore noted that the Code is broadly supported. Accordingly, the court took account of the Code as an important viewpoint in establishing whether the interests are sufficiently safeguarded of the persons to whose benefit the claim is brought to court.[967] These considerations contrast sharply with the, in view of the Dutch legislator's reference to the Code remarkable decision of the Gelderland District Court to not take account of the *Claimcode* since it was not a universally binding provision (*een ieder bindende bepaling*).[968]

Equally noticeable is a case brought before the District Court of The Hague concerning, in short, the rejection of an application to extend a residence permit for study purposes. In this case, it is the district court itself that brings up the code of conduct in some 'superfluous remarks'. After having validated the aforementioned rejection, the district court noted that the claimant was caught up in a vicious circle: whereas the residence permit was not granted as the claimant had no enrollment certificate from the educational institution, the educational institution refused to grant the certificate because the claimant had no permit. The court seeks to help the claimant out by indicating that a solution could be offered by the Code of Conduct International Student Higher Education, which supplements the legal framework and contains the conditions for admission to a higher educational institute. Considering that the education institute concerned had joined the Code, the court suggested the claimant bring the relevant Code rules to the attention of the education institute.[969]

For the sake of completeness, it can also be pointed at the role that codes of conduct can play in employment relationships. Codes of conduct may be part of or linked to an employment contract. As a vast body of case law shows, there are various ways in which failure from the side of the employee to abide by these rules can constitute one of the factors that justifies termination of contract.[970]

6.3.1.2 SMS Services

The SMS Service Provision Code of Conduct has been central to several judgments, which all centered on the question whether a consumer was bound to pay the excessive costs for an

[967] Rb. Oost-Brabant 29 June 2016, ECLI:NL:RBOBR:2016:3383, paras 5.20-5.21. See also Rb. Noord-Nederland 2 September 2015, ECLI:NL:RBNNE:2015:4185.
[968] Rb. Gelderland 3 September 2014, ECLI:NL:RBGEL:2014:5645, para 5.7.
[969] Rb. 's-Gravenhage 6 March 2009, ECLI:NL:RBSGR:2009:BH8906, para 7.
[970] Some more recent examples include Rb. Maastricht 28 March 2011, ECLI:NL:RBMAA:2011:BP9762; Rb. Zeeland-West-Brabant 14 January 2013, ECLI:NL:RBZWB:2013:BY983; Rb. Oost-Nederland 21 March 2013, ECLI:NL:RBONE:2013:BZ5412; Hof Arnhem-Leeuwarden 21 May 2013, ECLI:NL:GHARL:2013:CA2662; Rb. Midden-Nederland 21 August 2014, ECLI:NL:RBMNE:2014:3653; Rb. Gelderland 9 September 2014, ECLI:NL:RBGEL:2014:6306. Cf., slightly different, Rb. Zeeland-West-Brabant 26 February 2014, ECLI:NL:RBZWB:2014:313 (where it was held that in violating the code of conduct of his employer, the employee had acted unlawfully); Rb. Alkmaar 6 May 2010, ECLI:NL:RBALK:2010:BN1637 (where the court dismissed the claim that the employee had violated the employer's code of conduct) and Rb. Zutphen 14 July 2009, ECLI:NL:RBZUT:2009:BJ2559 (according to the court, the code of conduct did not play a self-standing role). See also HR 2 May 2014, ECLI:NL:HR:2014:1056, *NJ* 2014/250 (*ABN Amro/J.*) concerning the refusal of a bank to hand a former employee a declaration of integrity on the basis of the Integrity Code for banks of the Dutch Banking Association.

SMS service, which rose very shortly after the consumer had registered for the SMS service concerned. A noticeable example is a judgment delivered by the Arnhem District Court, where the court took the SMS Code as the focal point of its line of argument. The court started out by stating that the Code is an agreement and that the operator and the SMS service provider in question are parties to that agreement. Thereupon, it considered whether provisions of the Code could be regarded as third-party beneficiary clauses incorporated in the legal relation between consumer and provider. After having applied the criteria stipulated by Article 6:253(4) DCC, the court held that the eligible Code provisions should indeed be classified as such. Accordingly, the yardstick for assessing whether the provider has lived up to the requirements of the Code is to be found in the principle of good faith that both parties have to observe in their contractual relationship. Following this principle, the provider has to use the provisions of the Code to the benefit of the consumer, the court held. The subsequent assessment of the requirements of the Code led the court to conclude that the provider had not acted in good faith. The provider's argument that the consumer had registered for the SMS service and thus had himself to blame for the excessive costs for the SMS service was dismissed with reference to the fact that the provider had voluntarily subscribed to the Code, which, precisely to avoid overburdening credulous consumers financially, aims to prevent such situations from arising.[971]

Whereas the Arnhem District Court employed the Code by linking it to the legal concept of the 'third-party beneficiary clause', the Dordrecht District Court used the principles of reasonableness and fairness to assign legal relevance to the SMS Code. After having held that the applicability of the Code was established between the parties to the proceedings, the district court found that the provider had not followed the procedure for handling complaints set out in the Code. Taking account of this finding and with regard to another provision of the Code, the court concluded that it would be unacceptable according to the principles of reasonableness and fairness to charge the consumer with costs for the SMS service.[972]

The Leeuwarden District Court, in turn, founded its decision directly on the Code. The point of contention was, again, whether a consumer could be held liable for excessive costs for a text message service. According to the court, the consumer's defense, which included an email with the SMS Code, denoted an explicit reliance on the contents and purpose of this code of conduct. The court hereby remarked that the Code is "by now well known in social and economic life, and broadly accessible, that is at least via Internet"[973] and that the applicability of the Code to the relation between the operator and the provider of the text message service, both of which had joined the Code, had not been contested. Thereupon, the district court reviewed the facts of the case in the light of the applicable Code provisions. More specifically, the court found that the SMS service provider failed to comply with the

[971] Rb. Arnhem 26 March 2008, ECLI:NL:RBARN:2008:BC8904. See also Vzr. Rb. Utrecht 16 July 2008, ECLI:NL:RBUTR:2008:BF8825, where a consumer, with reference to the Arnhem District Court's decision, could invoke the provisions of the SMS Code in his capacity as a third party. The court thereby remarks that the operator did not contest, when asked, that he was bound by the Code. The fact that the consumer could rely upon the Code remained undisputed as well (cf. para 4.2 of the judgment).
[972] Rb. Dordrecht 27 December 2012, ECLI:NL:RBDOR:2012:BY8127.
[973] Rb. Leeuwarden 11 February 2009, ECLI:NL:RBLEE:2009:BH2709, paras 3.4.

Code and that with a view to the Code and the ensuing protection of the consumer, it would have been logical for the operator to check dubious SMS services practices at this point.[974] This led the court to disallow the claim for payment.[975]

6.3.1.3 Rules of conduct for lawyers

A first case in which the Rules of Professional Conduct 1992 of the Netherlands Bar Association (*Gedragsregels Advocatuur 1992*) played a role is one brought before the District Court of The Hague. After having concluded that the parties to the proceedings consented on the content of the Rules, the court marked the Rules as a custom of the profession within the meaning of Article 6:248 DCC.[976] Since the parties did not make an arrangement to the contrary, the court declared the Rules applicable to the agreement concerned. The claim of the plaintiff was awarded on the basis of the professional rules. The defendant's argument that a violation of the professional rules only leads to liability under disciplinary law, and not under civil law, was herewith dismissed.[977] Thus, the Rules of Professional Conduct had their effect through the doctrine of Article 6:248 DCC.[978] In another case, the applicability of the Code of Conduct for European Lawyers, drawn up by the Council of Bars and Law Societies of Europe (CCBE), on the relationship between a Dutch lawyer and his German colleague was also beyond dispute. The Dutch lawyer (the plaintiff) founded its claim that the German lawyer (the defendant) had to pay the Dutch lawyer's fee notes on the Code, which contained rules at this point. The German lawyer, in his turn, invoked the same rules in his defense, stating that he had explicitly disclaimed (future) liability at this point, as was allowed by the Code. The court held that the Code reflects the rules that govern the relation between lawyers acting in their professional capacity. Accordingly, the court assessed the Dutch lawyer's claim on the basis of the Code, which led to a conclusion in favor of the defendant.[979]

Judges have also used the rules of conduct for lawyers as a yardstick in assessing the legal permissibility of the conduct of lawyers. The first case that can be mentioned in this respect centered upon the question whether a lawyer had correctly applied one of the Rules of Professional Conduct 1992. After having established that, as a starting point, the legal relationship between the parties to the proceedings was covered by this rule, the court of appeal found that the lawyer had fallen short at this point and accordingly failed to fulfill its obligations towards his client.[980] In a second case, the plaintiff (a law firm) contested the decision of the subdistrict court to link up with the Rules of Professional Conduct in ascertaining whether there was a case of undue influence. The Amsterdam Court of Appeal, however, was of the opinion that the Rules could be applied as a criterion in this regard, remarking that this was not altered by the fact that only a disciplinary court is authorized to

[974] Rb. Leeuwarden 11 February 2009, ECLI:NL:RBLEE:2009:BH2709, para 3.7.
[975] Rb. Leeuwarden 11 February 2009, ECLI:NL:RBLEE:2009:BH2709, paras 3.4-3.8.
[976] Article 6:248 DCC stipulates, *inter alia*, that an agreement also has the legal effects that follow on from custom.
[977] Rb. 's-Gravenhage 10 July 2007, ECLI:NL:RBSGR:2007:BA9210, paras 4.2, 4.4. Cf. Giesen 2008, p. 786.
[978] Giesen 2008, p. 786.
[979] Rb. 's-Hertogenbosch 18 August 2010, ECLI:NL:RBSHE:2010:BN4531, paras 4.3-4.5.
[980] Hof Arnhem-Leeuwarden 11 August 2015, ECLI:NL:GHARL:2015:5952, paras 4.2-4.3, 4.5-4.6.

impose disciplinary measures in case of infringements of these Rules.[981] It found that the law firm "should be deemed to be familiar with" the applicable rule, "or at least should have been familiar with it".[982] The subsequent assessment of the conduct of the law firm on the basis of the Rules led to the dismissal of the complaint concerning the use of the Rules by the subdistrict court.[983]

Equally noticeable is a judgment of the Amsterdam Court of Appeal, where it was found that the mere fact that the law firm had acted in contravention of the relevant Rules of Professional Conduct would in itself not warrant the conclusion that the firm was in breach of contract in respect of its clients and liable for damage.[984] The court drew a similar conclusion with regard to the claim that by contravening the Rules of Conduct, the law firm had committed an unlawful act vis-à-vis third parties, given that the Rules applied to the contractual relationship between the firm and its clients.[985] By the same token, the Court of Appeal of Arnhem-Leeuwarden held that "*under circumstances*, mere compliance with the Rules of Professional Conduct is not sufficient to flesh out the duty of care [of a lawyer towards its client, MM]" [986] (emphasis added, MM).

6.3.1.4 Franchise

Private regulation can also play a role in disputes between franchisors and franchisees, as the judgments discussed in this subsection show. The European Code of Ethics for Franchising (*Europese Erecode Inzake Franchising*), as applied by the Netherlands Franchise Association (*Nederlandse Franchise Vereniging*), for instance proved relevant to the decision of the District Court of The Hague concerning the termination of a franchise agreement. The Code had been declared applicable to this agreement by the franchisor. The franchisee claimed that he rightfully terminated the franchise agreement since the franchisor, *inter alia*, failed to comply with the obligation, in short, to provide a financial forecast, as imposed on him by the Code. The court, however, rejected this argument on the basis of an interpretation of the Code provision relied upon by the franchisee. By declaring the Code applicable to the agreement, the franchisor was indeed obliged to provide such a forecast, but not in the way the franchisee claimed.[987] Likewise, the Franchise Code proved relevant for the interpretation of a franchise agreement clause in a case brought before the Utrecht District Court. The court held that in interpreting this agreement, the franchisee could also attach significance to the fact that the franchisor was bound by this Code and, particularly, to the rules concerning the obligation of the franchisor to provide future franchisees with full and correct information. The disputed clause of the franchise agreement could be viewed as a specification of this norm, which "is

[981] Hof Amsterdam 3 June 2014, ECLI:NL:GHAMS:2014:2410, para 3.7.
[982] Hof Amsterdam 3 June 2014, ECLI:NL:GHAMS:2014:2410, para 3.8.
[983] Hof Amsterdam 3 June 2014, ECLI:NL:GHAMS:2014:2410, paras 3.8-3.9. In Hof 's-Hertogenbosch 29 May 2012, ECLI:NL:GHSHE:2012:BW7211, concerning a comparable dispute, a similar line of argument was applied.
[984] Hof Amsterdam 23 February 2016, ECLI:NL:GHAMS:2016:635, para 3.11.
[985] Hof Amsterdam 23 February 2016, ECLI:NL:GHAMS:2016:635, para 3.15.
[986] Hof Arnhem-Leeuwarden 12 April 2016, ECLI:NL:GHARL:2016:2876, para 2.4.
[987] Rb. Den Haag 23 October 2013, ECLI:NL:RBDHA:2013:14241, paras 4.2-4.4.

endorsed by franchisors in the Netherlands"[988]. The franchisor, in turn, did not challenge the fact that the Code had significance, but did contest the alleged violation of its rules. This plea was however to no avail.[989]

To conclude this subsection, it can be pointed at a decision of the Arnhem District Court. Unlike the previous two judgments, this decision does not concern private rules governing franchise relations. The code of conduct that played a role here contained a rule on the use of the intranet and the email facilities of the franchisor. Central to the dispute was the franchisor's allegation that one of his franchisees had violated the aforementioned code. According to the franchisor, the franchisee's obligation to abide by this code followed on from the franchise agreement. The fact that the franchisee had failed to live up to this obligation constituted one of the reasons for the franchisor to terminate the franchise agreement. The court, however, disagreed. It was of the opinion that the termination was disproportionate as the code of conduct itself provided for less far-reaching sanctions in case of non-compliance.[990]

6.3.1.5 Insurers

Yet another example of a private regulatory arrangement that has been applied directly in civil case law is the general Code of Conduct for Insurers (*Gedragscode Verzekeraars*) of the Dutch Association of Insurers (*Verbond van Verzekeraars*). One of the issues in the judgment involving the Code was whether the unilateral cancellation of an insurance contract by the insurance company, with the argument of increased financial risks, was in breach of the Code. The insurance company itself contested the alleged violation of the Code. The court in this respect already ruled that the insurer (the defendant in this case) was allowed to terminate the contract on the basis of the law. This was not altered by the plaintiffs' reliance on the Code. The court hereby remarked the Code "does not purport to assign insured parties more rights in their relation to insurance companies than granted to these parties by law, jurisprudence and policy conditions".[991] By terminating the agreement, the insurance company, with a view to the aforementioned financial risks, had shown itself responsible towards all insured persons. Herewith, it had acted mindful of the Code, which constitutes the framework for insurers when they strive for a socially responsible business operation, the court held.[992]

Another private regulatory scheme of the Dutch Association of Insurers that has been applied by the Dutch judiciary is the Code of Conduct on Personal Inquiry (*Gedragscode Persoonlijk Onderzoek*, hereafter: GPO). A personal inquiry into the actions of an insured party is a sensitive issue as it can infringe the insured party's right to privacy. Such an

[988] Rb. Utrecht 12 December 2012, ECLI:NL:RBUTR:2012:BY6869, para 2.32.
[989] Rb. Utrecht 12 December 2012, ECLI:NL:RBUTR:2012:BY6869, paras 2.32-2.33.
[990] Vzr. Rb. Arnhem 2 December 2012, ECLI:NL:RBARN:2012:BV5455, paras 4.4 and 4.9.
[991] Rb. Gelderland 3 September 2014, ECLI:NL:RBGEL:2014:5645, para 5.17.
[992] Rb. Gelderland 3 September 2014, ECLI:NL:RBGEL:2014:5645, para 5.17, also pointing at the self-regulatory nature of the Code. Cf. in the context of insurance agreements also Hof 's-Hertogenbosch 18 September 2012, ECLI:NL:GHSHE:2012:BX7795 (where the defendant's claim that the insurer had violated several codes of conduct was dismissed) and Hof Arnhem-Leeuwarden, 9 April 2013, ECLI:NL:GHARL:2013:BZ6718.

infringement is in principle unlawful, unless there is a ground for justification (Article 6:162(1) DCC). With the GPO laying down the rules and conditions for holding personal inquiries, it may perhaps not come as a surprise that the Code has been frequently referred to in cases revolving around the question whether an insurance company has committed an unlawful act by holding a personal inquiry. The judgments follow a more or less set pattern in this respect. The insured party claims that the GPO has been violated, whereupon the court - sometimes after having established that the insurer was bound to the code[993] - assesses whether the insurance company abided by the general principles of the GPO.[994] In case of compliance with these principles, the infringement of the right to privacy is deemed justified and the personal inquiry is held lawful. Thus, courts deploy the GPO as a self-standing touchstone when answering the question whether an insurer had rightfully decided to conduct a personal inquiry.[995]

The Sectoral Regulations (*Bedrijfsregelingen*) of the Association of Insurers have also been referred to in various judgments. The Fire Insurance (Right of Recourse) Sectoral Regulations (*Bedrijfsregeling Brandregres*) and the Innocent Third Party Sectoral Regulations (*Bedrijfsregeling Schuldloze derde*) are most often brought to the fore by parties to the proceedings. In these cases, courts apply the relevant provisions, without further ado.[996] Courts have also considered the way in which the Fire Insurance (Right of Recourse) Sectoral Regulations must be interpreted.[997] Their judgments can be traced back to a Supreme Court ruling dating from 2003. In this case, the Supreme Court held that the aforementioned Regulations are a "regulation of a general nature, aimed at restricting the recourse of fire insurers, which extends to third parties that have not been involved in the drafting process".

[993] The fact that an insurance company has to abide by the GPO, or acknowledges that he is bound to the GPO, is not always explicitly referred to. However, the fact that an insurer does not contest the reliance of the insured party on the GPO arguably implies that he consents to the application of the Code.

[994] I.e., the decision to conduct the inquiry should be based on one of the two reasons set out by the GPO and the inquiry should meet the principles of proportionality and subsidiarity. In some judgments, these principles are clearly visible, while in others they are applied in more guarded terms.

[995] Some more recent examples of cases in which the GPO has been used as a (central) touchstone include: Rb. Den Haag 25 May 2016, ECLI:NL:RBDHA:2016:5695; Rb. Noord-Nederland 26 November 2014, ECLI:NL:RBNNE:2014:6661; Rb. Rotterdam 17 September 2014, ECLI:NL:RBROT:2014:7637; Rb. Noord-Holland 26 June 2014, ECLI:NL:RBNHO:2014:5555; Rb. Den Haag 5 March 2014, ECLI:NL:RBDHA:2014:3581; Hof Arnhem-Leeuwarden 4 March 2014, ECLI:NL:GHARL:2014:1698; Rb. Amsterdam 2 January 2014, ECLI:NL:RBAMS:2014:10; Hof Arnhem 18 December 2012, ECLI:NL:GHARN:2012:BY6523; Rb. Arnhem 11 April 2012, ECLI:NL:RBARN:2012:BW3674; Rb. Zwolle-Lelystad 4 May 2011, ECLI:NL:RBZLY:2011:BV6594. Earlier: Rb. Assen 25 July 2007, ECLI:NL:RBASS:2007:BH6215 and Rb. Arnhem 17 May 2006, ECLI:NL:RBARN:2006:AY0882. Cf. also Rb. Rotterdam 28 May 2014, ECLI:NL:RBROT:2014:6171.

[996] See, e.g., Rb. Midden-Nederland 12 June 2013, ECLI:NL:RBMNE:2013:CA3498; Rb. 's-Gravenhage 9 February 2012, ECLI:NL:RBSGR:2012:BV7111; Rb. Utrecht 25 August 2010, ECLI:NL:RBUTR:2010:BO1767. Cf. also Hof Amsterdam 24 July 2012, ECLI:NL:GHAMS:2012:BX9813; Rb. Rotterdam, 9 July 2014, ECLI:NL:RBROT:2014:5378; Rb. Rotterdam 31 March 2010, ECLI:NL:RBROT:2010:BM0821; Rb. Zwolle-Lelystad 19 August 2009, ECLI:NL:RBZLY:2009:BJ9081. See also Rb. Zutphen 7 November 2007, ECLI:NL:RBZUT:2007:BB8032 (briefly referred to by Giesen 2008, p. 786) and Rb. Zeeland-West-Brabant 26 June 2013, ECLI:NL:RBZWB:2013:7313.

[997] E.g., Hof Amsterdam 23 February 2010, ECLI:NL:GHAMS:2010:BM9488; Hof 's-Gravenhage 11 November 2008, ECLI:NL:GHSGR:2008:BG8142; Rb. Noord-Holland 5 March 2014, ECLI:NL:RBNHO:2014:1519; Rb. Rotterdam 15 February 2012, ECLI:NL:RBROT:2012:BV9671; Rb. Assen 16 November 2011, ECLI:NL:RBASS:2011:BU6547; Rb. Rotterdam 24 March 2010, ECLI:NL:RBROT:2010:BM2022.

Such a general regulation, the Court continued, "has to be interpreted according to objective, customary criteria. The intentions of the parties involved in the drafting process do not play a role insofar as they are not apparent from the text of the regulation or from sources that can be accessed by third parties".[998] The considerations of the Supreme Court concerning the general nature of the Fire Insurance (Right of Recourse) Sectoral Regulations also played a role in a ruling of the Court of Appeal of The Hague in which the Regulations' scope of application was in dispute. The insurer was of the opinion that private (insured) actors could not invoke the Regulations since the rules only covered the relationship between insurance companies. However, with a view to the aforementioned Supreme Court ruling, the court held that the Regulations do apply to the relation between an insurance company seeking recourse and the insured third party that is held liable.[999]

Noticeable with a view to the possible radiating effect ('*uitstralingseffect*') of private regulation is a judgment delivered by the Amsterdam District Court. One of the central issues of this case was whether an insurance company was bound by the Fire Insurance (Right of Recourse) Sectoral Regulations. The court of first instance had already held that this question had to be answered in the negative: the Regulations apply only to members of the Dutch Associations of Insurers and the insurer in question was, at the time, not affiliated with the Association. The appellant, however, contended that the insurer was nonetheless obliged to follow the Regulations and should accordingly have waived its right of recourse. He put forward several arguments to substantiate his point of view. First of all, the appellant referred to the statement on the insurance company's website reading that the company was a member of the Association, upon which he reasonably relied. The court of appeal rejected this argument, whereby it indicated that the fact that a large number of fire insurers does abide by the Regulations does not warrant such reliance either.[1000] Secondly, the appellant argued that, given the circumstances of the case, the principle of reasonableness and fairness compelled the insurance company to follow the Regulations. Again, however, the court of appeal disagreed with the appellant. Even though the Regulations most certainly carry weight, they do not bear such significance that a non-affiliated insurer has a social, legally enforceable, duty to comply with the rules.[1001] Thirdly, the appellant submitted that the insurance company could not take recourse as this would lead to an abuse of its right to do so. This argument was dismissed in a more or less similar vein as to the previous one. Considering that the number of fire insurers without an 'Association of Insurers-membership' is "not unsubstantial", the court held that "one cannot say that the view that one should not seek 'fire recourse' to private individuals enjoys such wide support" that doing so in the dispute at hand would lead to an

[998] HR 16 May 2003, ECLI:NL:HR:2003:AF4621, NJ 2003, 470, para 3.3.2.
[999] Hof 's-Gravenhage 28 October 2008, ECLI:NL:GHSGR:2008:BG2213, paras 5-6.
[1000] Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, paras 4.3-4.4. The fact that the Regulations are broadly supported was significant in a judgment of the Rotterdam District Court. Here, the fact that the Regulations had been drafted following consensus of the insurance industry on the fact that insurers should exercise strict restraint in invoking their right of recourse towards private individuals pleaded against the insurance company to which the Regulations applied. See Rb. Rotterdam 3 November 2010, ECLI:NL:RBROT:2010:BO9900, para 4.7.
[1001] Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, para 4.5. Similarly: Hof Arnhem-Leeuwarden 10 December 2013, ECLI:NL:GHARL:2013:9404, paras 4.13-4.14.

abuse of the right of recourse.[1002] Fourthly, the appellant claimed that it is a rule of trade usage that insurers do not exercise their right of recourse against private individuals. The court of appeal in this respect, again, pointed at the fact that the Regulations are not generally accepted within the insurance industry and that an insurance company can opt to subscribe to the Regulations. The court established that, for that reason, it could hardly be maintained that that the rules have become customary law within the industry. As a result, the insurance company was not under an obligation to comply with the Regulations.[1003] This implies, as the Arnhem-Leeuwarden Court of Appeal makes explicit in a later judgment, that one has to fall back on the legal rules on recourse.[1004] Conversely, if a claim is solely founded on the Regulations, there is no need to consider the legal rules, as the Amsterdam District Court held in a case concerning the Innocent Third Party Sectoral Regulations.[1005]

Finally, it can be pointed at the considerations of the Rotterdam District Court as regards the legal relevance of the Code of Conduct on the Handling of Personal Injury Claims (*Gedragscode Behandeling Letselschade*, referred to by the court as the 'GBL'): "the plaintiff has founded its request on rule of conduct 10 of the GBL. Such a code of conduct does not qualify as law within the meaning of Article 79 of the Judiciary Organization Act. However, HDI-Gerling [the insurer, MM] has not contested the fact that it has undertaken to abide by the GBL, as a result of which the request will be tested against this rule of conduct".[1006]

6.3.1.6 Privacy

As I already set out in Chapter 4, private regulation can play a regulatory role in the field of privacy. Industry associations, more specifically, can specify the Wbp through tailor-made codes of conduct. These codes can be filed with the Dutch DPA for formal approval (cf. Article 25 Wbp). The Dutch legislator has declared that such an official 'stamp' implies that the DPA is of the opinion that compliance with the code denotes compliance with the law.[1007]

[1002] Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, para 4.6.
[1003] Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, para 4.7. Cf. Rb. Dordrecht 24 February 2010, ECLI:NL:RBDOR:2010:BL6070, paras 5.6-5.7, where the court held the fact that the majority of the Dutch insurance companies is a member of the Dutch Association of Insurers does not alter the fact that an insurer that is not a member is not bound to the Regulations. Herewith, it dismissed the plaintiff's argument that since 80 percent of Dutch insurance companies endorses the Regulations, the rules should be taken as a yardstick in establishing an insurance company's duty of care. See also Rb. Den Haag 24 July 2013, ECLI:NL:RBDHA:2013:9259, paras 5.33-5.34, 5.37-5.38. The fact that the Regulations applied only to those insures subscribing to them, either through membership or otherwise, was not in dispute in this case. The court, after having reiterated the judgment of the Amsterdam Court of Appeal, pointed at the purpose of customary law: providing legal certainty when it is unclear which members of a group do and which members do not abide by the unwritten rules that the vast majority of the group perceive as binding. Since this is not the case when it comes to the Regulations, one cannot compel the minority to comply with the rules followed by the majority by referring to customary law (para 5.38).
[1004] Hof Arnhem-Leeuwarden 10 December 2013, ECLI:NL:GHARL:2013:9404, para 4.14.
[1005] Rb. Amsterdam 8 January 2009, ECLI:NL:RBAMS:2009:BH0255, para 6.
[1006] Rb. Rotterdam 11 April 2016, ECLI:NL:RBROT:2016:2802, para 4.2.
[1007] *Parliamentary Papers II* 1997/98, 25 892, no. 3, p. 132. See in this respect also Giesen 2007, pp. 61-62, who argues that this declaration not only renders the correctness of the private rules beyond dispute, but also strengthens the influence of these rules as regards the specification of the statutory provisions of the Wbp.

Indeed, several 'DPA-approved' privacy codes have played a legally relevant role in privacy-related disputes, as the following examples show.

The Code of Conduct on the Processing of Personal Data by Financial Institutions (*Gedragscode Verwerking Persoonsgegevens Financiële Instellingen*) for instance proved of relevance in a case brought before the Utrecht District Court. Central question in this dispute between an insured person and his insurance company was whether the advice given by the medical advisor of the insurer should be made available to insured party on the basis of Article 35 Wbp or the aforementioned Privacy Code. The court dismissed the insurance company's claim that the insured person had relied upon an outdated version of the Code: the new Code contained similar rules. However, having interpreted the Code, the court held that it cannot be derived from the private rules that the insured party should be allowed to inspect the advice of the medical advisor.[1008] In another case, again revolving around the scope of an insured party's right of inspection, the Privacy Code was brought to the fore by the plaintiff. Even though the declaration of approval of the DPA had expired at the time, the court deduced from the insurance company's statements that it still considered itself bound to the Code. Accordingly, the court took account of the Privacy Code, considering that "since the scope of the right of the person involved to receive from the party responsible an overview of the personal data processed is partly dependent upon what the Code of Conduct stipulates in this respect, the court will also take the rules set out by this Code of Conduct into consideration […]".[1009]

Another code of conduct that has played a role in civil law proceedings is the Privacy Code of Conduct of the private investigation agencies sector (*Privacygedragscode sector particuliere onderzoeksbureaus*). Besides being approved by the DPA, this Code forms the formal template for the industry: Article 23a of the Private Security Organizations and Detective Agencies Regulations (*Regeling particuliere beveiligingsorganisaties en recherchebureaus*) obliges private investigation companies to draw up and abide by a code of conduct identical to the Privacy Code. A first judgment in which the Code played a role is one delivered by the Haarlem District Court. The dispute at hand was caused by the plaintiff's former spouse who had commissioned a detective agency to carry out surveillance on the plaintiff in order to discover whether he was in an affectionate relationship with the person together with whom he was living. The plaintiff lodged a complaint with the court about this surveillance on him and his living environment, which took place with high regularity during a period of over ten months. More specifically, the plaintiff held the surveillance constituted an unjustified and hence unlawful infringement of his constitutional right to respect for privacy as it contravened the aforementioned Privacy Code. According to the plaintiff, the agency was legally bound to this Code on the basis of the Private Security Organizations and Detective Agencies Regulations. The agency contested the allegation, stating that it had acted in accordance with the conditions and norms applicable to the industry. The Haarlem District Court first and foremost stated that the conduct of private investigating agencies should be in

[1008] Rb. Utrecht 17 November 2010, ECLI:NL:RBUTR:2010:BO5222, para 4.9.
[1009] Rb. Zutphen 8 October 2009, ECLI:NL:RBZUT:2009:BK4206, para 5.7. Cf. Rb. Rotterdam 20 May 2005, ECLI:NL:RBROT:2005:AT8525, para 4.5.7, where the Code also played a role.

compliance with "what can be expected from a private research agency in social and economic life"[1010], whereby one may expect an agency to exercise a high degree of care. The court observed that this conduct is governed by an amalgam of general and specific, public and private norms: the general duty of care enclosed in Article 6:162 DCC (unlawful act), the Wbp and the aforementioned Privacy Code, as been laid down in the Private Security Organizations and Detective Agencies Regulations. The court subsequently builds on the relevant Code provisions to reach its preliminary decision, namely that the intrusion on the plaintiff's privacy was indeed inadmissible.[1011] A similar line of argument was employed by the District Court East-Brabant in a case again revolving around the question whether a private investigation company had infringed the privacy of the plaintiff and hence acted unlawfully. The plaintiff argued that the company had infringed the applicable legal rules as well as the Privacy Code of the industry. The court started out with the same general statement as the Haarlem District Court in the above case. Thereupon, it turned to the assessment of the disputed conduct, taking the relevant Code provisions as its norm. The court went on to rule that, by violating the Privacy Code, the company had acted unlawfully.[1012] Compliance with the Privacy Code, however, does not shelter from legal liability, as a judgment of the Zutphen District Court shows. In this case, the defendants, accused of having acted unlawfully, claimed in their defense that they had acted in accordance with the Code. The court dismissed their stance. Notwithstanding the fact that the Code does regulate the actions of private security organizations, compliance with its rules does not *per se* equate to lawful behavior, in other words, actions that are in conformity with the Code can still be unlawful. This is true especially when the conduct can be qualified as a criminal offence, the court held. The opposite, however, does hold true: actions that contravene the Privacy Code are, regarding the purpose of the Code, in principle unlawful. The court further remarked that the law does not allow private actors to use GPS tracking systems and that these actors cannot derive the authority to do so from the Code of Conduct either. For, "the Code is neither an Act of Parliament nor subordinate legislation that could derogate from" a criminal-law principle.[1013] From a more general perspective, this judgment contrasts with a later judgment of the Amsterdam District Court. Here, the court stated that the conduct at dispute could not be held unlawful for the sole reason that the ICOM Code of Ethics for museums had been infringed.[1014]

A last example that I mention at this point concerns the recording of personal data in the so-called 'incidents register' (*incidentenregister*). This register has been set up by Dutch financial institutions to record the personal data of persons abusing the services these

[1010] Vzr. Rb. Haarlem 16 July 2009, ECLI:NL:RBHAA:2009:BJ3060, para 4.4.
[1011] Vzr. Rb. Haarlem 16 July 2009, ECLI:NL:RBHAA:2009:BJ3060, notably paras 3.2, 3.3, 4.4, 4.7. For another example of a judgment involving this code of conduct, see Hof Arnhem-Leeuwarden 4 February 2014, ECLI:NL:GHARL:2014:753, where a combined action of the code of conduct, of which the applicability was beyond dispute, and the Wbp eventually led the court of appeal to a decision. Twice, the court referred to the code of conduct as 'self-imposed'.
[1012] Rb. Oost-Brabant 22 May 2014, ECLI:NL:RBOBR:2014:2701, paras 3.2, 4.2-4.6. See also Rb. Zutphen 9 May 2007, ECLI:NL:RBZUT:2007:BB1491.
[1013] Rb. Zutphen 12 December 2012, ECLI:NL:RBZUT:2012:BY6138, paras 5.4, 5.6 (quotation para 5.6).
[1014] Rb. Amsterdam 8 January 2014, ECLI:NL:RBAMS:2014:9, para 4.9.

institutions provide. The conditions for recording the data are included in the *Protocol Incidentenwaarschuwingssysteem financiële instellingen*. The Protocol played a role in an appeal lodged with the Amsterdam Court of Appeal. In assessing the recording of personal data in the incidents register by a bank, the court of first instance used the Wbp as a yardstick, wrongly, according to the bank, which had filed the appeal. Since the DPA had declared that the Protocol provided sufficient safeguards for recording personal data in a lawful manner, the court should have based its assessment on the Protocol. The court of appeal endorsed this viewpoint and held that the Protocol forms "a regulation that provides sufficient safeguards for processing personal data in a way the Wbp prescribes". Accordingly, the court assessed the actions of the bank on the basis of the Protocol.[1015]

6.3.1.7 Debt settlement

The Code of Conduct for Debt Settlement (*Gedragscode Schuldregeling*) of the Dutch Association of Municipal Money-Lending and Debt Counseling Institutions (*Nederlandse Vereniging voor Volkskrediet*, hereafter: NVVK) on several occasions has also been attributed a more self-standing role. This was for instance the case in a judgment of the Rotterdam District Court. Starting points in this case were the fact that the Code was part of the contract concluded between one of the defendants (a bank) and the plaintiff as well as the fact that the Code had binding force upon both defendants (the bank and a municipality) since they were both members of the NVVK. Against this background, the district court held that by acting contrary to, *inter alia*, the Code the bank had failed culpably in his dealings with the plaintiff while the municipality had acted unlawfully towards the plaintiff. The defense subsequently put up by the bank and the municipality was dismissed with reference to the objective of the Code.[1016] Whereas in this case, the NVVK Code was brought to the attention of the judge as part of the agreement central to the dispute and the affiliation of both defendants to the NVVK, there are also judgments in which such an explicit reference to the Code was lacking, or at least did not follow on from the text of the judgment. Yet, even without the parties to the dispute referring to the Code of Conduct, courts have taken account of the norms adopted by the NVVK, seemingly at their own initiative. This is for instance visible in cases where courts, referring to the fact that it follows on from Article 11.1 of the Code that the Code has binding force upon NVVK members, have employed the time frames enclosed in the Code in assessing whether the debt assistance organization had made a sufficient effort to come to a settlement of the debts with the creditors, so that the debt management regulation could be

[1015] Hof Amsterdam 18 January 2007, ECLI:NL:GHAMS:2007:BA5933, para 3.5-3.7 (quotation para 3.6). The Protocol also formed the central framework for assessment in Rb. Arnhem 16 February 2011, ECLI:NL:RBARN:2011:BP6166 (upheld on appeal, see Hof Arnhem 27 March 2012, ECLI:NL:GHARN:2012:BW0559); Rb. 's-Gravenhage 1 March 2012, ECLI:NL:RBSGR:2012:BV9587; Rb. 's-Gravenhage 31 May 2012, ECLI:NL:RBSGR:2012:BX1743; Rb. 's-Gravenhage 13 August 2012, ECLI:NL:RBSGR:2012:BX7262; Rb. 's-Gravenhage 22 September 2011, ECLI:NL:RBSGR:2011:BU3540.

[1016] Rb. Rotterdam 18 January 2012, ECLI:NL:RBROT:2012:BV1966. Cf. also Rb. Rotterdam 24 October 2012, ECLI:NL:RBROT:2012:BY3650, para 2.12, where the judge used the Code as one of the building blocks for its line of argument.

declared applicable.[1017] Illustrative in this respect is a case brought before the Arnhem-Leeuwarden Court of Appeal. The court started its line of argument by considering that the concrete duties of a proper budget manager are to be determined on the basis of what is customary within that branch of industry. In this respect, it dug up the NVVK Code, which is, as the court pointed out, widely accepted in the budget-management sector. The Code is published on the NVVK website and referred to on the defendant's website. Thereupon, the court took account of the rules of the Code and held that the budget manager had not acted reasonably.[1018] Yet, neither the plaintiff nor the defendant had invoked the Code of Conduct. In the end, however, there was no need for the parties to the proceedings to express their opinion of the Code, since the causal connection was missing as between the budget manager's negligence and claimant's eviction from the rented house, thus the court.[1019]

6.3.1.8 Industry codes of conduct and the open norm of responsible lending

A somewhat different example of private regulation being used as an elaboration of blanket clauses can be found in the area of financial regulation. Article 4:34(2) Wft entails a prohibition on overextension of credit, also known as the norm of responsible lending. The Dutch legislator has not specified this norm. As set out in Chapter 4 (section 4.4.2) of this doctoral thesis, the AFM has designated several codes of consumer credit adopted by the financial industry as an elaboration of the norm of responsible lending. Accordingly, the AFM takes the rules included in these codes as minimum standards when assessing whether Article 4:34(2) Wft has been complied with.[1020] Case law has endorsed this approach.[1021]

Outside this supervisory context, the aforementioned codes of conduct can also be used to specify the duty of care of credit providers, as a decision of the Gelderland District Court illustrates. One of the questions to be answered by the court was whether the bank had failed to fulfill its duty of care. The court stated first and foremost that the norm of responsible lending enshrined in Article 4:34(2) Wft is detailed by the GHF and the Code of Conduct on Consumer Credit. Considering that the bank had complied with the former code in assessing the application for financing, the court held that the bank had fulfilled its obligation to

[1017] E.g., Rb. 's-Gravenhage 20 July 2010, ECLI:NL:RBSGR:2010:BN2040; Rb. 's-Gravenhage 20 July 2010, ECLI:NL:RBSGR:2011:BR0796.
[1018] Hof Arnhem-Leeuwarden 19 March 2013, ECLI:NL:GHARL:2013:BZ4776, paras 6.5-6.10 (quotation para 6.10).
[1019] Hof Arnhem-Leeuwarden 19 March 2013, ECLI:NL:GHARL:2013:BZ4776, paras 6.10-6.11.
[1020] The codes concerned are: the codes of conduct on consumer credit of the VFN (Dutch Finance Houses' Association), the NVB (Dutch Banking Association) and the NTO (Dutch Home Shopping Organization). Initially, the GHF played a similar role. However, things changed with the enactment of the Temporary rules on mortgage credit (*Tijdelijke regeling hypothecair krediet*) on 1 January 2013. See Chapter 4, section 4.4.2 of this doctoral thesis.
[1021] See Rb. Rotterdam 4 May 2011, ECLI:NL:RBROT:2011:BQ3835, para 2.10 (where a violation of the VFN code of conduct led to an infringement of Article 4:34(2) Wft), confirmed as regards the considerations on code in CBb 28 November 2013, ECLI:NL:CBB:2013:260, para 5.4 ("the representative trade associations with the involvement of the AFM, have drawn up a code of conduct laying down, rules to prevent overextension of credit"). Cf. with regard to the GHF, with the caveat that this practice ceased to exist after the enactment of the Temporary rules on mortgage credit (see *supra* n 1020), Rb. Rotterdam 20 May 2010, ECLI:NL:RBROT:2010:BM5231, para 2.12 and CBb 19 July 2013, ECLI:NL:CBB:2013:69, para 5.2.

provide information and to investigate, and that there was no case of overextension of credit. As such, (compliance with) the GHF constituted one of the arguments on which the court eventually based its decision that the bank has not violated its duty of care under civil law.[1022] The Arnhem-Leeuwarden Court of Appeal, in turn, after having established that the parties to the proceedings agreed upon the applicability of the code of conduct to their legal relationship, founded its decision that a bank had failed to live up to its pre-contractual duty of care towards its client directly on the Code of Conduct on Consumer Credit of the VFN.[1023]

Equally worthy of mention is the following ruling of the Arnhem-Leeuwarden Court of Appeal. In dispute was whether three financial service providers had been in breach of their duty of care to prevent the overextension of credit towards their clients (the appellants). The clients brought forward the norms for responsible lending enclosed in the Code of Conduct of the VFN and the NVB, respectively, as well as those included in the GHF. The argument of the court relevant for the purposes of this chapter concentrates on the applicability of the GHF to the conduct of two of the financial services providers. The clients, more specifically, founded their claim on a report based solely on infringements of the GHF-norm.[1024] Both financial service providers had already contested the applicability of the GHF, with one of them also arguing that he was not bound by the Code. The GHF only applies to mortgage lenders that have entered into the agreement for the self-regulation of a mortgage loan. The court stated it had remained undisputed that the financial service providers had not done so, hence the GHF was inapplicable.[1025] While this statement suggests that the GHF has binding force only upon mortgage lenders having signed the aforementioned agreement, the second part of the court's consideration suggests that this is not necessarily the case. After all, the court considers, the appellants have failed to reason in a timely and adequate fashion that "the GHF-norm colors the norm of Article 4:34 Wft and the standard of a reasonably competent financial services provider, acting reasonably, in such a way that even when the GHF-code was inapplicable, […], the mere violation of the GHF-norm leads to the conclusion that irresponsible lending has occurred".[1026] Arguably, when interpreted *a contrario*, this statement is suggestive of the possible radiating effect of the GHF through the open-ended legal standards referred to by the court of appeal, provided that the argument in this respect is made timely and contains an adequate statement of reasons.[1027] In this case, however, the Arnhem-Leeuwarden Court of Appeal did not or could not take account of the GHF-norm. However, the role of private regulation was not yet played out. After having dismissed the argument regarding the GHF, the court turned to the VFN Code of Conduct and addressed the

[1022] Rb. Gelderland 10 June 2016, ECLI:NL:RBGEL:2015:5231, paras 3.39-3.41, 3.45.
[1023] Hof Arnhem-Leeuwarden 26 May 2016, ECLI:NL:GHARL:2015:3705, paras 4.5, 4.7, 4.9.
[1024] The GHF-norm denotes the criteria set out in the GHF to determine the borrowing capacity of a consumer.
[1025] Hof Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6792, para 4.15.
[1026] Hof Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6792, para 4.15.
[1027] Cf. Hof Amsterdam 13 May 2014, ECLI:NL:GHAMS:2014:1690, para 7.6.1 which reads: "the overextension of credit has been defined as the amount of credit provided by DSB Bank exceeding the maximum amount of credit that was allowed regarding, on the one hand, the personal financial situation of the client at the time of the loan and, on the other hand, the then applicable norms (Code of conduct for mortgage loans/Code of conduct of the Dutch Finance Houses' Association). This definition already encompasses the violation of the duty of care by DSB Bank". This statement of the Amsterdam Court of Appeal is suggestive of the relevance of private regulation in elaborating the duty of care of a bank towards its clients.

question whether the financial service providers had been in breach of their duty of care in the light of the norm set by the Code. The court thereby referred *inter alia* to the fact that the legislator has deliberately left to the industry the elaboration of the norm of responsible lending.[1028]

A last example that can be mentioned in this respect is a judgment of the Amsterdam District Court, where the open norm of Article 4:34 Wft has been fleshed out by (the NVB Code of Conduct on Consumer Credit enclosed in) a circular letter for members of the NVB. The plaintiff already came away empty-handed from his recourse to the Financial Services Complaints Tribunal (*Klachtinstituut Financiële Dienstverlening*, hereafter: Kifid). The decision of Kifid was challenged before the Amsterdam District Court. The plaintiff hereby explicitly contested Kifid's view that the aforementioned private rules specify the open norm of Article 4:34 Wft, with one of the arguments being that the professional group had itself drafted the rules. The court, however, was of the opinion that Kifid could have reasonably reached this decision. The open norm of Article 4:34 Wft needs to be fleshed out and since the Dutch banks, together with the AFM, have bound themselves to the private rules, Kifid's choice to seek a link with the circular letter in substantiating Article 4:34 Wft was obvious and justified.[1029]

6.3.1.9 Unfair commercial practices

As has been described in the previous chapter, the issue of unfair business-to-consumer commercial practices has triggered EU regulatory intervention, whereby codes of conduct have been attributed a role in establishing what constitutes an unfair or misleading commercial practice. It will therefore not come as a surprise that since the implementation of the Unfair Commercial Practice Directive in Articles 6:193a et seq. DCC, several 'unfair commercial practices cases' involving codes of conduct have been brought before the Dutch courts. With the Authority for Consumers & Markets (ACM) being the primary supervisor of the legal rules, these cases have thus far concerned decisions of the ACM to fine offenders of Articles 6:193a et seq. DCC. As such, the judicial assessment takes place in proceedings under administrative law. However, given the essentially private law nature of the dispute, it is worthwhile to take a closer look at how the role of codes of conduct plays out exactly under Dutch private law. This will be done on the basis of the *Celldorado* case, considered to best exemplify the situation.[1030]

[1028] Hof Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6792, para 4.15 in conjunction with para 4.10.

[1029] Rb. Amsterdam 31 December 2014, ECLI:NL:RBAMS:2014:9091, paras 2.5, 3.2, 4.7.

[1030] Similar cases include: Rb. Rotterdam 13 December 2012, ECLI:NL:RBROT:2012:BY6184; Rb. Rotterdam 25 April 2013, ECLI:NL:RBROT:2013:BZ8775 (both on the Code of Conduct for Consumers and Energy Suppliers). Cf. also Rb. Rotterdam 6 January 2010, ECLI:NL:RBROT:2010:BK9798; Rb. Rotterdam 14 April 2011, ECLI:NL:RBROT:2011:BQ1281 (where the general terms and conditions adopted by an industry organization were marked as a code of conduct for the purposes of Article 6:193c DCC). See also Rb. Rotterdam 26 November 2015, ECLI:NL:RBROT:2015:8642 (where the Advertising code for travel offers 2014 was referred to as an industry-specific elaboration of the professional diligence requirement of Article 6:193b(2)(b) DCC).

The cause of the law suit was a decision of the ACM to fine a provider of SMS services for infringing, *inter alia*, Article 6:193c(2)(b) DCC, which marks non-compliance with a code of conduct as a misleading commercial practice, and Article 6:193b(2)(b) DCC which renders actions contrary to the requirements of professional diligence 'unfair'. The provider challenged this decision before the Rotterdam District Court. Before turning to the contested decision, the court established that the provider has, undisputedly, indicated that he was bound by the applicable codes of conduct (the SMS Service Provision Code of Conduct and the SMS Advertising Code, which is part of the former code). It added that the obligations that follow on from these codes are firm and recognizable, as Article 6:193c(2)(b) DCC demands.[1031] With respect to the alleged breach of Article 6:193c(2)(b) DCC, the district court held that "when an entrepreneur has declared that he will comply with a code of conduct, the average consumer should be able to rely upon that statement. Failure to comply with the requirements of the code of conduct, even if it is only a minor failure, in itself influences or can influence consumer transactional decisions. Therefore, specific obligations set out by a code of conduct should be strictly fulfilled. Contrary to what the plaintiffs have posited, the fact that the intentions of the code provisions have materialized does not suffice in this respect".[1032] The court adds that "the average consumer perceives the SMS Code of Conduct as an expression of what is considered to be a common trade practice in the sector at hand. A consumer knowing that a trader has subscribed to the SMS Code of Conduct, will attune its decision-making to that fact".[1033] Against this backdrop, the court eventually reached the conclusion that by infringing the SMS Code of Conduct, the provider was in breach of Article 6:193c(2)(b) DCC.[1034] Thus, an explicit and public 'declaration of compliance'[1035] entails an obligation to live up to specific requirements of a code of conduct.[1036] However, the considerations on the influence of non-compliance with the SMS Code of Conduct on the average consumer were not upheld on appeal.[1037]

Additionally, in line with the intention of the European legislator, *Celldorado* shows that a code of conduct can be viewed as one of the facts and circumstances of a case that flesh out the requirement of professional diligence enclosed in Article 6:193b(2)(b) DCC. More specifically, the court held that "with the rules laid down in the SMS Code of Conduct, the industry has provided a concrete interpretation of the requirement of professional diligence. The SMS Code of Conduct can be perceived as an expression of what the industry considers

[1031] Rb. Rotterdam 19 April 2012, ECLI:NL:RBROT:2012:BW3358 (*Celldorado*), para 8.5.
[1032] *Celldorado*, para 8.8.
[1033] *Celldorado*, para 8.8.
[1034] *Celldorado*, para 8.9.
[1035] In the current case, the provider had explicitly stated its subscription to the SMS Code of Conduct on the Internet (*Celldorado*, para 8.3).
[1036] The court hereby endorsed the opinion of the ACM that a violation of Article 6:193c(2)(b) DCC is a very serious one since "non-compliance with a code of conduct affects the very foundations of self-regulation". The ACM deemed compliance with codes of conduct of great importance as it "inspires confidence not only in relation to consumers and their interest groups, but also in relation to supervisory authorities such as the defendants and traders and companies within the industry". See *Celldorado*, paras 27.6-27.7. Similar considerations on the importance of compliance with codes of conduct can be found in Rb. Rotterdam 14 April 2011, ECLI:NL:RBROT:2011:BQ1281.
[1037] CBb 25 August 2015, ECLI:NL:CBB:2015:285, paras 7.4-7.8.

to be the standard level of special expertise and care".[1038] Consequently, non-compliance with the provisions of the SMS Code can lead to the conclusion that a trader has acted contrary to these requirements. This part of the district court's decision was upheld on appeal.[1039] Finally, it can be pointed at the statement of the district court that generally, compliance with the aforementioned codes of conduct does not by definition equate meeting the other legal requirements that follow on from the Consumer Protection (Enforcement) Act (*Wet handhaving consumentenbescherming*).[1040]

6.3.1.10 Private regulation and sports

Rules of sporting associations have also played a role on several occasions. The 's-Hertogenbosch Court of Appeal, for instance, took account of such rules of conduct (referred to by one of the litigants) in determining whether the personal integrity of a minor athlete had been violated. In referring to these rules, the court of appeal pointed out that they came into force at the end of the nineties, that they have the objective of preventing sexual harassment and that the appellant could be expected to have knowledge of these rules.[1041] Private regulation was also used in a case concerning the liability for an accident during an 'eventing match', a discipline within equestrian sports. During the cross-country game, one of the riders crashed against the final obstacle, a portable fence, which consequently toppled over. The horse fall that followed injured both the horseman and the horse, whereby the latter suffered such severe injuries that it had to be put down. The case was brought before the Breda District Court. One of the points of contention was whether the obstacle concerned had been sufficiently anchored in accordance with the applicable international and national rules and regulations of the equestrian sport.[1042] The court took account of these rules, the available knowledge and the research done within the equestrian world with respect to the safety of portable fences. The safety requirements that follow on from this framework had not been met in the case at hand. The court concluded that there had been a violation of a norm that aims to prevent a specific danger with respect to the inception of loss. Accordingly, the causal link between the violation and the damage was established, subject to proof to the contrary.[1043] Also worth noticing is a decision of the Roermond District Court in which it was established that both the plaintiff and the defendant (both divers) were to blame for a diving accident. The

[1038] *Celldorado*, para 21.5.
[1039] CBb 25 August 2015, ECLI:NL:CBB:2015:285, paras 10.1-10.5.
[1040] *Celldorado*, para 23.3, adding that these legal demands do not necessarily correspond with the requirements set out by the code of conduct at hand. This leads Pavillon to conclude, in her critical assessment of the *Celldorado* case, that the standard of professional diligence laid down in a code of conduct amounts to no more than a minimum standard (Pavillon 2013, p. 68).
[1041] Hof 's-Hertogenbosch 1 May 2012, ECLI:NL:GHSHE:2012:BW4879, para 4.9. This judgment is discussed by Westhoff 2013, p. 73.
[1042] The private rules concerned are the General Competition Regulations and the Code of Conduct concerning the well-being of the horse included in these Regulations, the Disciplinary Regulations Eventing, the Rules of Eventing of the Féderation Equestre Internationale and the Guidelines for constructors and designers of cross country tracks. See Rb. Breda 7 March 2012, ECLI:NL:RBBRE:2012:BV8015, paras 3.1.6-3.1.10. Cf. Westhoff 2013, pp. 73-74, where this judgment is discussed.
[1043] Rb. Breda 7 March 2012, ECLI:NL:RBBRE:2012:BV8015, para 3.5. This is the doctrine of the rule of reversal of the burden of proof (*omkeringsregel*).

safety rules prescribed by the sporting association both parties were affiliated with as well as those of the Egyptian Diving Federation, brought to the fore by the plaintiff, played an important part in this respect. According to the court, both parties had violated these rules, whilst they bore knowledge of these rules, or at least should have borne such knowledge, given their level of diving education and their diving experience.[1044] In yet another case, the Leeuwarden Court of Appeal used the Rules for the Conduct of Skiers and Snowboarders adopted by International Ski Federation (FIS) to color the standard of due care included in Article 6:162 DCC. The court found, as the appellant had argued and the court of first instance affirmed,[1045] that the FIS rules do indeed fill out the standard of due care for skiers. However, the skiing accident around which the case revolved occurred in a sports and games setting (*sport en spel situatie*), which, according to the Supreme Court line of case law, requires a different assessment of the conduct in dispute, as the court noted. With a view to that, the mere fact that the FIS rules had been infringed did not render the conduct of the wrongdoer negligent. Rather, the alleged violation of the FIS rules constituted one of the arguments that the court had to take into account.[1046]

6.3.1.11 Advertising

In the field of advertising, industry codes of conduct have been used to specify open-ended legal standards. Illustrative is the following decision of the District Court of The Hague. In this case, the defendant had argued that the private rules on pharmaceutical advertising, drafted by the Foundation for the Code for Pharmaceutical Advertising (*Stichting Code Geneesmiddelenreclame*, hereafter: SCGR), could not be considered standard practice. He also argued that he was not bound by these rules since he was not affiliated with the trade association that had subscribed to the rules. The district court, however, dismissed his argument. It started out by stating that both the civil judge and the SCGR have consistently applied the rules in question, which warrants the conclusion that one could speak of standard practice. Thereupon, the court pointed out that case law indicates that the rules drafted by the SCGR, laid down *inter alia* in the Code of Conduct for Pharmaceutical Advertising, constitute a further specification of several general legal criteria, such as those included in Article 6:194 DCC on false advertising. Civil courts have applied these rules on several occasions and their validity has been generally accepted in case law. The court added the defendant "had not disputed that almost the entire pharmaceutical industry is bound to the Code of Conduct and the decisions of the SCGR"[1047]. Considering the foregoing, the court reached the conclusion that, notwithstanding the fact he was not a member of the trade

[1044] Rb. Roermond 23 November 2011, ECLI:NL:RBROE:2011:BU5452, paras 4.18-4.19. The judgment is discussed by Westhoff 2013, pp. 73-74.
[1045] Herewith, the court of first instance dismissed the plea of the defendant that the FIS Rules contain practical advices rather than decisive rules of priority. See Hof Leeuwarden 26 June 2012, ECLI:NL:GHLEE:2012:BW9768, para 2.
[1046] Hof Leeuwarden 26 June 2012, ECLI:NL:GHLEE:2012:BW9768, paras 7-10. Westhoff 2013, pp. 73-74 discusses this case.
[1047] Vzr. Rb. 's-Gravenhage 24 July 2004, ECLI:NL:RBSGR:2004:AQ5353, para 3.3.

association, the defendant had to abide by the rules.[1048] This implies that the private rules have to be followed by not only the signatories to the rules or by the members of a trade association that has joined the scheme, but also by other actors, i.e., third parties.[1049] In a similar vein, the Arnhem-Leeuwarden Court of Appeal held that the Code of Conduct on Pharmaceutical Advertising can be a reference point in establishing whether certain advertisements are unlawful within the meaning of Article 6:162 DCC. More specifically, the court of appeal argued, since the Code is widely supported, it can be used to flesh out the open norm of "a rule of unwritten law pertaining to proper social conduct".[1050]

6.3.1.12 Medical liability cases

To close this subsection, a few words on the use of private regulation in medical liability cases.[1051] In these cases, private rules have first of all been used to specify the general norm of 'proper care' that providers of care must observe (Article 7:453 DCC).[1052] In a case concerning wrongful life and wrongful birth, for instance, the district court held that the norms generally accepted by the profession concerned, in this case the profession of midwives, are to be taken as a starting point in assessing whether the norm of Article 7:453 DCC has been observed. Accordingly, the court founded its decision that the defendant had not acted unlawfully directly on the applicable professional rules, which both parties considered to reflect the generally accepted standards.[1053] In a case brought before the North-Holland District Court, the professional code of conduct for psychiatrists was used in establishing that the psychiatrist, who had violated the code, had acted in breach of Article 7:453 DCC. The district court in this respect held that a psychiatrist is expected to comply with the private rules of his profession concerning responsible medical conduct and that he can deviate from the rules only if desirable in the interests of proper patient care.[1054]

Medical protocols can also play a role in case law in a different respect, as a judgment of the Roermond District Court shows. Here, the conformity of an expert report with the Guidelines of the Dutch Society of Neurology was considered a strong point of that report. Conversely, the slight deviation of the conclusions of the other expert from these Guidelines

[1048] Vzr. Rb. 's-Gravenhage 24 July 2004, ECLI:NL:RBSGR:2004:AQ5353, para 3.3. The case is discussed by Giesen 2007, p. 73.
[1049] Giesen 2007, p. 73. Cf. Hof Amsterdam 14 December 2014, ECLI:NL:GHAMS:2014:5228, para 4.5.1. In this criminal law case the court stated that professional guidelines, in this case the professional code for naturopathic therapists, "substantiate the current professional standard in that profession, regardless of whether or not the care provider is a member of the professional association".
[1050] Hof Arnhem-Leeuwarden 24 December 2013, ECLI:NL:GHARL:2013:9929, para 3.11. Cf. in first instance Rb. Zwolle-Lelystad 29 August 2012, ECLI:NL:RBZLY:2012:1648**,** paras 4.4.3-4.4.7.
[1051] I will limit the discussion to some examples. More case law can be found in, for instance, Van Reijsen 1999.
[1052] Article 7:453 DCC, more specifically, obliges care providers to observe this standard. In doing so, they should act in conformity with the responsibilities imposed on them by the professional standard for providers of care.
[1053] Rb. Utrecht 10 January 2010, ECLI:NL:RBUTR:2007:AZ6197, paras 4.1 et seq. (discussed by Giesen 2008, p. 786).
[1054] Rb. Noord-Holland 22 January 2015, ECLI:NL:RBNHO:2015:876, paras 4.5-4.6. Cf. HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*), para 3.3.3 where the Supreme Court already formulated a similar general starting point as regards the application of a hospital protocol. See below, section 6.4.2.2.2.3.

was considered a weak point of his report. After all, the court argued, even though they are not undisputed, the Guidelines should be considered as the most authoritative. It hereby remarked that "not taking account of these Guidelines would immediately prompt the question as to what standards one should then take as an assessment criterion and to what extent these standards are supported by the medical world".[1055] In another case, the Guidelines of the Dutch Society of Neurology concerning the diagnosis and treatment of whiplash were considered to be a "sufficiently manageable and acceptable touchstone" for a factual diagnosis of whiplash-related complaints, the more so since a certain degree of objectification, provided by these Guidelines, was deemed necessary.[1056] Another way of using private regulation can be found in the decision of the District Court of Zeeland-West Brabant. Here, a rule of conduct adopted by the Royal Dutch Medical Association (*Koninklijke Nederlandsche Maatschappij ter bevordering der Geneeskunst*) was used as one of the arguments in establishing whether, in short, a treatment with acupuncture performed by a physician fell within the scope of the area of expertise as defined in the Individual Healthcare Professions Act (*Wet op de beroepen in de individuele gezondheidszorg*). The court deduced from the rule of conduct that this was indeed the case.[1057]

6.3.2 A dismissive attitude

The sample of cases composed on the basis of the case law search also includes judgments in which the lower courts disregard the code of conduct relied upon by parties to the proceedings. Two categories of judgments can be distinguished in this respect: judgments in which the dismissive attitude of the court could have been anticipated, at least at first blush, (section 6.3.2.1) and judgments in which the disregarding of the private rules invoked was more remarkable (section 6.3.2.2).

6.3.2.1 'Straightforward' dismissals

As a first case within this category, the judgment of the Amsterdam District Court concerning the Fire Insurance (Right of Recourse) Sectoral Regulations can be recalled. The plaintiff's argument that the insurance company was bound to the Regulations was dismissed since the company was not a member of the Dutch Association of Insurers and the court ruled that the Regulations did not have radiating effect.[1058] Another example can be found in a decision of the District Court of The Hague. The court held that the BOVAG Code of Conduct was not applicable to the reparation contract between a consumer and a car business as it had neither been argued, nor had it become evident that the code formed part of the contract. Moreover, there was no evidence of the car business having accepted the applicability of the Code of

[1055] Rb. Roermond 1 September 2004, *NJF* 2004, 578, paras 5.2, 5.3.2 (quotation para 5.3.2). Giesen 2007, pp. 24, 32, 106 also discusses this case.
[1056] Rb. Amsterdam 13 December 2006, ECLI:NL:RBAMS:2006:AZ5732, para 5.5. On this case, see also Giesen 2008, p. 786
[1057] Rb. Zeeland-West-Brabant 16 September 2014, ECLI:NL:RBZWB:2014:6382, para 4.4.
[1058] Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316 (discussed in section 6.3.1.5).

Conduct or of circumstances suggesting that the Code of Conduct was applicable.[1059] The 's-Hertogenbosch District Court employed a similar reasoning with respect to the Code on the Returns and Risks of Investment (*Code Rendement en Risico*). It follows from the judgment that this Code, drawn up by the Dutch Association of Insurers, only applied to insurance companies that had explicitly subscribed to it. Since the insurance company in the case at hand had not done so and as the Code was not referred to in the insurance policy, the plaintiff could not base its claim on the Code.[1060]

With a view to the Supreme Court's line of case law on the legal value of decisions of disciplinary bodies and disciplinary or professional rules (cf. section 6.3.3.2 below), it can also be pointed at the following judgment of the Amsterdam District Court. In this case, the plaintiff argued that the publication of his full name instead of his initials was unlawful. The Netherlands Press Council (*Raad voor de Journalistiek*) had already decided in the plaintiff's favor. However, the court thought differently and, following the aforementioned line of case law, held that this was not altered by the decision of the Press Council. The court thereby also referred to the Guidebook for Journalistic Behavior (*Leidraad voor de journalistiek*), stating that "the violation of a journalistic agreement to only publish the initials of persons subjected to a criminal law investigation (as laid down in the Guidebook for Journalistic Behavior) cannot be equated with breach of a statutory provision".[1061] Moreover, it had remained undisputed that the defendant was not bound to the Guidebook, the court noted.[1062]

These judicial decisions appear rather straightforward, since the private rules concerned either lacked binding force upon the private actor involved or were not applicable to the case at hand. As such, these decisions will probably not raise any pressing questions. However, it should be noted that case law equally suggests that legal relevance can be assigned to industry codes of conduct when the code lacks binding force upon the private actors concerned (see below, section 6.3.3.3, under 'radiating effect'). This adds an element of uncertainty to the approach of the lower courts at this point.

6.3.2.2 More remarkable dismissals

Several judgments can be mentioned in which the dismissive attitude of the courts can be deemed more remarkable, in several respects.

6.3.2.2.1 Same code, different decisions

The first category of 'remarkable dismissals' is constituted by cases in which different courts ruled differently upon the legal relevance of one and the same industry code of conduct. The Breda District Court, for example, rejected the argument that a bank had failed to live up to its

[1059] Rb. 's-Gravenhage 23 March 2011, ECLI:NL:RBSGR:2011:BP9631, para 4.8.
[1060] Rb. 's-Hertogenbosch 17 July 2012, ECLI:NL:RBSHE:2012:BX3136, para 4.4.2.2. Cf. Hof 's-Hertogenbosch 21 September 2010, ECLI:NL:GHSHE:2010:BN9270, para 4.17 where the court found that since it did not cover the contested actions, the plaintiff could not rely upon the Code.
[1061] Rb. Amsterdam 7 March 2012, ECLI:NL:RBAMS:2012:BV9330, para 4.7.
[1062] Rb. Amsterdam 7 March 2012, ECLI:NL:RBAMS:2012:BV9330, para 4.7.

duty of care since it had, *inter alia*, infringed the standards for responsible lending included in the Wft and the GHF. The court held that neither of the two regulatory schemes "played a role in determining the content of the bank's obligations towards its clients. Both regulations entail norms relevant only within the framework of banking supervision". Instead, a general duty of care applies.[1063] When compared with the judgments discussed in section 6.3.1.8 and considering the fact that the Code precisely concerns responsible lending, this decision can be deemed remarkable.[1064]

The Groningen District Court, in turn, decided to disregard the medical guideline in question, first and foremost because it was not in force at the time the disputed behavior was performed, as the defendants had argued. However, it remains to be seen whether the guideline would have carried any weight had it been in force. After all, the court adds that a guideline amounts to no more than a guiding principle for medical conduct. It does not set forth obligatory rules of conduct for individual cases. Against this backdrop, the court takes as a yardstick the legal duty to observe proper care (Article 7:453 DCC).[1065] Giesen submits that this is a striking decision when set against the background of the Supreme Court case law on medical protocols.[1066] Indeed, the general wordings in which the court rejects the use of 'guiding' medical rules can be considered remarkable. However, it should be noted that there is a wide array of private rules for the medical profession, the nature of which varies. From this perspective, guidelines cannot be equated with protocols, as Giesen appears to do, since the latter can be of a binding nature.[1067]

In another case, the journalistic rules adopted by the Netherlands Press Council were denied legal relevance, seemingly because of the private, non-legal nature of the rules. The plaintiffs in this case had argued that the journalistic rules were violated, which implied that the actions performed by the defendant were inadmissible. The court responded very briefly by stating that the rules are rules of conduct of the profession and not legal rules.[1068] Without going into the issue any further, the court subsequently disregarded the professional rules altogether, seemingly because of their non-legal nature. The Limburg District Court was less abrupt in a case involving the Guidebook for Journalistic Behavior of the Netherlands Press Council. The court noted that "even though the Guidebook is not applicable law, the litigants agree upon the fact that it is a set of rules formulated by professional colleagues, more or less comparable to disciplinary regulations and codes of conduct".[1069] It continued by indicating that a violation of the Guidebook "does not automatically imply that one has acted unlawfully within the meaning of private law, yet can be an indication in that respect".[1070] Herewith,

[1063] Rb. Breda 7 September 2011, ECLI:NL:RBBRE:2011:BT7273, para 3.5.
[1064] Similarly: C.W.M. Lieverse, case note to Rb. Breda 7 September 2011, *JOR* 2012/267, under 5. See in this respect also Rb. Gelderland 11 March 2015, ECLI:NL:RBGEL:2015:2208, para 4.31-33, where the Code was deemed relevant in ascertaining whether the bank had failed to observe its duty of care.
[1065] Rb. Groningen 4 May 2006, ECLI:NL:RBGRO:2007:BA7177, para 2.5. Cf. Giesen 2008, p. 786.
[1066] Giesen 2008, p. 786, footnote 16.
[1067] See F.C.B. van Wijmen, case note to HR 2 March 2001, *NJ* 2001/649 (*Trombose*), under 2.1.
[1068] Vzr. Rb. Amsterdam 11 April 2013, ECLI:NL:RBAMS:2013:BZ7028, para 4.7
[1069] Rb. Limburg 3 September 2015, ECLI:NL:RBLIM:2015:7621, para 4.3.
[1070] Rb. Limburg 3 September 2015, ECLI:NL:RBLIM:2015:7621, para 4.3. See also Rb. Amsterdam 15 December 2015, ECLI:NL:RBAMS:2015:8976, para 4.4: "even though these journalistic guidelines are not

although it frames its decision differently, the court in effect links up with the ruling of the Supreme Court in *Pretium/Tros*, yet without referring to the ruling.[1071]

Finally, it can be pointed at two judgments in which the application of the European Code of Ethics for Franchising, as applied by the Netherlands Franchise Association, was dismissed. In the first case, one of the points of contention was whether the franchisor had been in breach of his contractual obligations. Here, the question as to whether the franchisor was legally bound to the Code was brought to the fore by the litigants (a franchisor and a franchisee). While the franchisee argued that the franchisor had to abide by the Code, the franchisor not only contested that he was bound to the Code, but also disputed the applicability of the Code. The North-Netherlands District Court in this respect considers that the Code, to which franchisors affiliated with the Dutch Franchising Association have subscribed, "sets forth a guideline for a fair and reasonable set-up of the franchise relation, whereby account is taken of the interests of both the franchisor and the franchisee".[1072] However, it does not include legally enforceable (*in rechte afdwingbare*) obligations. "Insofar as its status amounts to a standard of decency at the most", thus the court.[1073] Therefore, the court disregarded the Code in addressing the aforementioned question.[1074] Two years later, the Overijssel District Court adopted a similar stance on the legal relevance of the Code, using almost identical wordings to pass over the defendant's reliance on the Code.[1075] The dismissive stance of the district courts appears to have been motivated by the private nature of the Franchise Code: both courts explicitly point at the fact that the Code does not include *legally* enforceable obligations. Considering the fact that the very same Franchise Code was assigned legal relevance in other rulings (see section 6.3.1.4), this is a remarkable decision. Why has the non-legal nature of the rules been brought to the table in the present judgments and not in the other rulings? An answer may be found in the fact that the applicability and binding force of the Franchise Code was beyond dispute in these other rulings, whereas the binding force as well as the applicability of the Code were a (visible) point of contention in at least the judgment of the North-Netherlands District Court. Perhaps the court would have adopted a different approach if the parties to the proceedings had reached consensus on these points.

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criteria that have to be applied as a matter of law, they do constitute standards that carry weight as a circumstance that has to be taken into consideration".

[1071] HR 8 April 2011, ECLI:NL:HR:2011:BP6165, *NJ* 2011/449 (*Pretium/Tros*). See below, section 6.4.2.2.6.

[1072] Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307, para 5.15.

[1073] Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307, para 5.15.

[1074] Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307, para 5.15. Cf. Houben, Sterk & Devilee 2014, p. 248, who note that in Rb. Limburg 26 February 2014, ECLI:NL:RBLIM:2014:2557, the court disregarded the fact that the franchisor, as a member of the Dutch Franchise Association, was bound to the Code. See also J.B.M. Vranken, case note to HR 25 January 2002, ECLI:NL:HR:2002:AD7329, *NJ* 2003/31 (*Paalman/Lampenier*), under 4, stating that the judgment failed to take into account the three important private transnational regulations concerning franchise, amongst which the aforementioned code of conduct. Vranken sees this as a missed opportunity.

[1075] Rb. Overijssel 13 November 2015, ECLI:NL:RBOVE:2015:5020, para 5.5.

6.3.2.2.2 District court versus court of appeal

The second category is formed by a case in which the district court and the court of appeal held different opinions on the legal relevance of the private rules concerned. Citing their advisory nature, the Amsterdam District Court rejected the applicability of the Recommendations of the OSB - the employers' organization for cleaning and business services (*Organisatie voor Schoonmaak- en Bedrijfsdiensten*). The court pointed out that the Recommendations are targeted at companies that are an OSB member. Thereupon, it states that "a recommendation does not equate with a safety standard that the company in question has to abide by, let alone that it constitutes a norm that a third party, such as the plaintiff, can invoke. For that reason, non-compliance with the recommendation cannot warrant the conclusion that the conduct of the defendant towards the plaintiff is thus unlawful"[1076]. Subsequently, disregarding the Recommendation, the court put the circumstances of the case central to its assessment of the contested behavior.[1077] Interestingly, however, the decision on appeal turned out differently: the Amsterdam Court of Appeal did deem the Recommendations relevant in assessing whether the cleaning company had acted negligently. The court, more specifically, considered that it can be assumed that cleaning companies are aware of the risk of accidents on a wet floor since this risk is set out in the Recommendations. Furthermore, the court held, which actions have to be taken after a floor has been mopped follows on from the Recommendations. Since these norms are generally known within the cleaning industry, it can be said to be common and not too inconvenient to take measures to prevent accidents.[1078] Thus, the court partly founded its argument on the Recommendations. This approach contrasts sharply with that adopted by the court of first instance.

6.3.2.2.3 No legal relevance, or rather, a little

The third 'category' is formed by a ruling of the Arnhem Court of Apppeal, in which private rules that were initially denied legal relevance in the end turned out to have little legal significance after all. Central to this ruling were the Rules for bankruptcy trustees (*Praktijkregels voor curatoren*), adopted by the Dutch Association of Insolvency Practitioners (*Vereniging Insolventierecht Advocaten*, hereafter: Insolad).[1079] The appellant complained about, among other things, the opinion of the court of first instance that there was no need to go into the applicability of the Rules for bankruptcy trustees (the Rules) since these Rules only aim to provide guidance and are not binding.[1080] The non-binding, guiding nature of the Rules was not challenged on appeal, but the appellant did argue that the Rules put down in writing the prevailing opinions within the profession as well as the customary norms and

[1076] Rb. Amsterdam 22 November 2006, ECLI:NL:RBAMS:2006:AZ3700.
[1077] Rb. Amsterdam 22 November 2006, ECLI:NL:RBAMS:2006:AZ3700. On this decision, see Giesen 2008, p. 786. Cf. Hof Amsterdam 26 March 2013, ECLI:NL:GHAMS:2013:944, para 2.7, stating that, in the case at hand, the Code of Conduct for judicial experts did not have independent significance.
[1078] Hof Amsterdam 26 January 2010, ECLI:NL:GHAMS:2010:BO7591, paras 3.5.2, 3.5.4, 3.6.2.
[1079] Discussed by Giesen 2008, p. 787; Van der Heijden 2012, pp. 182-183.
[1080] Hof Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620, para 4.1.

values followed by bankruptcy trustees in performing their activities. As a corollary, according to the appellant, the Rules can be perceived as a form of customary law and can be used to specify the general duty of care included in Article 6:162 DCC.[1081] The court of appeal agreed with appellant's line of reasoning, but dismissed his conclusion. At this point, it shared the opinion of the court of first instance. The norms included in the Rules that can be considered legally valid derive this validity from the prevailing legal opinion in society on what is socially proper, and not from the Rules themselves.[1082] Neither does the fact that bankruptcy trustees commonly abide by certain rules necessarily imply that they perceive them as legal rules, nor does it constitute an argument to classify the Rules as general legal rules that impose obligations upon third parties or as general legal rules from which third parties (e.g., appellant) can derive certain rights. The Rules are, in the words of the court "no more, or sometimes even less, than an indication of what a bankruptcy trustee should refrain from doing or how he should act from a legal perspective".[1083] Thus, the Arnhem Court of Appeal kept its distance with a view to the non-binding and non-legal nature of the Rules, notwithstanding the fact that Insolad itself classifies its Rules as 'best practice rules' that aim to fill the gaps left where neither legislation nor case law provides guidance.[1084] In effect, the court held that the non-legal Rules cannot independently call into being legally enforceable obligations or rights. Nevertheless, later on in its ruling the court does refer to the Rules. It clarifies the content of one of the provisions of the Rules and subsequently uses this provision to support its argument (cf. the Rules as an 'indication').[1085] This leads Giesen to conclude that the Rules have at least some radiating effect.[1086]

6.3.2.2.4 Industry codes and fundamental principles of law

To close this subsection, it can be pointed at a judgment of the Arnhem-Leeuwarden Court of Appeal, in which the plaintiff relied upon the Rules of Professional Conduct 1992 for lawyers. The reason why the dispute arose was the fact that the summons to appear in court did reach the plaintiff, but was not passed on to the right person. Consequently, the judgment was delivered without the plaintiff being present. A troubling factor for the plaintiff was that the judgment fell within the scope of a provision of the Dutch Civil Code stipulating that neither appeal nor appeal in cassation could be lodged against the decision of the district

[1081] Hof Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620, para 4.2.
[1082] Cf. Van Zeben & Du Pon 1981 (Parliamentary history DCC), p. 616, on Article 6:162 DCC with reference to HR 8 January 1960, *NJ* 1960/415 (*Scrabble*): "a violation of a norm of professional ethics, recognized within a certain group, only constitutes an unlawful act, if that norm also qualifies as a rule of unwritten law".
[1083] Hof Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620, paras 4.2-4.3 (quotation para 4.2). In October 2005, the Leeuwarden Court of Appeal was of the opinion that the legal scope of the Insolad Rules was unclear. The court added that the Rules did not cover the current situation and, accordingly, disregarded the Rules. This follows on from the appeal in cassation: HR 22 June 2007, ECLI:NL:HR:2007:BA2511, *NJ* 2007, 520 (*ING/Verdonk q.q.*), para 3.2. On the Supreme Court ruling, see Giesen 2008, pp. 787-788.
[1084] <www.insolad.nl/praktijkregels.html> (accessed 1 July 2016). Bartman greets the decision of the Arnhem Court of Appeal with applause. He proposes to apply the same argument to the Corporate Governance Code. See S.M. Bartman, case note to Hof Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620, *JOR* 2007/316. Giesen, by contrast, shows himself more critical of the court's argument. See Giesen 2008, p. 787.
[1085] Hof Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620, para 4.9.
[1086] Giesen 2008, p. 787.

court, unless, among other things, fundamental principles of law had been violated. The plaintiff contended that the principle of hearing both sides of the argument had been violated, with one of the arguments being that Rules of Professional Conduct entailed an obligation to send a copy of the application to the lawyer of the opposing party, which the lawyer of the plaintiff had failed to do. The court of appeal held that the plaintiff has been summonsed in accordance with the principal legal rule and that there is no legal rule that dictates that a copy of the application has to be sent to the lawyer of the opposing party. According to the court "the rules of conduct for lawyers can serve as a guideline for actions within the profession, but cannot autonomously call such a legal rule into being".[1087] From a legal perspective, it does not come as a surprise that private regulation cannot independently set aside a statutory provision. The judgment however does raise questions as to the value of industry codes of conduct going beyond what is legally required, as the Rules of Professional Conduct did. Is it the private nature of the rules that forms the obstacle here or is the court's decision influenced by the fact that the case revolved around fundamental principles of law?

Similar observations can be made as regards a case brought before the North-Netherlands District Court in which a lawyer and his client quarreled about whether it was agreed upon that the lawyer would work on the basis of 'no cure, no pay'. The client in this respect, among other things, held that the lawyer had violated the Rules of Professional Conduct 1992 which stipulate that important agreements should be in writing, since there was only an oral agreement about the fees. The district court dismissed this claim, indicating that the fact that there is only an oral agreement may be contrary to the professional rules for lawyers, but it does not imply there is no agreement between the lawyer and its client. After all, as the court pointed out, an oral agreement has as much legal force as a written agreement.[1088] Thus, the violation of the professional rules could not set aside this fundamental principle.

6.3.3 Analysis

6.3.3.1 Three judicial 'techniques'

The discussion in the previous sections unveils the fact that Dutch district courts and courts of appeal are generally willing to take account of industry codes of conduct relied upon by parties to the proceedings. Courts have done so in different ways. More specifically, it follows on from the case law analysis that they have used three judicial 'techniques' to assign legal relevance to these codes. First of all, judges have used private rules to color open norms, such as the different duties of care that exist under Dutch civil law. Secondly, in few instances, courts have transformed industry codes into existing private law concepts. The previous section includes examples of judgments in which industry codes were classified as custom within the meaning of Article 6:248 DCC and as third-party beneficiary clause, assuming

[1087] Hof Arnhem-Leeuwarden 17 February 2015, ECLI:NL:GHARL:2015:1078, paras 3.2-3.12 (quotation para 3.12).
[1088] Rb. Noord-Nederland 4 March 2015, ECLI:NL:RBNNE:2015:1112, para 4.5.

legal relevance accordingly.[1089] Thirdly, courts have referred to (the violation of) industry codes as a self-standing argument, for instance in establishing the lawfulness of the conduct at issue or in addressing questions related to contractual obligations.[1090] Contrary to what might have been anticipated with a view to the private origins of industry codes,[1091] courts have used these techniques to confer legal relevance upon industry codes without any visible reservations. The private, non-legal origins of these codes have not proven to be an obstacle in this regard. Rather, the judgments in which the court's displayed an open attitude towards industry codes suggest that judges generally tend to go along with the litigants' argument that a code bears legal significance in the case at hand. Accordingly, reflections on the role of the private rules form a self-standing part of the overall judicial assessment of the case. The legal weight that is eventually attributed to the rules differs, however. In some judgments, industry codes are referred to as a relevant factor or as a viewpoint, while in others, they formed one of the weightier self-standing building blocks in the court's line of reasoning. Furthermore, the case law analysis includes examples of judgments in which industry codes played a decisive, self-standing role in that the judicial decision was founded entirely on the applicable code.

However, even though industry codes of conduct play a legally relevant part in the majority of the judgments analyzed, there are also cases in which courts have displayed a more reticent or even dismissive attitude, either withholding legal relevance of the codes or limiting this relevance.[1092] In some cases, disregarding the private rules concerned was a fairly straightforward matter, given the fact that the rules were, broadly speaking, inapplicable. In other cases, however, the private, non-legal nature of the codes appears to have echoed through as an argument to mitigate or deny the legal relevance of these codes. Considering the fact that most courts have shown themselves open to assigning legal relevance to industry codes and hence do not appear to be troubled by the private origins of the rules, this observation begs the question as to what exactly constitutes the difference between the two sets of judgments. Put in more general terms: what determines the way in which lower courts respond to confrontations with rules adopted by private actors? In answering this question, I will first take a closer look at the influence of the 'procedural' context of a case on the possible legal relevance of an industry code (section 6.3.3.2). Thereupon, I turn to the way in which the courts – against the procedural backgrounds of a case – have approached the 'legal relevance issue' (section 6.3.3.3).

[1089] Rb. 's-Gravenhage 10 July 2007, ECLI:NL:RBSGR:2007:BA9210 (custom, discussed in section 6.3.1.3) and Rb. Arnhem 26 March 2008, ECLI:NL:RBARN:2008:BC8904 (third-party beneficiary clause, discussed in section 6.3.1.2).

[1090] Cf. Verbruggen 2014a, pp. 19, 288-289, indicating that contract law (breach of contract) and tort law (e.g., the open-ended legal standard of negligence) form the legal basis for the judicial enforcement of private regulation.

[1091] See Chapter 1, section 1.2.2 where I explained that according to the prevailing opinion, visualized by Vranken (2006, p. 66) in the "framework of legislation and adjudication", private regulation lacks a clear self-standing legal status of its own, due to the private origins of this form of regulation.

[1092] The judgments in which industry codes were assigned legal importance outnumber those in which such importance was denied: section 6.3.2 includes only about fourteen cases in which the lower courts took a dismissive attitude towards the industry code of conduct at issue.

6.3.3.2 Procedural context

The room for maneuver that a court has in respect of industry codes of conduct is demarcated by procedural 'factors', most notably the facts of the case, the nature of the dispute, existing lines of case law and the way in which parties to the proceedings formulate their claims and defenses. Illustrative in this respect is a set of cases that has not been discussed in the previous sections: cases in which courts could not take account of the private regulatory scheme relied upon by litigants.[1093] In substantiating their decision to disregard the scheme, among other things, courts referred to the fact that the litigant relying upon the scheme failed to substantiate his claim that the private rules had been violated or failed to specify which rules had been violated,[1094] or relied upon rules that did not cover the subject matter[1095].[1096] These arguments show what matters is the way in which an industry code is brought to the fore by parties to the proceedings. Equally relevant is the way in which a claim is framed in respect of an industry code. If, for instance, a plaintiff relies upon a code of conduct in substantiating his claim that the standard of due care has been infringed, in principle, depending on the defense put up by the defendant, the court will consider the code when carving out the standard of due care. When a private regulatory scheme is invoked as a self-standing touchstone, the court will generally assess it in that context. Hence, parties to the proceedings set an important part of the scene of a dispute.

Another part of this scene is set by established lines of Supreme Court case law, on which lower courts generally build their decisions. As regards the legal relevance of industry codes of conduct, it can for instance be referred to the Supreme Court's stance on the role of 'industry views' (*brancheopvattingen*) in detailing the general duty of care enclosed in Article 6:162 DCC. From the established case law at this point we learn that "social opinions on proper conduct do not give rise to a legal duty to act in conformity with these opinions".[1097] Of similar relevance is the settled case law on the role of decisions of disciplinary councils in

[1093] Cf. Giesen 2008, pp. 791-792, who indicates that it is up to the litigants to supply judges with the necessary information on the private rules that they invoke.

[1094] E.g., Rb. Amsterdam 4 December 2013, ECLI:NL:RBROT:2013:9884, para 4.8; Hof Arnhem-Leeuwarden 5 November 2013, ECLI:NL:GHARL:2013:8290, para 3.12. In Hof Arnhem-Leeuwarden 26 March 2014, ECLI:NL:GHARL:2014:2385, paras 4.6-4.7 and Rb. Midden-Nederland 30 July 2014, ECLI:NL:RBMNE:2014:3030, para 4.5 it was not specified which provisions had been violated.

[1095] E.g., Hof 's-Hertogenbosch 15 December 2015, ECLI:NL:GHSHE:2015:5258, para 3.7.7; Hof Amsterdam 2 September 2014, ECLI:NL:GHAMS:2014:3704; Rb. Amsterdam 18 July 2013, ECLI:NL:RBAMS:2013:5253, para 4.5; Rb. Overijssel 25 June 2014, ECLI:NL:RBOVE:2014:3607, para 4.21; Hof 's-Hertogenbosch 19 March 2013, ECLI:NL:GHSHE:2013:BZ5106, para 4.15; Hof 's-Hertogenbosch 15 July 2014, ECLI:NL:GHSHE:2014:2143, para 7.10; Rb. Utrecht 15 February 2012, ECLI:NL:RBUTR:2012:BW0548, para 5.13; Rb. Utrecht 29 February 2012, ECLI:NL:RBUTR:2012:BV8187, para 2.19.

[1096] Sometimes the court simply does not get around to an assessment of the private rules invoked. See, e.g., Rb. Arnhem 12 September 2012, ECLI:NL:RBARN:2012:BX8182, paras 4.6-4.7; Rb. Amsterdam 7 May 2014, ECLI:NL:RBAMS:2014:3455, para 4.4.

[1097] Thus the interpretation of Asser Procesrecht/Veegens, Korthals Altes & Groen 2005/105 of HR 8 January 1960, *NJ* 1960/415 (*Scrabble*). In this judgment, it was held that "when answering the question whether a certain action contravenes the standard of proper social conduct, the fact that this action is perceived as unusual and inappropriate in the industry sector concerned is not readily decisive" (HR 8 January 1960, *NJ* 1960/415 (*Scrabble*). This judgment was sustained in HR 27 June 1986, *NJ* 1987/191 (*Decca/Holland Nautica*). See also Van Nispen in: *GS Onrechtmatige daad* IV 2.2.20 (last updated 3 February 2015); Giesen 2007, pp. 117-118; Van Driel 1989, pp. 151-152, 167.

civil law cases. More specifically, decisions entailing that a professional rule has been violated do not compel a civil court to rule that, accordingly, a party is in default or has committed an unlawful act.[1098] Nonetheless, a court is only allowed to dissent from a decision of a disciplinary body if properly motivated.[1099] Thus, a decision of a disciplinary council as regards the liability of a professional can play a role in civil law proceedings, but often only as a relevant factor in establishing civil liability.[1100] After all, as the Supreme Court has held, a 'negative' disciplinary decision does not readily warrant the conclusion that one is liable under civil law for having infringed a civil law duty of care.[1101] This line of case law has led several scholars to submit that a breach of disciplinary norms or professional rules of conduct does not carry decisive force in civil law proceedings either. Like the decisions of a disciplinary council, these rules form but one of the viewpoints that a civil court can draw on in establishing civil law liability (for a professional error).[1102] Leading the foregoing back to the judgments discussed in section 6.3.2, it can be said that this line of case law might carry (some) explanatory force as to the lower courts' reticent attitude towards the professional rules for bankruptcy trustees and the professional rules for journalists.

Thus, procedural factors will to a certain extent steer the judicial approach to industry codes by 'setting the scene' of a dispute. As such, they may also influence the legal weight that can be attributed to a code.[1103] However, judges themselves always have the last say. It is eventually up to them, within the given procedural context, to decide upon what legal relevance, if any, a code of conduct bears in the case at hand.

[1098] HR 15 November 1996, *NJ* 1997/151 (*NTK/Paardekooper c.s.*), para 3.5.

[1099] Vranken 2006, p. 74, with reference to HR 12 July 2002, ECLI:NL:HR:2002:AE1532, *NJ* 2003/151 (*A./E.*).

[1100] HR 10 January 2003, ECLI:NL:HR:2003:AF0690, *NJ* 2003/537 (*Portielje/Y.*), para 3.3; HR 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2006/528 (*Vie d'Or*), para 5.4.3 Cf. HR 12 January 1996, *NJ* 1996, 683 (*Kroymans/Sun Alliance*) where the Supreme Court attached significance to the decisions of the disciplinary body of the insurance sector (then: *Raad van Toezicht op het Schadeverzekeringsbedrijf*) under the guise of the current juridical views in the Netherlands (Article 3:12 DCC). This approach has been sustained in HR 14 May 2004, ECLI:NL:HR:2004:AO5662, *NJ* 2006/188 (*Witte/Leipziger*) and HR 3 December 2004, ECLI:NL:HR:2004:AQ8089, *NJ* 2005/160 (*A./London*).

[1101] Thus HR 3 April 2015, ECLI:NL:HR:2015:831, *NJ* 2015/479 (*Reijnders-Louis/Ribama BV Novitaris*), para 3.5.3, with reference to HR 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2006/528 (*Vie d'Or*). The rationale behind this approach is that the aim of disciplinary law differs from that of civil law. Whereas the first seeks to ensure the quality of professional practices, the latter revolves around redress and damages. The standards applied in the assessment of a disciplinary complaint are, accordingly, different from those used to establish civil liability. Furthermore, the rules of evidence that have to be applied in civil law proceedings are not applicable in disciplinary proceedings. Therefore, liability under disciplinary law - resulting from a violation of professional rules - does not necessarily amount to liability under civil law. See Vranken 2005, p. 94; HR 10 January 2003, ECLI:NL:HR:2003:AF0690, *NJ* 2003/537 (*Portielje/Y.*), para 3.3; HR 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2006/528 (*Vie d'Or*), para 5.4.3.

[1102] Asser/Hartkamp & Sieburgh *6-IV* 2011/79; E.J. Dommering, case note to HR 8 April 2011, *NJ* 2011/449 (*Achmea/Rijnberg*), under 3-5; Van Nispen, in: *GS Onrechtmatige daad* IV 2.2.19-21 (online, last updated 3 February 2015); Huijgen, in: *GS Onrechtmatige daad* VI.1.11 (online, last updated 24 December 2014); Giesen 2007, pp. 116-118. Cf. Van Zeben & Du Pon 1981 (Parliamentary history DCC), p. 616.

[1103] This may also partly explain why one and the same code has provoked different judicial responses. The different ways in which courts have deployed the SMS Code of Conduct, the Code of Ethics for Franchising and the Code of Conduct for Debt Settlement all exemplify this (see sections 6.3.1.2, 6.3.1.4 and 6.3.1.7).

6.3.3.3 Approach of the lower courts

How then do Dutch lower courts decide upon the legal relevance of industry codes? Before answering this question, it should be noted that the courts themselves generally do not explicitly motivate why an industry code bears or lacks legal relevance. Nonetheless, it has been possible to deduce the following broad outline from the above discussion.

A closer analysis of the case law at this point shows that three sets of cases can be distinguished. The first set comprises the judgments in which the binding force or applicability of an industry code of conduct was beyond dispute. In these judgments, the binding force of a code or consensus between the litigants on the binding force or the applicability of a code constituted sufficient ground for courts to readily assign legal relevance to the code. The second set includes the judgments where a code's binding force or applicability was a point of contention. In these cases, courts have adopted different approaches: they either disregarded a code for want of binding force, or referred to the radiating effect of a code or to its non-legal nature in deciding upon the legal significance of the code concerned. The third set of judgments is small and comprises judgments in which other arguments were advanced to establish the legal relevance of an industry code. Jointly, these observations lead to the following general overview of how the lower courts determine the legal relevance of industry codes.

- **Binding force and consensus about applicability**

In the vast majority of judgments in which industry codes assumed legal relevance, the approach of the Dutch lower courts was rather straightforward. If the binding force or applicability of a code could be established or if there was agreement between the parties to the proceedings on the applicability of a code, judges readily attributed legal relevance to the code, without applying additional criteria and without the private nature of the rules constituting an obstacle.

In several judgments, courts referred to or established the **binding force** of the code relied upon by the parties to the proceedings before incorporating the code into their line of argument. In these judgments, more specifically, courts either stated that one of these parties was bound to the code or remarked that the binding force of the code had not been disputed. In some instances, it was indicated in the judgment where the source of this binding force lay. Examples include instances where a code was declared applicable to the legal relationship between the litigants,[1104] where a litigant had contractually subscribed to a code,[1105] where a code was made part of the contract between the litigants,[1106] or where the legislator formally acknowledged the code[1107]. In these cases, the legal relevance of a code in the dispute at hand

[1104] Rb. Den Haag 23 October 2013, ECLI:NL:RBDHA:2013:14241 (see section 6.3.1.4)
[1105] Rb. Arnhem 26 March 2008, ECLI:NL:RBARN:2008:BC8904 (see section 6.3.1.2)
[1106] Rb. Rotterdam 18 January 2012, ECLI:NL:RBROT:2012:BV196 (see section 6.3.1.7)
[1107] Rb. Oost-Brabant 22 May 2014, ECLI:NL:RBOBR:2014:2701; Vzr. Rb. Haarlem 16 July 2009, ECLI:NL:RBHAA:2009:BJ3060 (see section 6.3.1.6); Rb. Oost-Brabant 29 June 2016, ECLI:NL:RBOBR:2016:3383; Rb. Noord-Nederland 2 September 2015, ECLI:NL:RBNNE:2015:4185 (see section 6.3.1.1).

is the logical consequence of the fact that the code concerned already had legal binding force before 'entering' the legal dispute. In other judgments, however, the source of the binding force referred to by the court remained opaque.[1108]

Alternatively, courts have referred to the fact that there was **consensus on the applicability** of the industry code between the parties to the proceedings, without referring to the binding force of the code. Some judgments explicitly refer to this consensus or to the fact that the applicability of the code has remained uncontested.[1109] There are also judgments in which both plaintiff and defendant have relied upon the code of conduct, and judgments where the plaintiff has invoked a code without the defendant 'visibly' putting up a defense in this respect.[1110] Arguably, also in these judgments, parties to the proceedings consented to the application of the rules, albeit only implicitly. From a procedural perspective, this approach of the Dutch lower courts does not come as a surprise. After all, Article 149 of the Dutch Code of Civil Procedure obliges lower courts to accept as established "facts or rights stated by one party, that have not been or not sufficiently been contested".[1111]

The question is whether 'binding force' of a code of conduct forms a 'criterion for entry' for judicial scrutiny and possible legal relevance of a code. The different judicial references to this binding force suggest that it does, as do the judgments in which courts rejected the applicability of a code of conduct for the want of binding force (see section 6.3.2.1). However, explicit or apparent agreement on the applicability of the private rules also appears to be sufficient for courts to take account of a code. Moreover, the references to the binding force of the private rules in question are often only mentioned in passing, rather than as an explicit reason for drawing these rules into the legal sphere. Therefore, stating that the binding force of an industry code forms an explicit criterion of entry for judicial scrutiny seems to be too firm a conclusion.[1112]

- **Other factors**

Occasionally, courts have referred other factors, i.e., other than binding force or (consensus on) applicability, in establishing the legal relevance of the private rules at dispute in cases

[1108] The cases in which it remained unclear where the binding force originated from, provide food for some legal theoretical reflections. See section 6.5.2 below.

[1109] See *inter alia* Rb. Utrecht 10 January 2010, ECLI:NL:RBUTR:2007:AZ6197 (Professional rules midwives, discussed in section 6.3.1.12); Rb. 's-Gravenhage 10 July 2007, ECLI:NL:RBSGR:2007:BA9210 (Professional rules for lawyers, discussed in section 6.3.1.3); Rb. Leeuwarden 11 February 2009, ECLI:NL:RBLEE:2009:BH2709 (SMS Code of Conduct, discussed in section 6.3.1.2); Rb. 's-Hertogenbosch 18 August 2010, ECLI:NL:RBSHE:2010:BN4531 (Code of Conduct European Lawyers, discussed in section 6.3.1.3). See also the judgments concerning the GPO and the Sectoral Regulations of the Dutch Association of Insurers referred to in n 995 and n 996, respectively.

[1110] E.g., Rb. Gelderland 3 September 2014, ECLI:NL:RBGEL:2014:5645 (Code of Conduct for Insurers of the Dutch Association of Insurers, discussed in section 6.3.1.5) and several of the judgments concerning the GPO and the Sectoral Regulations of the Dutch Association of Insurers (see the cases mentioned in n 995 and n 996, respectively).

[1111] Jongbloed 2006, p. 245. See also Asser Procesrecht/Asser *3* 2013, sections 4.2.1 and 4.2.2.

[1112] Admittedly, there is a link between 'binding force' and 'applicability'. On the one hand, it can be argued that actors are likely to agree on the applicability of a code of conduct when they are in some way bound to it. Viewed from this perspective, binding force precedes applicability. On the other hand, the fact that a code had binding force upon an actor implies that it is, at least in that respect, applicable to the dispute. In this sense, applicability and binding force are more or less equivalent.

where there was no apparent disagreement on the rules. These factors include whether the private actors were familiar with the code or should have been familiar with it,[1113] the accessibility of the code,[1114] and the level of support that the code enjoys[1115]. It is unclear as to whether governmental approval or backing also bears significance.[1116] However, since these arguments were advanced in only a few or even in just one judgment, their actual value as more 'general' factors for determining the legal relevance remains unclear. At this point, the only status they have is that of possible hints as to what may be of importance when determining such relevance

A different picture emerges when the binding force or applicability of an industry code of conduct is a point of contention.

- **Nature of the rules**

Putting it broadly, the arguments advanced in the judgments where courts have adopted a reticent attitude to industry codes of conduct can be said in most instances to pertain to the nature of the code at issue, i.e., either the non-binding nature or, seemingly, the private nature of the code.[1117]

In several judgments, disagreement on the binding force or applicability has led courts to disregard the private rules brought up for discussion with reference to the **non-binding** nature of the rules, i.e., the fact that the binding force or applicability of the rules at issue could not be established in the dispute at hand.[1118] Considering that in other cases, (consensus on) the binding force or applicability constituted an argument to assign legal relevance to codes of conduct, this rather straightforward argument could reasonably be expected. After all, it is difficult to maintain that a code has legal relevance when it lacks binding force or applicability. Yet, as few other cases suggest, it is not entirely out of the question that legal relevance is assigned to a code in these cases (see below under 'radiating effect').

[1113] Hof 's-Hertogenbosch 1 May 2012, ECLI:NL:GHSHE:2012:BW4879; Rb. Roermond 23 November 2011, ECLI:NL:RBROE:2011:BU5452 (discussed in section 6.3.1.10); Hof Amsterdam 3 June 2014, ECLI:NL:GHAMS:2014:2410 (discussed in section 6.3.1.3). Cf. Hof 26 January 2010, ECLI:NL:GHAMS:2010:BO7591 (discussed in section 6.3.2.2.2).

[1114] Hof Arnhem-Leeuwarden 19 March 2013, ECLI:CL:GHARL:2013:BZ4776 (discussed in section 6.3.1.7). Cf. Hof Arnhem-Leeuwarden 24 December 2013, ECLI:NL:GHARL:2013:9929, referring to the broad, online accessibility of the SMS Code, in addition to the fact that the applicability of the Code was not contested (discussed in section 6.3.1.2).

[1115] Hof Arnhem-Leeuwarden 19 March 2013, ECLI:CL:GHARL:2013:BZ4776 (discussed in section 6.3.1.7); Hof Arnhem-Leeuwarden 24 December 2013, ECLI:NL:GHARL:2013:9929 (discussed in section 6.3.1.11).

[1116] In Hof Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6792 (discussed in section 6.3.1.8) it was referred to the fact that the legislator left it to the industry to specify the open norm of responsible lending. In Hof Amsterdam 18 January 2007, ECLI:NL:GHAMS:2007:BA5933 it was held that the Protocol provided sufficient safeguards, on the basis of a declaration issued by the DPA. Yet, only one 'privacy-judgment' (discussed in section 6.3.1.6) made mention of the fact that the applicable Privacy Code had been approved by the DPA, only to find that the declaration of approval had expired (Rb. Zutphen 8 October 2009, ECLI:NL:RBZUT:2009:BK4206)

[1117] Cf. section 6.3.2.2.4 for a discussion of two judgments in which the court's decision to pass over the private rules was based on a different argument, namely the fact that fundamental principles of law were concerned.

[1118] See the judgments discussed in section 6.3.2.1.

In some judgments, by contrast, it seems as if the **private, non-legal** nature of the private rules echoes through in the court's decision to keep the rules at a distance, either mitigating the importance of the rules[1119] or disregarding the rules[1120]. The judgments involving the European Code of Ethics for Franchising and the Rules for bankruptcy trustees in particular seem to hint at the fact that these private origins may become relevant when the binding force of the rules cannot be established.[1121]

- **Radiating effect**

Even though the lack of (agreement on) binding force or applicability of a code in most judgments led the courts to disregard or at best adopt a reticent attitude to the code, case law suggests that courts can also move around the issue by lending radiating effect to the code, i.e., by applying the industry code to an industry actor that has not subscribed to the code. Going by the two judgments in which this radiating effect was considered, it seems that two scenarios can be distinguished here. The first scenario concerns cases in which the vast majority of the industry is bound by the code of conduct. Then, radiating effect can come about when rules are repeatedly applied by the courts and the validity of the rules is accepted in case law.[1122] The second scenario is that in which a code has binding force upon a large part of the industry, even though a 'not unsubstantial' part of the industry actors not having subscribed to the code. Here, it seems that the scope of a code can extend to these 'non-subscribing parties' when the rules carry such significance that there is a social, legally enforceable duty to comply with them or when the rules have become trade usage or custom.[1123] Finally, it can be pointed at a ruling of the Arnhem-Leeuwarden Court of Appeal, which seems to suggest that radiating effect may be present when private rules 'color an open-ended legal standard in such a way' that even without the rules being applicable, they can still be used as a specification of this norm.[1124]

[1119] Hof Arnhem 11 September 2011, ECLI:NL:GHARN:2007:BB8620 (Rules for bankruptcy trustees, discussed in section 6.3.2.2.3).

[1120] Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307 and Rb. Overijssel 13 November 2015, ECLI:NL:RBOVE:2015:5020 (European Code of Ethics for Franchising, discussed in section 6.3.2.2.1); Vzr. Rb. Amsterdam 11 April 2013, ECLI:NL:RBAMS:2013:BZ7028 (Rules of conduct for journalists, discussed in section 6.3.2.2.1); Rb. Gelderland 3 September 2014, ECLI:NL:RBGEL:2014:5645 (Claimcode, discussed in section 6.3.1.1) Cf. also Rb. Amsterdam 22 November 2006, ECLI:NL:RBAMS:2006:AZ3700 (advisory nature of the OSB Recommendations, discussed in section 6.3.2.2.2) and Hof Arnhem-Leeuwarden 17 February 2015, ECLI:NL:GHARL:2015:1078 (Rules of conduct for lawyers, discussed in section 6.3.2.2.4).

[1121] Hof Arnhem 11 September 2011, ECLI:NL:GHARN:2007:BB8620 (Rules for bankruptcy trustees, discussed in section 6.3.2.2.3); Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307 and Rb. Overijssel 13 November 2015, ECLI:NL:RBOVE:2015:5020 (European Code of Ethics for Franchising, discussed in section 6.3.2.2.1)

[1122] Vzr. Rb. 's-Gravenhage 24 July 2004, ECLI:NL:RBSGR:2004:AQ5353 (Code on Pharmaceutical Advertising, discussed in section 6.3.1.11).

[1123] This can *a contario* be inferred from Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, paras 4.5-4.7 (discussed in section 6.3.1.5), where the court of appeal applied these criteria, yet reached the conclusion that they were not met. Accordingly, the private rules at issue were thus held not to have radiating effect.

[1124] Hof Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6792 (discussed in section 6.3.1.8).

- **General starting points**

Besides the aforementioned 'criteria', three general starting points can be deduced from the case law discussed in this section, with the caveat that these starting points are mentioned in very few rulings. First of all, it follows on from the case law analysis that, given their private, non-legislative origins, industry codes of conduct cannot derogate from fundamental legal principles and legal requirements.[1125] This reflects the general legal principle that private rules cannot be applied or interpreted *contra legem*.[1126] Secondly, courts have repeatedly held that the fact that a private actor has complied with an industry code does not readily warrant the conclusion that the actor has acted lawfully. More specifically, the fact that a code of conduct has been complied with does not automatically imply that the 'corresponding' legal rules are also complied with.[1127] Furthermore, compliance with an industry code does not mean that one cannot be held legally liable.[1128] Conversely, and this is the third starting point, non-compliance with a code of conduct does not imply that a private actor has thus acted unlawfully, albeit non-compliance could still serve as an indication in establishing the unlawfulness of certain conduct.[1129] However, case law is not unequivocal at this point. In some judgments, the violation of private rules was qualified as unlawful conduct or as an unlawful act.[1130]

In sum, the approach of the Dutch lower courts is as follows. If the (legal) binding force of an industry code of conduct can be established or if there is consensus between the parties to the proceedings about the applicability of a code, courts assign legal relevance to the code of conduct and use it as a viewpoint, argument or standard for assessment when making their decision. When this consensus is lacking, however, the approach of the courts becomes more ambiguous. On the one hand, there are the judgments in which the rules on pharmaceutical advertising[1131] and the Fire Insurance (Right of Recourse) Sectoral Regulations[1132],

[1125] Rb. Zutphen 12 December 2012, ECLI:NL:RBZUT:2012:BY6138, paras 5.6 (discussed in section 6.3.1.6); Hof Arnhem-Leeuwarden 17 February 2015, ECLI:NL:GHARL:2015:1078; Rb. Noord-Nederland 4 March 2015, ECLI:NL:RBNNE:2015:1112 (discussed in sections 6.3.1.3). See in the context of administrative law ABRvS 25 May 2011, ECLI:NL:RVS:2011:BQ5921, para 2.10.1 where the Council held that the code of honor of the aquatic sports sector could not derogate from the legal competence of the Minister to restrict access to a nature reserve.

[1126] Verbruggen 2014a, p. 290.

[1127] Rb. Rotterdam 19 April 2012, ECLI:NL:RBROT:2012:BW3358, para 23.3 (section 6.3.1.9).

[1128] Particularly not when actions can be qualified as criminal, thus Rb. Zutphen 12 December 2012, ECLI:NL:RBZUT:2012:BY6138, paras 5.4-5.6 (discussed in section 6.3.1.6). See also Hof Arnhem-Leeuwarden 12 April 2016, ECLI:NL:GHARL:2016:2876 (discussed in section 6.3.1.4). Cf. HR 1 April 2005, ECLI:NL:HR:2005:AS6006, *NJ* 2006/377 (*X/ZAO*), para 3.4: compliance with a medical protocol "does not naturally equate with correct behavior". See below, n 1207.

[1129] Hof Amsterdam 23 February 2016, ECLI:NL:GHAMS:2016:635 (discussed in section 6.3.3.3); Rb. Amsterdam 8 January 2014, ECLI:NL:RBAMS:2014:9, para 4.9 (discussed in section 6.3.1.6); Rb. Amsterdam 7 March 2012, ECLI:NL:RBAMS:2012:BV9330 (discussed in section 6.3.2.1); Vzr. Rb. Amsterdam 11 April 2013, ECLI:NL:RBAMS:2013:BZ7028; Rb. Limburg 3 September 2015, ECLI:NL:RBLIM:2015:7621 (both discussed in section 6.3.2.2.1) and, more generally, the line of case law on the civil law relevance of disciplinary rules of conduct (discussed in section 6.3.3.2). Cf. also HR 8 January 1960, *NJ* 1960/415 (*Scrabble*) on 'industry views'. See also Giesen 2007, pp. 116-118, 129.

[1130] Rb. Zutphen 12 December 2012, ECLI:NL:RBZUT:2012:BY6138, paras 5.4-5.6 (section 6.3.1.6). The GPO has been applied in a similar fashion on several occasions. See the case law referred to in section 6.3.1.5.

[1131] Rb. The Hague 24 Juli 2004, ECLI:NL:RBSGR:2004:AQ5353 (discussed in section 6.3.1.11).

respectively, were assigned legal relevance, in spite of the fact that the applicability of these rules was disputed. On the other hand, however, there is also a case in which the Fire Insurance (Right of Recourse) Sectoral Regulations, the applicability of which was disputed, were denied legal relevance.[1133] In another ruling, the Franchise Code met with the same fate.[1134] Accordingly, it remains unclear as to how the legal relevance of industry codes is to be determined in these cases.

6.4 Supreme Court

This section takes a closer look at the responses of the Supreme Court (hereafter also referred to as the Court) to industry codes of conduct. I start the discussion with a description of the relation between industry codes and Article 79 of the Judiciary Organization Act (*Wet op de Rechterlijke Organisatie*, hereafter: RO), which lays down the grounds for cassation (section 6.4.1). Thereupon, I discuss the cases in which the Court was faced with industry codes (section 6.4.2). The section closes with a general analysis of the Court's approach that follows on from these cases (section 6.4.3).

6.4.1 Article 79 RO

Article 79 RO cannot be ignored when analyzing the approach of the Supreme Court. In laying down the grounds for cassation (in brief: procedural defects and infringements of law) this provision forms the statutory 'gateway' to appeal in cassation.

6.4.1.1 Article 79 RO: 'Infringements of the law'

Article 79 RO[1135] provides that the Supreme Court can set aside acts, judgments and orders in case of procedural defects or infringements of the law.[1136] This section will focus on the second ground of cassation, infringements of the law, as this ground determines whether industry codes are subject to review in cassation. This second ground did not exist until 1963. Originally, appeal in cassation could only be lodged in case of procedural defects, excess of jurisdiction and infringements of *legislation*. Besides primary legislation, the notion of legislation included "external rules, that is to say, generally applicable rules directed at everyone, enacted by a public authority, which derived its regulatory authority from

[1132] Hof The Hague 28 October 2008, ECLI:NL:GHSGR:2008:BG2212 (discussed in section 6.3.1.11).
[1133] Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316 (discussed in section 6.3.1.5)
[1134] Rb. Noord-Nederland 29 November 2013, ECL:NL:RBNNE:2013:7307 (discussed in section 6.3.2.2.1).
[1135] Until 1 January 2002, Article 99 RO laid down the grounds for cassation.
[1136] The full Article reads as follows: "- 1. The Supreme Court sets aside acts, judgments and orders: a) on account of a procedural defect in so far as nullity is the express consequence of such defect or such nullity results from the nature of the procedural defect; b) on account of an infringement of the law, with the exception of the law of foreign states. - 2. Facts from which the applicability or otherwise of a rule of customary law is inferred are assumed, in so far as they require proof, to have been established only on the basis of the disputed decision." Translation taken from <www.rechtspraak.nl/English/Pages/Legislation.aspx> (accessed 1 July 2016).

legislation, i.e., a regulation issued by the legislature"[1137]. In 1963, the scope of this ground was broadened to infringements of the *law*, as a result of which the Supreme Court can now set aside judgments of lower courts because of both infringements of legislation and infringements of unwritten law, e.g., customary law and international private law.[1138] One can speak of an 'infringement' when a lower court has made an incorrect judgment as to the content or applicability of the law.[1139] Worth noticing is that the proposed amendment of the legal rules on cassation, from which this eventual broadening ensued, initially also entailed the introduction of another cassation ground, namely the incorrect interpretation of general applicable regulations (*reglementen*), statutes (*statuten*) and standard clauses (*standaardbedingen*). The rationale behind this proposal was the general scope and intended uniform nature of these rules: subjecting their interpretation to review in cassation would ensure their uniform application. Rules adopted by private legal entities or groups of persons without a more general reach were thereby explicitly excluded from the scope of the notion of 'law' as their binding force is founded on contract.[1140] However, in the end, this amendment was not approved.[1141]

What rules qualify as law within the meaning of Article 79 RO? The criteria initially formulated by the Supreme Court with respect to the notion 'legislation' still apply in this respect. Accordingly, a rule qualifies as 'law' i) when the regulatory power on the basis of which the rule was adopted is derived from legislation (sufficient legal basis for the rule), ii) when the rule can be regarded as an external, generally applicable rule directed at everyone, and (iii) when the rule has been made known in a duly fashion.[1142] The first criterion, however, did not constitute an obstacle for the Supreme Court when it ruled that policy rules as well as the docket procedures of a court constitute law for the purposes of Article 79 RO. The Court in this respect first of all pointed at the fact that both types of rules are intended to regulate the exercise of the powers of the body that has enacted them. Even though both types of rules are not issued on the basis of legislative authority, the Court held that they do have binding force upon administrative authorities and judges, respectively, on the basis of general principles of law, i.e., the principles of proper administration for administrative authorities and the principles of proper judicial procedure for judges. Moreover, since the rules were duly published and suitable to be applied as legal rules with respect to those concerned, the

[1137] This formula has its origins in HR 10 June 1919, *NJ* 1919/647 and 650 (*Rogge-arrest*): "*alle naar buiten werkende, dus tot eenieder gerichte algemeene regelingen, welke zijn uitgegaan van een openbaar gezag, dat de bevoegdheid daartoe aan de wet, in den zin van eene regeling door de wetgevende macht, ontleent*".

[1138] *Parliamentary Papers II* 1950/51, 2079, no. 3, p. 4. Cf. Teuben 2004, p. 56; Asser Procesrecht/Korthals Altes & Groen *7* 2015/33, 100, 109; Röttgering 2013, pp. 93-96. With the 1963 amendment, excess of jurisdiction ceased to exist as ground of cassation.

[1139] Röttering 2013, p. 96.

[1140] *Parliamentary Papers II* 1950/51, 2079, no. 3, p. 4.

[1141] The reason for this was the general nature of the notions regulations, statutes and standard clauses, and the ensuing fear that the new cassation ground would lead to legal uncertainty and, as a corollary, to a higher case load for the Supreme Court until proper demarcation of these notions by the Court had taken place. See Asser Procesrecht/Korthals Altes & Groen *7* 2015/127.

[1142] See for instance HR 24 November 2006, ECLI:NL:HR:2006:AY9222, *NJ* 2006/644 (*Renzenbrink/Van Lanschot Bankiers*), para 3.3.2. Cf. Giesen 2007, p. 46; Stein & Rueb 2009, p. 251. The formulation of the second criterion varies: the Court has also used the phrase 'rules with an external effect that are binding upon those involved' ('*naar buiten werkende, voor betrokkenen bindende regels*'), as Teuben notes (2004, p. 57).

Supreme Court did mark them as law within the meaning of Article 79 RO.[1143] Collective agreements that have been declared generally binding as well as pension schemes with a legal obligation to participate can also be considered 'law'.[1144] Considering the foregoing, it can be said that the Supreme Court has softened the criterion that regulatory authority should be based on primary legislation.[1145] Nonetheless, the factor 'state involvement', broadly speaking, still constitutes an important factor in defining what can be considered 'law':[1146] policy rules and docket procedures are adopted by state organs while collective agreements and participation in pension schemes are eventually rendered legally binding by the legislator.[1147] However, the fact that rules have been adopted by a public body does not by definition imply that these rules classify as law for the purposes of Article 79 RO, as several Supreme Court rulings on general terms and conditions drafted by a district water board (*waterschap*) make clear. With the binding force of these terms originating in the individual contract in which they are included, they cannot be considered 'law', notwithstanding the fact that the government is a party to said contract, the Court ruled.[1148] This warrants the general conclusion that duly published and generally applicable rules can be considered 'law' within the meaning of Article 79 RO when these rules or their binding force can be traced back to a basis in public law, e.g., when the regulatory authority is based on legislation (cf. the criteria above) or when the legislator has lent the rules legal binding force (cf. collective agreements and pension schemes).

The result of a classification of a rule as 'law' is not only that an appeal in cassation can be lodged for infringements of this rule, leading to a quashing of the judgment of the lower court if the Supreme Court finds that this is indeed the case, but also that the rule can be subject to full review in cassation.[1149] That is to say that the Supreme Court can assess the

[1143] Teuben 2004, pp. 57-62, 104-105, 126-127. See also Asser Procesrecht/Korthals Altes & Groen *7* 2015/115-116. With respect to policy rules, see HR 28 March 1990, *NJ* 1991/118; HR 19 June 1990, *NJ* 1991/119 and HR 29 June 1990, *NJ* 1991/120, whereby the Supreme Court added that the rules had been adopted within the boundaries of the competence of the administrative authority. On docket procedures, see HR 28 June 1996, *NJ* 1997/495 (*De Nieuwe Woning/Staat*). Cf. HR 10 September 2010, ECLI:NL:HR:2010:BM5710 (*Eiser/Gemeente Oude IJsselstreek*), para 3.4). More extensively on the relation between the different 'criteria', see Teuben 2004, Chapter 4.

[1144] With respect to collective agreements, see for instance HR 16 March 1962, *NJ* 1963/222 (*Bakker/Grafische Industrie*) and, more recently, HR 31 May 2002, ECLI:NL:HR:2002:AE2376, *NJ* 2003/110 (*De Heel/X*). On pension schemes, see, e.g. HR 16 October 1987, *NJ* 1988/117 (*Pensioenfonds voor Huisartsen/Schmidt*) and, more recently, HR 30 March 2001, ECLI:NL:HR:2001:AB0806, *NJ* 2001/292 (*Stichting Pensioenfonds Medische Specialisten/X.*). Cf. Asser Procesrecht/Korthals Altes & Groen *7* 2015/109.

[1145] Teuben 2004, p. 57 submits that there are several indications that the Supreme Court has abandoned this criterion.

[1146] Giesen 2007, p. 48. See also below, section 6.4.1.2.

[1147] Giesen 2007, pp. 47-48; Teuben 2004, pp. 101-102.

[1148] HR 5 February 2010, ECLI:NL:HR:2010:BK0870, *NJ* 2010/242 (*Willems/Hoogheemraadschap*), para 3.4. Earlier: HR 10 January 1992, *NJ* 1992/670 (*Scheffers/Gemeente Utrecht*). See also HR 12 May 1989, *NJ* 1989/613 (*Reco/Staat*), para 3.1.1 where the Court held that the rules concerned "merely contained general terms and conditions" that bind contracting parties because they have been agreed upon, and not on a public law basis.

[1149] As Teuben notes, whether or not the application of 'law' by a lower court is fully reviewable in cassation depends on whether the judicial decision qualifies as a 'findings of law' (*rechtsbeslissing*), as a 'factual decision' (*feitelijke beslissing*) or as a 'mixed decision' (*gemengde beslissing*). Findings of law will be fully reviewed in any case, while factual decisions are subject to marginal review only. See Teuben 2004, pp. 203-204. See also Röttgering 2013, pp. 128-143; Asser Procesrecht/Korthals Altes & Groen *7* 2015/145-157.

correctness (*juistheid*) of the interpretation and application of the rule.[1150] Thus, the classification of rules as law within the meaning of Article 79 RO enables the Supreme Court to exert control over the application and the interpretation of said rules.[1151] This opportunity is lacking when certain rules do not qualify as 'law'. Then the Supreme Court can only assess the comprehensibility (*begrijpelijkheid*) of the interpretation given to the rules by the lower court, not the correctness of the way in which the rules as such have been applied or interpreted.[1152]

6.4.1.2 Article 79 RO and industry codes of conduct

Turning to the relation between Article 79 RO and industry codes of conduct, the well-known *Kouwenberg/Rabo* case comes to mind. In this case, the Supreme Court held that "the RHO [the Rules concerning trade on the options exchange, MM], which concerns private regulation, does not meet the criteria developed in Supreme Court case law in order to be qualified as law" within the meaning of Article 79 RO.[1153] One could infer from this ruling that private rules cannot be considered law for the purposes of Article 79 RO. However, the discussion in the previous subsection has shown that this conclusion is not by definition warranted. When the binding force of an industry code or the private actor's regulatory authority have their roots in public law, the code may be considered law within the meaning of Article 79 RO (cf. the case law on collective agreements and pension schemes). Illustrative in this respect are the following three rulings, which, pursuant to the discussion in the previous subsection, highlight that private regulatory schemes that are founded on and come to operate within a broader network of public regulation can eventually be classified as 'law'.

The first case that can be mentioned in this respect is *ACM/Albert Heijn*, involving the now obsolete *Fondsenreglement*, a private regulatory scheme adopted by the stock exchange sector stipulating, among other things, the conditions for stock exchange listing. The Supreme Court held that this scheme could be regarded as law for the purposes of Article 79 RO. In substantiating its argument, the Court referred to the fact that the scheme was designated by law as implementing several European directives, that the authority issuing the rules (Euronext) was approved by law as the organization responsible for compliance with these directives, and that the external, generally applicable scheme was duly published.[1154] In a

[1150] Teuben 2004, pp. 85, 103, 192, 203, 209-210, 347-348; Korthals Altes 2005, no. 25; Giesen 2007, pp. 45-51. Moreover, as Teuben notes, this 'reviewability' presumes that the rule conforms to the applicable legal rules. This means the rule itself can be assessed in the light of said legal rules. If it is in breach of the law, the Supreme Court will refrain from reviewing it. Thus, the classification of rules as law for the purposes of Article 79 RO enables the Supreme Court to exert control over the application and interpretation of these rules. See Teuben 2004, pp. 205-209, with a description of the ways in which the Court can perform this assessment.
[1151] Teuben 2004, pp. 179, 201-202.
[1152] Korthals Altes 2005, no. 25; Giesen 2007, pp. 45-51.
[1153] HR 11 July 2003, ECLI:NL:HR:2003:AF7419, *NJ* 2005/103 (*Kouwenberg/Rabo*), para 3.5.3.
[1154] HR 24 February 2006, ECLI:NL:HR:2006:AV0046, *NJ* 2006/302 (*ACM/Albert Heijn*) para 3.5. As a result, the Supreme Court was authorized to assess the correctness of the court of appeal's interpretation of the *Fondsenreglement*. For a detailed description of the regulatory context of the case, see Advocate General Wesseling-van Gent's conclusion in the case, ECLI:NL:PHR:2006:AV0046, paras 2.1-2.24. The Advocate General submits that the fact that the *Fondsenreglement* eventually comes to effect by means of a private law agreement "does not obstruct the classification as 'law' since the *Fondsenreglement* itself demands the

similar vein, the Supreme Court in *Renzenbrink/Van Lanschot Bankiers* held that the *Nadere Regeling Toezicht Effectenverkeer 1995*, which also entailed rules of conduct for trading in options, could be considered 'law'. In this case, it was considered relevant that the regulation, besides being duly published and generally applicable, was, on the one hand based on legal provisions and, on the other hand, specified these provisions, which, in their turn, specified another statutory provision. This statutory provision eventually constituted the legal, public law basis for the private rules.[1155] A different lot befell the General Regulations AEX (*Algemeen Reglement AEX*) and the Listing and Trading rules for Screentrading, adopted unilaterally by Euronext and then applicable to the trade on the AEX options exchange (now Euronext). These rules, which were central to the third case (*Euronext/AFS*), did not constitute 'law' within the meaning of Article 79 RO.[1156] Consequently, the Supreme Court had to focus on the comprehensibility of the court of appeal's interpretation of the private rules, instead of reviewing the correctness of this interpretation.[1157] What then constituted the difference between these rules and the private regulatory schemes in *ACM/Albert Heijn* and *Renzenbrink/Van Lanschot Bankiers*? All three sets of rules had been duly published and were generally applicable. However, the private rules in the *Euronext/AFS* case, unlike the other two regulatory schemes, lacked any sufficient basis in public law. The fact that the Minister of Finance subjected these rules to a certain degree of public supervision did not constitute sufficient reason to conclude otherwise.[1158] Thus, the lack of any (sufficient) public law basis eventually formed an obstacle to classifying the private regulatory schemes as law for the purposes of Article 79 RO.[1159]

It follows on from these judgments that the private origins of industry codes of conduct will constitute a stumbling block as regards the 'application' of Article 79 RO in relation to such codes.[1160] Considering the discussion in the previous subsection of the concept of 'law'

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conclusion of this agreement". Moreover, "the mere fact that the applicability of the *Fondsenreglement* is ensured by means of a private law instrument does not derogate from the content and the general nature of the Regulation". See para 2.22 of the Conclusion.

[1155] See HR 24 November 2006, ECLI:NL:HR:2006:AY9222, *NJ* 2006/644 (*Renzenbrink/Van Lanschot Bankiers*), para 3.3.2 (with reference to the conclusion of Advocate General Verkade, para 4.13.5) and the Conclusion of Advocate General Verkade in this case, ECLI:NL:PHR:2006:AY9222, paras 4.13-4.13.5.

[1156] HR 22 October 2010, ECLI:NL:HR:2010:BN5665, *NJ* 2010/570 (*Euronext/AFS*), paras 3.3.1-3.4.4.

[1157] The Supreme Court noted in this respect first and foremost that an interpretation of the rules "mainly depends on objective factors, such as the wordings of the provision in question, read in the light of the purpose of that provision and that of the Trading Rules as a whole" (para 3.4.4). Thereupon, it established how the provision concerned had to be interpreted and dismissed the interpretation of the court of appeal at this point as 'incomprehensible'.

[1158] HR 22 October 2010, ECLI:NL:HR:2010:BN5665, *NJ* 2010/570 (*Euronext/AFS*), paras 3.3.1-3.3.2; Conclusion Advocate General Huydecoper in *Euronext/AFS*, ECLI:NL:PHR:2010:BN5665, no. 4-12.

[1159] See in this respect also Giesen 2007, pp. 47-48; Teuben 2004, pp. 101-102, who point at HR 1 November 1991, *NJ* 1992/30 (*M./H.*), where it was held that the alimony guidelines of the *Nederlandse Vereniging voor Rechtspraak* (Dutch Association for the Judiciary) could not be considered 'law' since they have been developed by a *private* law body and not by the judiciary itself. Likewise, the court-approved scale of costs (*liquidatietarief*), developed by the Bar of the Netherlands and Dutch Association for the Judiciary, were not considered law for the purposes of Article 79 RO either. See HR 3 April 1998, *NJ* 1998/571 (*Lindenboom/Beusmans*).

[1160] Notwithstanding the fact that the criteria 'generally applicable' and 'duly published' may also constitute obstacles in this respect, since these also seem to be tailored to 'public law norms'. For a more detailed assessment of these criteria, see Teuben 2004, pp. 155 et seq.

included in Article 79 RO, this conclusion will not come as a surprise. After all, it follows on from this discussion that the understanding of law for the purposes of Article 79 RO is rooted in the traditional concept of law. In this concept, tellingly visualized by Vranken in terms of the framework of legislation and adjudication, law denotes 'rules' enacted by the legislator or the judiciary.[1161] Industry codes, accordingly, do not qualify as law in and of themselves. Even though it is not unlikely that the State, in one way or another, is involved with an industry code, the degree of State influence required by the Supreme Court in the context of Article 79 RO goes beyond the mere presence of the State. Hence, the vast majority of industry codes will not be considered law within the meaning of Article 79 RO. As a consequence, the Supreme Court will not exert full control over the application or interpretation of these codes, but rather limit itself to assessing the comprehensibility of the judgment of the lower court at this point.

These observations have given rise to the suggestion that the legal binding force of private regulation may be dependent on whether the private rules can be considered 'law' within the meaning of Article 79 RO.[1162] However, although of importance for the intensity of the review in cassation, Article 79 RO does not appear to be decisive for the legal influence of industry codes, at least not entirely. Obviously, this statutory provision is no impediment to lower courts when taking account of codes of conduct. What is more, Article 79 RO does not stand in the way of industry codes having significance in rulings of the Supreme Court either, as the analysis in the next section highlights.[1163] Thus, as Giesen notes, Article 79 RO determines the degree of control that the Supreme Court can exert over a certain norm, without derogating from the intrinsic influence of this norm on the decision of the Court.[1164]

6.4.1.3 A brief side-step to round off: The Knooble case

To conclude this section, it is worthwhile making a brief change of context by going to administrative building law and taking a look at the *Knooble* case, the Dutch equivalent of *Fra.bo*.[1165] This case illustrates how vital the divide between 'law' and 'non-law' can be to the outcome of a legal dispute.

The reason for the dispute to arise between Knooble, a consultancy agency operating in the construction sector, and the Dutch government was the fact that Knooble was not allowed to publish technical standards developed by the Netherlands Standardization Institute (NNI). These so-called NEN standards are referred to in the Dutch Buildings Decree (BD)

[1161] Vranken 2005, pp. 79-86. See also Akkermans 2011 and Chapter 1, section 1.5.2 of this doctoral thesis.
[1162] Giesen 2007, p. 45.
[1163] See also Giesen 2007, pp. 45-51; Korthals Altes 2005, no. 25; Teuben 2004, pp. 201-202, 229-230; Kristic, Van Tilburg & Verbruggen 2009, p. 200. Cf. Menting 2013, p. 120, Menting 2015, pp. 107-108.
[1164] Giesen 2007, p. 50.
[1165] Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465; Hof 's-Gravenhage 16 November 2010, ECLI:NL:GHSGR:2010:BO4175; HR 22 June 2012, ECLI:NL:HR:2012:BW0393, *NJ* 2012/397 (*Knooble/Staat*). Like *Fra.bo* (discussed in Chapter 5, section 5.4.2.3), *Knooble/Staat* caused quite a stir among legal scholars, as is testified by the legal publications that came out after the decision of the district court was published. See, mainly on the implications of the respective judgments, e.g., Van Gestel 2009 and 2012; Munneke et al. 2009; Van Gestel & Micklitz 2013. For a taste of the discussion before *Knooble/Staat*, see Elferink 1998 and Evers 1999.

(*Bouwbesluit*) and in the Regulations governing the Buildings Decree (RBD) as a specification of technical construction requirements.[1166] Consequently, they need to be complied with when buildings are constructed or renovated. An exception to this rule can be found in the equivalence clause of the BD, setting forth that one is allowed to employ alternatives to the NEN standards, provided that these alternative options ensure that the building meets an equivalent degree of, in short, quality and protection as required by the NEN standards referred to in the BD. The NEN standards, which are not published by the State, can only be acquired by buying them from the NNI. As the NNI advocates that it holds the copyright to the NEN standards, Knooble was not permitted to publish these norms itself. This led Knooble to lodge a complaint against both the NNI and the State of the Netherlands with the District Court of The Hague.[1167]

The district court starts out by indicating that the private law status and voluntary nature of NEN standards that are not referred to in legislation and regulations is undisputed. Thereupon, the court holds that the NEN standards transform from private to public rules once they are referred to by the BD and the RBD. This reference, more specifically, turns the initially private standards into standards with a generally binding nature.[1168] The fact that the standards have been adopted by a private law body does not derogate from this argument. On the contrary, the district court establishes that by referring to the NEN standards in generally binding regulations, i.e., the BD and the BDR, the public authorities "have simultaneously determined the content of the standards referred to as rules binding upon all persons".[1169] Accordingly, the State was under a duty to duly publish the NEN standards.[1170] Both the Court of Appeal of The Hague and the Supreme Court, however, were of a different opinion. The court of appeal, more specifically, ruled that the mere reference to the (private) NEN standards in a generally binding regulation does not change the color of these standards. Even though the references do turn the standards into public, generally applicable norms, they do not become generally binding regulations (*algemeen verbindende voorschriften*). The court of appeal in this respect clings on to one of the formal requirements for classifying a rule as a generally binding regulation, namely that it has to be laid down on the basis of regulatory powers under public law. The NEN standards are adopted on the basis of private agreements

[1166] More specifically, Article 2 of the Dutch Housing Act (*Woningwet*) states that rules will be laid down by order in council concerning, in short, the construction of new buildings and the state of existing buildings, whereby 'order in council' denotes the Buildings Decree. Article 3 of the Housing Act subsequently reads that it can be referred to, among other things, standards by order of council. Against this background, the Buildings Decree entails technical requirements both for existing buildings and buildings that are yet to be constructed. These requirements have not all been fleshed out in the BD itself; part of their specifications can be found in the NEN standards to which the BD, in accordance with Article 3 Housing Act, refers. See Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465, paras 2.3-2.6.

[1167] Van Gestel & Micklitz 2013, p. 161; Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465, paras 2.1-2.4.

[1168] Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465, paras 4.5-4.11. The court thereby *inter alia* attached significance to a passage from the Explanatory Memorandum to the Housing Act reading that private standards assume a public law nature and become generally applicable through such a reference. Cf. *Parliamentary Papers II* 1986/87, 20 066, no. 3, p. 38.

[1169] Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465, para 4.14.

[1170] Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465, para. 4.22. Cf. Van Gestel & Micklitz 2013, p. 162.

between organizations that lack this authority. Consequently, they cannot be considered generally binding regulations.[1171] The Supreme Court upheld the judgment of the court of appeal,[1172] affirming that under or pursuant to the law, the NNI was indeed not authorized to enact legal rules, that the NEN standards could, accordingly, not be classified as such and that the legal references to the standards did not change this.[1173]

The judgment of the Supreme Court as well as that of the appellate court coincides with the traditional focus on the public law origins of rules and norms. Both the Supreme Court and the court of appeal found that the private nature of these standards, i.e., the fact that they are adopted on the basis of private agreements between organizations without public regulatory powers, stood in the way of considering the standards as generally binding regulations.[1174] It is highly questionable however, whether this status-based judicial approach, as a result of which NEN standards continue to reside in the realm of private law, squares with the *de facto* effect of the standards and the actual power of the organizations adopting them. Exemplifying in this respect is the equivalence clause included in the BD, which enables the construction industry to use alternative options to comply with the legal requirements, provided that these options are equivalent to the NEN standards. In theory, this clause leaves the choice to the industry. Yet, in order to establish whether the option chosen is indeed equivalent to the NEN standards, one first needs to have knowledge of these very standards. As this knowledge can only be obtained by purchasing the standards from the NNI, one can rightly question whether use of NEN standards is all that voluntary.[1175] When viewed from this perspective, the private nature of standardization appears to be, to use the words of Van Gestel and Micklitz, no more than a veil, which the Supreme Court is not (yet) prepared to pierce.[1176] Again, however, a caveat has to be introduced. Before the Supreme Court delivered its judgment, the highest administrative court in the Netherlands, the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van*

[1171] Hof 's-Gravenhage 16 November 2010, ECLI:NL:GHSGR:2010:BO4175, para 8. Cf. Van Gestel & Micklitz 2013, p. 162. The court of appeal added that this is not altered by the fact that public officials may initiate the development of or changes in the NEN standards, or can be on the committees setting the standards. Moreover, the standards only contain technical requirements and as such do not set out rules. The court also points at the fact that the equivalence clause of the BD allows the construction industry to opt for alternative ways to comply with the legal requirements. As a final point, the court remarks that cost-wise (the costs for obtaining the NEN standards are passed on to other parties) the system does not lead to unacceptable consequences either. See Hof 's-Gravenhage 16 November 2010, ECLI:NL:GHSGR:2010:BO4175, paras 9-13. See also Van Gestel & Micklitz 2013, pp. 162-163.

[1172] HR 22 June 2012, ECLI:NL:HR:2012:BW0393, *NJ* 2012/397 (*Knooble/Staat*), para 3.8.

[1173] This is not to say that NEN standards cannot play a legally significant role as Rb. Rotterdam 28 May 2014, ECLI:NL:RBROT:2014:4578 illustrates. Here, the court held, with reference to the dominant objective of NEN standards (creation of objective security and safety) and the fact that clients often select a company for the very reason that they apply such standards, that the insurer was allowed to apply NEN standards as one of the touchstones in assessing whether the insured party had taken all required precautionary and safety measures. The fact that the standards were not included in the policy conditions did not derogate from this conclusion.

[1174] Hof 's-Gravenhage 16 November 2010, ECLI:NL:GHSGR:2010:BO:4175, para 8; HR 22 June 2012, ECLI:NL:HR:2012:BW0393, para 3.8.

[1175] Van Gestel & Micklitz 2013, pp. 176, 165; Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465, para 4.11.

[1176] Van Gestel & Micklitz 2013, p. 153. This is in sharp contrast to the ruling in the *Fra.bo*, where de CJEU did look beyond the public-private divide. See also Van Gestel & Micklitz 2013, pp. 153, 169-177.

State), had already reached a similar conclusion in another case.[1177] Herewith, the Court was from a procedural perspective more or less compelled to follow the line of argument of the Council of State, as Van Gestel and Micklitz note. Otherwise, from the perspective of legal unity there would be an undesirable clash between the two highest courts in the Netherlands.[1178] In this light, it was not up to the Supreme Court to pierce the private veil, at least, not in this case.

6.4.2 The Supreme Court and industry codes of conduct

6.4.2.1 Endorsement of the use of industry codes of conduct by courts of appeal

In some of its rulings, the Supreme Court endorsed the use of private rules by courts of appeal, without delving into the legal relevance of these rules itself. A first example in this respect is the Supreme Court ruling in a dispute between the Netherlands Inspection Service for Horticulture (Naktuinbouw), an inspection and certification agency, and a grower of strawberries. This grower, who was not in a direct business relationship with Naktuinbouw, had bought plants that suffered from mites, which should not have been the case as the plants had been certified by Naktuinbouw. This gave rise to the question whether Naktuinbouw had committed an unlawful act against the grower. The court of appeal held that Naktuinbouw had violated its Certification Regulation by issuing certificates for the plants concerned. Consequently, Naktuinbouw was held liable by reason of a wrongful act since "buyers, like the grower in this case, should be able to rely on the trustworthiness of the certificates issued by NAK, in the sense that the inspections leading to certification are conducted in conformity with the Certification Regulation".[1179] The Supreme Court dismissed the appeal in cassation. In doing so, the Court arguably agreed with the relevance of the Certification Regulation in scrutinizing the conduct of Naktuinbouw, even though the Regulation itself was not in question in the case before the Court.[1180]

Likewise, the Supreme Court held that the court of appeal was allowed to use the fact that the then valid technical standards for gas installations (*GAVO-voorschiften*) had been infringed as an argument to substantiate its claim that there had been a violation of a norm aimed at protection against a specific danger.[1181] In *ING/Verdonk q.q.*, the Court validated the decision of the court of appeal to dismiss the plaintiff's reliance on the Insolad Rules of bankruptcy trustees: "apart from the legal status of the rules, of which the court of appeal also took account, the judgment of the court of appeal that the current situation is not covered by

[1177] ABRvS 2 February 2011, ECLI:NL:RVS:2011:BP2750.
[1178] Van Gestel & Micklitz 2013, p. 163.
[1179] HR 29 June 2007, ECLI:NL:HR:2007:BA0895 (*Aarbeienmijt*), para 3.2.
[1180] *Aarbeienmijt*, paras 3.2-3.3. On this case, see also Giesen 2008, p. 788; Van der Heijden 2012, p. 18; Verbruggen 2014d, under 5.
[1181] HR 13 July 2007, ECLI:NL:HR:2007:BA4200 (*X./Fortis Insurance*), paras 3.3.1, 3.3.5. Giesen 2008, p. 789 also touches upon this ruling.

(Article 7.2 of) the rules is not incomprehensible".[1182] In another judgment, the Supreme Court concurred with the decision of the court of appeal to take the rules of conduct for lawyers as its starting point in the assessment of the contractual relationship between the parties to the proceedings by dismissing the cassation appellant's arguments directed at this decision.[1183]

The Court also endorsed the far-reaching stance of the Enterprise Division of the Amsterdam Court of Appeal in the *Versatel* case.[1184] The Amsterdam Court of Appeal, more specifically, not only founded its ruling on the Dutch Corporate Governance Code, but also extended the reach of this Code beyond its intended scope of application, i.e., listed companies. In short, the court of appeal held that, given the facts of the case, the principles of the Code remained applicable even though Versatel no longer classified as a listed company. Accordingly, Versatel was not allowed to deviate from the principle on conflicts of interest and the accompanying best practice provisions, despite the 'comply or explain' nature of the Code.[1185] This has led some scholars to conclude that the rulings of both the Supreme Court and the court of appeal equate the legal force of the Corporate Governance Code with that of legislation.[1186] Others deduced from these judgments that the principles of reasonableness and fairness included in Article 2:8 DCC can set aside the Code's 'comply or explain' nature.[1187]

Finally, it can be pointed at *Bouwhuis/Dexia Bank Nederland*, delivered in the aftermath of the lingering securities lease affair.[1188] Two years before, in 2009, the Supreme Court had already established that providers of security lease products have a special duty of care towards the buyers of these products. This duty of care in brief entails that the provider has to warn a buyer about the residual debt risk, and that he has to conduct an income and assets test prior to the conclusion of the securities lease agreement, with the ensuing obligation to advise the buyer to refrain from concluding the agreement in case the results of this test show that the agreement would lead to an unacceptably high financial burden for the buyer.[1189] The *Bouwhuis/Dexia Bank Nederland* case, which elaborates on these 2009 *Dexia* cases,[1190] revolved around the formula used by the court of appeal to establish the financial room of the

[1182] HR 22 June 2007, ECLI:NL:HR:2007:BA2511, *NJ* 2007/520 (*ING/Verdonk q.q.*), para 3.5 (discussed by Giesen 2008, p. 788). It should be noted that this judgment has been delivered in a case different to that which gave rise to the court of appeal judgment involving the Insolad Rules that I discussed in section 6.3.2.2.3.
[1183] HR 8 January 2010, ECLI:NL:HR:2010:BK0163, *NJ* 2010/43 (*R./Moonen Vastgoed B.V.*), para 3.5.3.
[1184] HR 14 September 2007, ECLI:NL:HR:2007:BA4887, *NJ* 2007/612 (*Versatel II*).
[1185] Hof Amsterdam (Enterprise Division) 14 December 2005, ECLI:NL:GHAMS:2005:AU8151, para 3.6. On this case, see Giesen 2007, p. 72; Memelink 2010, p. 48; Raaijmakers 2006, pp. 203-205; J.M.M. Maeijer, case note to HR 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel II*), *NJ* 2007/612.
[1186] Raaijmakers 2006, p. 205; J.M.M. Maeijer, case note to HR 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel II*), *NJ* 2007/612, under 3. Cf. Memelink 2010, p. 48, pointing out that the ruling of the court of appeal concerned a preliminary injunction. According to Memelink, this could imply that it is still possible to deviate from the Code, but that this does not stand in the way of granting injunctive relief which declares the Code binding upon the parties concerned.
[1187] S.M. Bartman, case note to HR 14 September 2007, ECLI:NL:HR:2007:BA4887, *JOR* 2007/239, under 4.
[1188] HR 5 April 2011, ECLI:NL:HR:2011:BP4003, *NJ* 2013/41 (*Bouwhuis/Dexia Bank Nederland*).
[1189] HR 5 June 2009, ECLI:NL:HR:2009:BH2815, *NJ* 2012/182 (*de Treek/Dexia*); HR 5 June 2009, ECLI:NL:HR:2009:BH2811, *NJ* 2012/183 (*Levob Bank/Bolle*); HR 5 June 2009, ECLI:NL:HR:2009:BH2822, *NJ* 2012/184 (*Stichting Gedupeerden Spaarconstructie/Aegon Bank*).
[1190] See J.B.M. Vranken, case note to HR 5 April 2011, ECLI:NL:HR:2011:BP4003 (*Bouwhuis/Dexia Bank Nederland*), *NJ* 2013/41, under 1 and 10.

buyer of a securities lease product so as to assess whether there was an unacceptably high financial burden. According to the cassation appellant, this formula allowed "lending beyond what is and could be considered acceptable on the basis of the present and then valid codes of conduct [adopted by the VFN and the NVB, respectively, MM]".[1191] However, the appellant in cassation vainly sought recourse to the VFN and NVB Codes of Conduct on Consumer Credit. The Supreme Court in this respect first of all held that judges are allowed to use a general formula to assess the financial capacity, provided that this formula leaves sufficient room for weighing the individual circumstances of the buyer.[1192] Thus, it was at the discretion of the court of appeal to decide which frame of reference it wished to use in this respect. Moreover, the Court points out, the codes of conduct referred to cover consumer credit rather than agreements on securities leases. According to the Court, the latter cannot be equated with the former. Furthermore, the respondent and the appellant in cassation held different views on whether it was desirable to take account of these codes of conduct in the calculation of the customer's financial room as well as on the applicability of the '2% norm' set out by the codes. All this led the Supreme Court, which did not voice any objections to the use of the VFN and NVB codes as such in this context, to conclude that the court of appeal was not obliged to apply the aforementioned codes as a yardstick.[1193]

As the Supreme Court takes a fairly passive stance in the judgments just discussed, the foregoing in effect does not tell us much about the attitude of the Court towards industry codes and other forms of private regulation. Giesen, however, submits that the first three cases allowed the Supreme Court to voice any objections against the legal relevance of the private rules concerned,[1194] even though neither of the appeals in cassation prompted the Court to actively engage in a debate on the legal importance of rules.[1195] In refraining from doing so, the Court has shown itself not unfavorably disposed to private regulation having legal significance, Giesen argues.[1196] Even though this might hold true, the fact remains that the Court itself has kept silent upon the legal role of the private rules at issue and, accordingly, kept its attitude towards these rules veiled.

[1191] Conclusion Deputy Procurator General De Vries Lentsch-Kostense in *Bouwhuis/Dexia Bank Nederland*, ECLI:NL:PHR:2011:BP4003, para 5.8.

[1192] *Bouwhuis/Dexia Bank Nederland*, para 4.2. Similarly: HR 29 April 2011, ECLI:NL:HR:2011:BP4012, *NJ* 2013/40 (*Van der Heijden/Dexia Bank Nederland*), para 4.1.2. This ruling also elaborates on the 2009 *Dexia* cases.

[1193] *Bouwhuis/Dexia Bank Nederland*, para 4.5.2. Cf. Court of Appeal Amsterdam 1 April 2014, ECLI:NL:GHAMS:2014:1135, paras 3.14-3.42, referring *Bouwhuis/Dexia Bank Nederland*.

[1194] Giesen 2008, pp. 789-790. He also discusses *HBU/Groenendijk* (see section 6.4.2.2.5 below), HR 13 July 2007, ECLI:NL:HR:2007:BA3161, *NJ* 2007/505 (*X./Staat*) and HR 7 December 2007, ECLI:NL:HR:2007:BB9613, *NJ* 2008/554 (*Man/Vrouw*). Since the latter two judgements involve rules adopted by a public law body (a Public Prosecution Service Guideline and a Regulations of the appellate courts concerning application proceedings, respectively), I will not be discussing them in this chapter.

[1195] In HR 22 June 2007, ECLI:NL:HR:2007:BA2511, *NJ* 2007/520 (*ING/Verdonk q.q.*), the fact that the Insolad Rules were not applicable already formed sufficient grounds for dismissal. In the other two cases, the appellants in cassation did not broach the issue of the legal status of the rules. See Giesen 2008, pp. 788-789.

[1196] Giesen 2008, pp. 788-790. With regard to *ING/Verdonk q.q.* Giesen, more specifically, points at the fact that the Supreme Court passed over the opinion of Advocate General Wuisman, who argued that the Insolad Rules only carry limited legal force (ECLI:NL:PHR:2007:BA2511, para 2.7). Giesen however readily admits that there was no need for the Supreme Court to go into this statement.

6.4.2.2 Supreme Court's own interpretation of the legal relevance of industry codes of conduct

The judgments discussed in this section shed more light on the matter: in these judgments the Supreme Court took a more 'active' approach in assessing the legal relevance of the private rules concerned.

6.4.2.2.1 ABN Amro case

A first example in this respect is the judgment in the *ABN Amro* case. Here, the Court itself held that the Dutch Corporate Governance Code reflects the prevailing juridical view in the Netherlands.[1197] According to the Court, this view is a relevant factor in substantiating the principles of reasonableness and fairness included in Article 2:8 DCC and the requirement imposed on a director by Article 2:9 DCC to properly perform its tasks.[1198]

6.4.2.2.2 Van der Tuuk Adriani/Batelaan

Simplified, the dispute in *Van der Tuuk Adriani/Batelaan* (1996) centered upon the question whether Van der Tuuk Adriani, a pharmacist, was enriched in an unjustified way by the take-over of the pharmacy of Batelaan, a general practitioner.[1199] The court of appeal in this respect assigned relevance to the so-called BACO Agreement, concluded between the professional associations of pharmacists and medical practitioners. This agreement provides guidelines to fix the take-over price to be paid by a pharmacist that takes over the pharmacy of a general practitioner. These guidelines do not apply directly to individual pharmacists and medical practitioners; for these groups, the rules are of a non-binding, advisory nature.[1200] The Supreme Court used the BACO Agreement as an important argument in establishing that the court of appeal had not erred in law.[1201] The Court thereby referred to the fact that it follows on from the adoption of the BACO Agreement that the respective professional associations have deemed it fair and just to compensate the general practitioner's loss of

[1197] HR 13 July 2007, ECLI:NL:HR:2007:BA7972, *NJ* 2007/434 (*ABN Amro*), paras 4.4, 4.8. Herewith, the Supreme Court implicitly refers to Article 3:12 DCC in which this juridical view is included. See Memelink 2010, p. 47; S.M. Bartman, case note to HR 14 September 2007, ECLI:NL:HR:2007:BA4887, *JOR* 2007, 239, under 3. See earlier HR 21 February 2013, ECLI:NL:HR:2003:AF1486, *NJ* 2003, 182 (*HBG*), where it was held that the views on corporate governance accepted in the Netherlands may constitute a source of legal rules, thus Eijsbouts 2010, pp. 55, 73. Cf., more generally, Conclusion Advocate General Langemeijer in *HBG*, ECLI:NL:PHR:2007:AZ9122, para 3.8 indicating that this view could be reflected in, for instance, codes of conduct.

[1198] HR 13 July 2007, ECLI:NL:HR:2007:BA7972, *NJ* 2007/434 (*ABN Amro*), paras 4.4, 4.8. See also Memelink 2010, p. 47; HR 9 July 2010, ECLI:NL:HR:2010:BM0976, *NJ* 2010/544 (*ASMI*), para 4.4.2. Eijsbouts 2010, p. 74 points out that the judgment is indicative of the fact that a corporate specification of the principles of corporate governance can thus give rise to specific obligations against shareholders and, perhaps, other stakeholders.

[1199] HR 15 March 1996, *NJ* 1997/3 (*Van der Tuuk Adriani/Batelaan*).

[1200] Conclusion Advocate General Koopmans in *Van der Tuuk Adriani/Batelaan*, para 3; J.B.M. Vranken, case note to HR 2 February 2001, ECLI:NL:HR:2001:AA9765 (*Hulsman/Van der Graaf*), *NJ* 2001/319, under 5.

[1201] J.B.M. Vranken, case note to *Hulsman/Van der Graaf*, *NJ* 2001/319, under 6.

income in the given circumstances. Van der Tuuk Adriani's argument that the agreement was not directly applicable to the relation between the parties to the proceedings was of no avail as this had not been misunderstood by the court of appeal, the Supreme Court found.[1202] As Vranken points out, the Court thus pulled private regulatory guidelines in the legal sphere as an expression of the fundamental conceptions of law in a certain societal circle and therewith, notwithstanding the voluntary and legally non-binding nature of the BACO Agreement for members of the professional associations, indirectly turned these guidelines into *de facto* binding norms.[1203]

6.4.2.2.3 Trombose case

The *Trombose* case (2001) revolved around the legal relevance of a hospital protocol.[1204] The reason for the dispute to arise was the fact that a physician had forgotten to administer his patient anticoagulants after his knee operation, as stipulated by a hospital protocol. As a result of this omission, the patient sustained thrombosis. The patient sued both the hospital and the physician for damages and founded his claim directly on a breach of the hospital protocol. The court of appeal had held that the protocol applied to the relation between the physician and the patient as the rules, in short, fill out the duty of proper care of the physician (cf. Article 7:453 DCC). Furthermore, the court noted that the protocol was based on consensus between the hospital and its physicians on proper medical care. Against this backdrop, the court held that the failure to adhere to the protocol indeed constituted an attributable failure from the side of the physician, as the breach of the protocol did not rest on solid arguments, but rather resulted from the physician simply having forgotten to administer the anticoagulants.[1205] The hospital and the physician appealed to the Supreme Court, arguing, *inter alia*, that the infringement of the protocol was an insufficient ground for liability since the protocol had an internal scope: it only applied to the physician and the hospital itself. The court of appeal should have looked at the way in which a reasonably competent fellow physician, acting reasonably would have proceeded. In this regard, the court should have considered the degree of consensus within the medical profession on (the treatment prescribed by) the protocol.[1206] The Supreme Court dismissed this argument and ruled that the appellate court, in the given circumstances, had not erred in law. The Court thereby rephrased the decision of the court in more general terms. It held that the protocol was based on consensus between the hospital and its physicians on proper medical care and that in principle both the

[1202] *Van der Tuuk Adriani/Batelaan*, paras 3.6-3.8. After the judgment, the association of pharmacists unilaterally terminated the BACO Agreement. See J.B.M. Vranken, case note to *Hulsman/Van der Graaf*, *NJ* 2001/319, under 7. Cf. HR 2 February 2001, ECLI:NL:HR:2001:AA9765, *NJ* 2001/319 (*Hulsman/Van der Graaf*) where the Supreme Court affirmed the argument of the Amsterdam Court of Appeal that the BACO Agreement was not applicable to the specific case at hand, and Rb. Leeuwarden 4 December 2002, ECLI:NL:RBLEE:2002:AF2583.
[1203] J.B.M. Vranken, case note to *Hulsman/Van der Graaf*, *NJ* 2001/319, under 8. Cf. Giesen 2007, pp. 23, 59.
[1204] HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*).
[1205] See the judgment of the Leeuwarden Court of Appeal, para 10-11 (published in *NJ* 2001/649).
[1206] Ground for cassation no. 1.1, as included in *NJ* 2001/649.

hospital and the physicians are expected to adhere to these self-imposed rules. One is only allowed to diverge from the protocol when desirable in the interests of proper patient care.[1207]

Thus, the Supreme Court founded its judgment that the physician was liable for the damages resulting from the breach of the protocol directly on the private rules. The protocol is assigned legal importance, yet without any references to the private nature of the rules.[1208] Admittedly, the appeal in cassation, as in the judgments discussed in section 6.4.2.1, did not (explicitly) raise the issue of the private nature. The lack of references can however be considered remarkable when one recalls the 'Article 79 RO discussion' in the previous section and the generally assumed lack of legal binding force of private regulation. What is more, the *Trombose* case, as the appellate court noted, in effect did center upon the question about the legal weight of the protocol.[1209] Viewed from this perspective, one might have expected the Supreme Court to broach Article 79 RO or to at least touch upon the fact that the protocol contained private regulation. However, in forming its opinion on the legally binding force of the rules, the Court did not go into the issue. The fact that the rules rested on consensus between the hospital and the physician together with the ensuing obligation to abide by these self-imposed rules appear to be sufficient arguments in this respect.

6.4.2.2.4 Kouwenberg/Rabo

Kouwenberg/Rabo (2003), together with *Trombose*, is perhaps one of the most well-known civil law cases involving private regulation.[1210] The case revolved around the question whether a bank had failed to fulfill its duty of care towards a client involved in option trading by not adhering strictly to the overdraft limit of the client's account. One set of rules applicable to this case were the Rules concerning trade on the options exchange (*Reglement voor de handel op de optiebeurs,* hereafter: RHO), governing the relation between the options exchange and the securities houses trading at the exchange.[1211] Article 31m RHO, more specifically, concerning the overdraft limit, imposed an obligation on the bank to demand from its clients that they provide the cover required by the options exchange, before proceeding with option trading on behalf of these clients.[1212] The court of appeal had already

[1207] *Trombose*, para 3.3.3. The Supreme Court adds that there was no need for the court of appeal to go into the argument that there was a lack of consensus within the medical profession on the treatment prescribed by the protocol, since the breach of the protocol resulted from the fact that the physician had forgotten to administer the anticoagulants. However, if the deviation from the protocol is made with a view to the patient's interests, this consensus may become relevant (*Trombose*, para 3.3.3) See also Vranken 2005, pp. 92-93. Cf. HR 1 April 2005, ECLI:NL:HR:2005:AS6006, *NJ* 2006/377 (*X/ZAO*), sustaining in para 3.4 that "a medical protocol is a guideline that in principle has to be observed, but from which one is allowed to divert provided that the patient is given the care that can be demanded from a reasonably competent doctor in the circumstances of the case. This implies that divergence from the protocol has to be substantiated. At the same time, however, compliance with the protocol does not naturally equate with correct behavior". Giesen 2007, pp. 31, 77-78, 105 discusses this ruling.
[1208] Cf. Vranken 2005, p. 93.
[1209] Judgment of the Leeuwarden Court of Appeal, para 4 (published in *NJ* 2001/649).
[1210] HR 11 July 2003, ECLI:NL:HR:2003:AF7419, *NJ* 2005/103 (*Kouwenberg/Rabo*).
[1211] The client had signed a declaration to the effect, *inter alia*, that the RHO was applicable to the relationship between the client and the bank. See Conclusion Advocate General Verkade in *Kouwenberg/Rabo*, ECLI:NL:PHR:2003:AF7419, para 2.2.
[1212] Vranken 2006, p. 72.

ruled that this obligation does not imply that a bank always has to refrain from option trading when the required cover cannot be provided.[1213] The client appealed to the Supreme Court, challenging *inter alia* this decision of the court of appeal. One of the arguments advanced by the client in this regard entailed the claim that the RHO constituted law within the meaning of Article 79 RO. The Supreme Court started out by agreeing with the decision of the court of appeal as regards the scope of Article 31m RHO. Subsequently, it dismissed the claim that the RHO is to be considered 'law'. According to the Court, "the RHO, which concerns private regulation, does not meet the criteria developed in Supreme Court case law in order to be qualified as law".[1214] Finally, the Court provided a list of viewpoints that have to be used as a yardstick in assessing the scope of the bank's duty of care. The RHO are one of the factors that have to be taken into account in this respect.[1215] The subsequent application of these viewpoints on the facts of the case, eventually made the Court reach the decision that the bank had failed to live up to its duty of care.[1216]

Vranken has shown himself critical of the Supreme Court's line of argument, pointing out that the Court could have reached the same decision directly on the basis of the RHO.[1217] Instead, however, the Supreme Court "distanced itself from the Rules" by holding that the RHO amounted to *no more* than a viewpoint in establishing the duty of care of the bank towards its client, Vranken argues.[1218] With the judgment remaining silent about the reasons for going down the 'viewpoints route', it is difficult to pinpoint why the Court chose to attribute only limited legal weight to the RHO, as Vranken notes. Does the refusal of the Court to qualify the RHO as 'law' echo through at this point? Is the Court's reticence, in other words, caused by the fact that the RHO contains private regulation? Vranken submits that it may indeed have been the RHO's lack of a legal nature that led the Supreme Court to its current approach, yet at the same time does not rule out the possibility that the Court's approach follows on from its interpretation of the RHO.[1219] What does become clear, however, is that the barrier raised by Article 79 RO in the end did not prevent the Supreme Court from taking account of the RHO, albeit the private origins of the rules might have played a role in the Court's decision to assign only limited legal relevance to the RHO.

[1213] Judgment Court of Appeal 's-Hertogenbosch, para 4.10.1 (published in *NJ* 2005/103).
[1214] *Kouwenberg/Rabo*, para 3.5.3.
[1215] *Kouwenberg/Rabo*, para 3.6.3. See also Vranken 2005, p. 90.
[1216] *Kouwenberg/Rabo*, para 3.6.4. See also Vranken 2005, p. 90.
[1217] Vranken 2005, p. 91. Additionally, it can be noted that the RHO undisputedly aims to protect the interest of the bank's clients, as the Supreme Court itself already held in HR 26 June 1998, *NJ* 1998/660 (*Van de Klundert/Rabobank*), para 3.6. Cf. HR 24 January 1997, *NJ* 1997/260 (*D./Internationale Nederlanden Bank*) and HR 23 May 1997, *NJ* 1998/192 (*Rabobank/Everaars*), where the RHO also played a role.
[1218] Vranken 2005, pp. 90-91. English quotation taken from Vranken 2006, p. 72.
[1219] Vranken 2005, p. 91. Cf. Giesen 2007, p. 100. Additionally, it can be pointed out that the 'viewpoint approach' and the ensuing role of the RHO already follow on wordily from HR 26 June 1998, *NJ* 1998/660 (*Van de Klundert/Rabobank*), para 3.6. As the appellant in cassation did not broach the status of the RHO under Article 79 RO, this statutory provision did not play a role in this judgment.

6.4.2.2.5 HBU/Groenendijk

In *HBU/Groenendijk* (2007), the Supreme Court used the Code of Conduct on the Processing of Personal Data by Financial Institutions (*Gedragscode Verwerking Persoonsgegevens Financiële Instellingen*) in determining the reach of the statutory right to receive an overview of the personal data processed (Article 35 Wbp). Considering that the Code forms an elaboration of the provisions of the Wbp and that as such it has been formally approved by the DPA, the Court more specifically held that the scope and content of the aforementioned right "partly depend on the rules of the code in this respect as well as on the circumstances of the case".[1220] Accordingly, the Court used several provisions of the Code to found its line of argument.[1221]

Interestingly, it is the Supreme Court itself that brings up the private rules; neither the appellate court nor the appellant in cassation had made mention of the Code.[1222] Advocate General Verkade, by contrast, does refer to the Code and briefly reflects upon the relation between the Code and Article 79 RO in what he calls 'a diagnosis of the status of the code of conduct' (*statusdiagnose*). He concludes that the mere fact that the DPA has approved the Code does not turn it into 'law'. According to Verkade, judges are not bound to the industry interpretation of the Wbp reflected in the Code, yet it is possible that "reliance on the Code by one of the parties should be considered as a viewpoint or an essential argument that judges need to decide upon"[1223]. As Giesen rightly remarks, the Supreme Court does not seem to concur with the view of the Advocate General. The Code plays a rather important part in the Court's reasoning ('partly depend on'), without a single word being mentioned about the legal status of the Code, but with the Supreme Court in fact presenting the rules as binding. The private rules therewith seem to amount to more than a viewpoint or an essential argument, Giesen argues.[1224] The fact that the Supreme Court draws the private rules in at its own initiative adds to this impression.

[1220] HR 29 June 2007, ECLI:NL:HR:2007:BA3529, *NJ* 2007/639 (*HBU/Groenendijk*), para 3.7. Discussed by Giesen 2008, pp. 788-789; Van der Heijden 2012, pp. 183-184. Similarly: HR 29 June 2007, ECLI:NL:HR:2007:AZ4664 (*Dexia/Verweerder*) and HR 29 June 2007, ECLI:NL:HR:2007:AZ4663, *NJ* 2007/638 (*Dexia/Van Steenoven*).

[1221] Cf. Giesen 2008, p 789.

[1222] In substantiating his argument, the cassation appellant did refer to the applicable European legal framework, legislative history, literature and case law. He also made some remarks from the perspective of comparative law. Against this backdrop, it is even more striking that a code of conduct, explicitly mentioned in both the European and the Dutch legal frameworks was overlooked (cf. Chapter 4, section 4.4.1.1.3 under i).

[1223] Conclusion Advocate General Verkade in *HBU/Groenendijk*, ECLI:NL:PHR:2007:BA3529, para 4.13. Additionally, the Advocate General notes that an actor can become contractually bound to the Code by referring to the rules in a contractual relationship with a client. This can result in obligations for the legal actors that go beyond what is required by the Wbp, but cannot lead to a derogation from the provisions of the Wbp to the detriment of the client. The Advocate General concludes by pointing to the fact that industry peers who do not subscribe to the Code may have the appearances against them when they interpret the Wbp in a more restrictive fashion, particularly when the elaboration of open norms is concerned. See Conclusion Advocate General Verkade in *HBU/Groenendijk*, ECLI:NL:PHR:2007:BA3529, para 4.14.

[1224] Giesen 2008, p. 789,

6.4.2.2.6 Pretium/Tros

Central issue in the appeal in cassation in the *Pretium/Tros* case (2011),[1225] concerning the lawfulness of the broadcasting of visual material collected with a hidden camera, was the role of the Guidebook for Journalistic Behavior (*Leidraad voor de Journalistiek*) of the Netherlands Press Council. One of the provisions of this Guidebook concerns the use of hidden recording equipment. Neither the court of first instance nor the court of appeal had referred to the Guidebook in establishing the lawfulness of the broadcast. Wrongly, according to Pretium, the appellant in cassation. The appellate court should have decided the case on the basis of the applicable private rules, as the Guidebook is generally considered unwritten law within the meaning of Article 6:162(2) DCC. Tros violated the Guidebook and hence committed an unlawful act, Pretium claimed.[1226] The Advocate General argued that the Guidebook cannot be equated with current Dutch law and deemed it highly unlikely that this plea would be successful. The Advocate General in this respect referred to the line of case law establishing that a violation of disciplinary or professional rules, to which the Guidebook bears resemblance, does not necessarily equate to unlawful conduct, but rather serves as an indication that a legal norm or a standard of care has been breached. [1227] The Supreme Court, in its turn, did not agree with the proposition of Pretium either. The lawfulness of the disputed behavior had to be assessed by balancing the interests and circumstances involved. The journalistic standards included in the Guidebook could in this respect not be considered "a criterion that has to be applied as a matter of law", but rather constituted "a condition which, as a rule, will carry some weight, but which will not necessarily be decisive".[1228]

With the appellant in cassation expressly advocating that the Guidebook carried legal significance, the Court had to rule on the legal role of the private rules. Clearly, the Supreme Court did not wish to follow Pretium in its apparently too far-reaching qualification of the Guidebook as 'unwritten law' and its ensuing conclusion that the violation of the rules (therefore) amounted to an unlawful act. However, the Court fails to provide the reasons behind its decision. Several scenarios can be thought of in this respect. The wordings of the judgment (the Guidebook is not 'a criterion that has to be applied as a matter of *law*') suggest that the lack of a legal nature, resulting from the private origins of the rules, has induced the Court to adopt a reticent attitude, limiting the legal weight of the rules to no more than a relevant factor in the context of the judicial balancing exercise.[1229] However, following on

[1225] HR 8 April 2011, ECLI:NL:HR:2011:BP6165, *NJ* 2011/449 (*Pretium/Tros*)
[1226] *Pretium/Tros*, *NJ* 2011/499 - Notice of Appeal, notably I.1-I.4; E.J. Dommering, case note to HR 8 April 2011, ECLI:NL:HR:2011:BP6165 (*Pretium/Tros*), *NJ* 2011/449, under 1.
[1227] Conclusion Advocate General Huydecoper in *Pretium/Tros*, ECLI:NL:PHR:2011:BP6165, paras 16, 22.
[1228] *Pretium/Tros*, para 3.3.2. Cf. HR 5 October 2012, ECLI:NL:HR:2012:BW9230, *NJ* 2012/571 (*Endemol/SBS & Peter R. de Vries/Koos H.*). In this case, the court of appeal balanced the interests and circumstances involved, whereby it assigned relevance to the private journalistic standards. The Supreme Court held that the appellate court had applied the correct yardstick.
[1229] Noticeable in this respect is the remark of the Advocate General that the Guidebook cannot be equated to current law since the content of the private rules on the use of hidden cameras more or less coincides with the rules formulated in case law (Conclusion Advocate General Huydecoper in *Pretium/Tros*, ECLI:NL:PHR:2011:BP6165, para 23). One could infer from this argument that there was no need to take account of the Guidebook, since it would lead to a similar result if the case was decided on the basis of the

from the reasoning of the Advocate General, the decision of the Court could also have been dictated by its judgments concerning disciplinary rules.[1230] Alternatively, the judgment may have been inspired by factors pertaining to the manner in which the profession itself applies the Guidebook, such as the fact that its status is not undisputed within the profession.[1231] It is thus difficult to draw firm conclusions as to how the *Pretium/Tros* judgment is to be interpreted at this point. Be that as it may, it can be concluded that the Supreme Court did not withhold legal significance from the Guidebook, in spite of its non-legal nature.

6.4.2.2.7 Achmea/Rijnberg

The *Achmea/Rijnberg* case (2014) forms, for now at least, the tailpiece of the Supreme Court's case law on private regulation.[1232] The dispute arose following the decision of an insurance company to terminate the invalidity insurance of an insured person. This decision was based on the results of a personal inquiry into the activities of this person, which revealed that he had furnished the insurance company with false information regarding his work-disability. In the judicial procedure that followed, both the insurance company and the insured person referred to the GPO in substantiating their respective claims. This led the district court and the court of appeal to deploy the GPO as the central touchstone in assessing the permissibility of the personal inquiry.[1233] Accordingly, the case came to revolve around the question whether the insurance company had lived up to the GPO and, if not, what consequences this should have for the information obtained through the personal inquiry.[1234]

The applicability of the GPO as a central assessment framework was also beyond dispute in the appeal in cassation, where the insurer challenged the appellate court's interpretation of

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applicable legal rules. This of course begs the question whether, against the backdrop of the line of case law on disciplinary rules, things would have been different had there been no case law on the use of hidden cameras.

[1230] Cf. section 6.3.3.2. Dommering also seeks a link between the ruling and the line that follows on from the Court's case law on disciplinary and professional rules. See E.J. Dommering, case note to *Pretium/Tros*, *NJ* 2011/449, under 1, 3-4. In my opinion, this would not be a fully convincing foundation of the Court's argument. The rules set out by the Guidebook on the use of hidden camera's more or less coincide with the rules formulated in case law, as the Advocate General points out (Conclusion Advocate General Huydecoper in *Pretium/Tros*, ECLI:NL:PHR:2011:BP6165, para 23). Viewed from this perspective, it appears difficult to maintain that the purpose of the rules at issue is merely to guard the quality of professional conduct, as the rationale behind the line of case law on professional and disciplinary rules assumes. Admittedly, however, drawing a distinction between professional rules that meet this rationale and rules that have a different purpose might be too much of a differentiation.

[1231] See E.J. Dommering, case note to *Pretium/Tros*, *NJ* 2011/449, under 1-5.

[1232] HR 18 April 2014, ECLI:NL:HR:2014:942, *NJ* 2015/20 (*Achmea/Rijnberg*). For an analysis of this case in the light of earlier Supreme Court rulings involving private regulation, see Menting 2015.

[1233] The district court thereby held that the GPO had been complied with and that, hence, the personal inquiry was justified. This decision was overturned on appeal. According to the appellate court, the insurance company had intruded on the privacy of the insured person, which, in absence of a justification defense, constituted an unlawful act. This implied that the evidence gathered through the personal inquiry had been obtained illegally. The court eventually decided to exclude the evidence. The fact that the company, in the view of the court of appeal, had been in breach of the code, played an important part in the appellate court's judgment. See Rb. Middelburg 29 September 2010, ECLI:NL:RBMID:2010:BO9418 and Hof 's-Hertogenbosch 4 September 2012, ECLI:NL:GHSHE:2012:BX9465.

[1234] Cf. Menting 2015, p. 106. See also Rb. Middelburg 29 September 2010, ECLI:NL:RBMID:2010:BO9418, paras 2.1-2.6, 4.1; Conclusion Advocate General De Vries Lentsch-Kostense in *Achmea/Rijnberg*, ECLI:NL:PHR:2014:77, para 20.

the GPO as well as the court's reasoning with respect to the exclusion of the evidence. The Supreme Court in this respect first and foremost stated that a personal inquiry such as the one under dispute violates the right of the insured party to privacy protection. Such a violation is in principle unlawful, unless a ground for justification applies. The presence of any such ground has to be ascertained on the basis of a balancing of interests: the right to privacy protection has to be weighed against the interest of the insurance company to prevent, detect and combat fraud.[1235] Here, the GPO plays a decisive role:

> "With the Code of Conduct, the Dutch Association of Insurers has, also in the interests of the insured, sought to specify the aforementioned balancing of interests, particularly by including an obligation for insurance companies to observe the principles of proportionality and subsidiarity. It follows on from the introduction that the Code of Conduct seeks to link up with current legislation in the field of privacy, such as the Dutch Personal Data Protection Act and legislation on the (secret) use of camera's. Regarding the content and purpose of the Code of Conduct, it can be taken as a starting point that a violation of the Code by an insurance company constitutes an unjustified and therewith unlawful intrusion on the privacy of the insured person."[1236]

Against this backdrop, the Supreme Court held that deployment of the GPO as a central framework for assessment was rightly beyond dispute: the insurers' decision to hold a personal inquiry had to be assessed on the basis of the principles of proportionality and subsidiarity as embodied in the GPO. However, the Court mentions in passing, the GPO cannot be considered law within the meaning of Article 79 RO since it is based on self-regulation. Consequently, the Court held, the correctness of the appellate court's interpretation of the code cannot be reviewed in cassation.[1237] The following assessment of the grounds of cassation eventually led to a dismissal of the appeal in cassation.[1238]

So, instead of turning straight to the grounds for cassation put up by the appellant in cassation, the Supreme Court first dedicated some general considerations to the role of the GPO. It is not uncommon for Supreme Court rulings to start out with a general proposition or general reflections. What is exceptional is that the current propositions concern private regulation. The Court rarely rules on private regulation in such general terms.[1239] Moreover, in the light of the judgments preceding this case, it would have been reasonable for the Court to adopt a slightly cautious approach. In fact, it could have confined itself to referring to Article 79 RO and, in doing so, agree with the reasoning of the appellate court. Instead, the Supreme Court, as in the *Trombose* ruling, choose to cast aside the reservations that it might previously have had by lending the private rules decisive legal force, using express and general wordings. Herewith, the Court has conferred far greater legal importance on private regulation than in most other rulings. The private nature of the rules is thereby only referred

[1235] *Achmea/Rijnberg*, para 5.2.1.
[1236] *Achmea/Rijnberg*, para 5.2.1.
[1237] *Achmea/Rijnberg*, para 5.2.1.
[1238] The Supreme Court, more specifically, ruled that the court of appeal's interpretation of the GPO was not incomprehensible and that the court did not err in law with its subsequent decision to exclude the evidence obtained through the personal inquiry. See *Achmea/Rijnberg*, paras 5.3.1-5.4.2.
[1239] The *Trombose* ruling forms the main exception here. See Menting 2015, pp. 106-107.

to in passing in the guise of Article 79 RO, without derogating from the legal significance of the rules. Viewed in the light of this judgment, the suggestion that the private origins of a regulatory scheme may be of influence on its legal weight loses force.[1240]

Arguably, the Court already prescribes how the GPO is to be applied, before even having touched upon the grounds of cassation. In doing so, Article 79 RO is in effect brushed aside. This once more highlights that this statutory provision does not conclusively steer decisions of the Supreme Court on the legal importance of private regulation (cf. section 6.4.1.2). What is more, the Supreme Court seems to tie in with one of the lines that can be inferred from the lower courts' body of case law, namely that courts are generally inclined to apply private regulation when the parties to the proceedings agree upon its applicability. After all, in *Achmea/Rijnberg,* the Supreme Court follows these parties in taking the GPO as the central framework for assessment. Strengthened by the fairly explicit way in which the Court proceeded, this apparent link with one of the lower courts' lines of case law may offer new opportunities for parties to the proceedings who whish to rely upon private regulation.[1241]

6.4.3 Analysis[1242]

6.4.3.1 The approach of the Supreme Court

The picture that emerges from the discussion in the previous subsections is that the Supreme Court, perhaps contrary to what might have been anticipated with a view to Article 79 RO, does not always adopt a dismissive approach towards industry codes. In fact, the private origins of these codes and the ensuing lack of fit with the notion of 'law' ex Article 79 RO have not withheld the Court from attributing legal relevance to industry codes of conduct. The Supreme Court went down different routes in this respect, adopting both a passive (affirming the use of codes of conduct by courts of appeal) and an active approach. As regards the latter, the case law discussed shows that industry codes have been employed as one of the viewpoints in carving out blanket clauses (*Kouwenberg/Rabo*, *Pretium/Tros*), as an expression of the prevailing juridical view (*ABN Amro*) within a social circle (*Van der Tuuk Adriani/Batelaan*), as a weighty argument ('*partly* dependent on') in the interpretation of a statutory right (*HBU/Groenendijk*) and in a *decisive*, self-standing role (*Trombose, Achmea/Rijnberg*). Thus, at first blush, it seems fair to say that the Court does not seem to be unfavorably disposed to attaching legal relevance to industry codes.[1243]

On closer analysis, however, there is a contrast between the judgments that catches the eye: the legal weight that the codes of conduct have assumed varies. The important role of the codes in *Van der Tuuk/Adriani* and *Trombose* was followed by a more marginal one in *Kouwenberg/Rabo*. And after having considered an industry code as a partly determinative factor in *HBU/Groenendijk*, the Supreme court took a more reticent stance in *Pretium/Tros*.

[1240] I already made these observations in Menting 2015, pp. 106-108.
[1241] Menting 2015, pp. 107-109, 111.
[1242] The analysis partially draws on one I conducted earlier in Menting 2015. The overlap between the analyses will be marked through references to the relevant sections of that publication.
[1243] Similarly: Giesen 2008, pp. 788-790.

The latter case in turn, is followed by the explicit ruling in the *Achmea/Rijnberg* case. The ensuing picture is that of an ambiguous approach. This most notably comes to the fore when contrasting the *Kouwenberg/Rabo* and *Tros/Pretium* with *Trombose* and *Achmea/Rijnberg*. Whereas the industry codes concerned carried important legal weight in the latter two judgments, their legal relevance was significantly less in the former two.[1244]

6.4.3.2 Criteria?

These observations raise the question as to how the Supreme Court decides whether an industry code of conduct bears legal significance. Thus far, the Court has not been particularly explicit about the reasons underlying its approach. In *Van der Tuuk Adriani/Batelaan*, it seems to base its conclusion that the BACO Agreement bore legal relevance on the fact that the agreement resulted from consensus of the adopting professional organizations on the rules included in it. Similarly, in *Trombose* the Supreme Court seems to found its decision that the self-imposed hospital protocol had legal relevance on the fact that the protocol rested on consensus between the hospital and its physicians. The code of conduct that played a role in *HBU/Groenendijk* was drawn into the legal sphere with reference to the fact that it formed a 'DPA approved' specification of the Wbp. In *Achmea/Rijnberg*, the legal binding force of the GPO appears to have been motivated by substantive criteria. The Court referred to the 'content and purpose' of the GPO, which in fact encompassed the following five features of the GPO: the fact that its adoption was also in the interests of the insured, its purpose, its contents (notably the principles of proportionality and subsidiarity), its compulsory nature, and its link with current privacy legislation. Regarding these features, the framework set out by the GPO reflects the balancing of interests that has to be applied as a yardstick in case of violations of the right to privacy protection. The 'fitness' of the private rules in this respect led the Supreme Court to lend the GPO decisive legal binding force.[1245] Additionally, with the ruling seemingly linking up with the lower courts' approach at this point, the employment of the GPO as a central framework for assessment may have been motivated by the fact that there was consensus between the parties to the proceedings on the applicability of the GPO.

Whereas in neither of these four judgments nor in *ABN Amro* (where the Court did not apply any 'criteria'), the private nature of the industry code at issue played a role, it does appear to have been a relevant factor in *Kouwenberg/Rabo* and *Tros/Pretium*. More specifically, in the latter two judgments the Court seems to have used the private, non-legal nature of the rules as an argument to mitigate their legal weight. The criteria of Article 79 RO might have echoed through in this regard.[1246] Admittedly, however, it cannot and should not

[1244] A good illustration is the contrast between *Pretium/Tros* and *Achmea/Rijnberg*. While the starting point was similar in both cases, namely a balancing of interests, the role assigned to the applicable private rules in this respect differed widely. In *Pretium/Tros,* the Court dismissed the argument that a violation of the Guidebook amounted to an unlawful act, limiting the legal role of the Guidebook to that of a relevant factor. In *Achmea/Rijnberg,* by contrast, the Court held with respect to the GPO that a violation of the private rules was in effect unlawful.
[1245] Menting 2015, p. 108.
[1246] See the remarks to the *Pretium/Tros* judgment (section 6.4.2.2.6) and Vranken 2005, pp. 90-92 with respect to the *Kouwenberg/Rabo* judgment.

be ruled out that the Court's decision has been motivated by other arguments, as was already submitted during the discussion of the judgments. It is therefore difficult to put a finger on the source of the reticence that the Court displays in these cases.

What can be inferred from these observations as to how the Supreme Court decides upon the legal relevance of industry codes? To put it briefly: there is no consistency in the Court's case law at this point. As the Supreme Court does not state the reasons behind its approach, it is difficult to ascertain whether the aforementioned elements can be considered criteria used by the Court to establish the legal significance of the private rules concerned, or whether these elements are just arguments that fit the context of the case. The Court still appears to decide upon the applicability and legal relevance of industry codes on a case-by-case basis.[1247] An explanation for this ambiguous approach might be found in the procedural context in which the Supreme Court cases are embedded, which limits the Court's room for maneuver.[1248]

6.4.3.3 Procedural context

The procedural environment within which the Supreme Court has ruled on the legal relevance of industry codes of conduct differs from the procedural context in which the lower court cases involving private regulation were situated.[1249] These differences might explain the ambiguous nature of the Supreme Court approach towards industry codes, as opposed to the more unequivocal approach of the lower courts at this point. First of all, it can be noted that only few cases involving industry codes have reached the Supreme Court. These cases moreover tend to be the 'problematic ones', in that the industry codes are, in one way or another, subject to dispute (e.g., because of a lack of consensus between the litigants about the applicability of the code). This complicates the development of a more uniform approach. The procedural framework of Article 79 RO, which does not affect the lower courts, further complicates the matter. Following the narrow conception of 'law' laid down by Article 79 RO, the Supreme Court can exert only limited control: it can subject the lower court's interpretation and application of a code of conduct to a marginal review only. As such, Article 79 RO has even given rise to the impression that industry codes cannot have legal binding force.[1250] However, as several scholars indicate[1251] and as the case law analysis conducted in this chapter affirms, this impression does not hold true: industry codes have been assigned legal relevance, in spite of Article 79 RO. The majority of the Supreme Court rulings

[1247] As was already noted in 2009 by Kristic, Van Tilburg and Verbruggen (2009, p. 203).
[1248] Cf. Giesen 2008, pp. 788-790. Illustrative in this respect are the 'approval cases', where the Court did not need to delve into the nature and legal relevance of the rules concerned, since these issues had not been raised by the parties to the proceedings, and *Pretium/Tros*, where the explicit argument of the appellant in cassation caused the Court to have to consider the legal role of the Guidebook.
[1249] Cf. section 6.3.3.2 where the role of 'procedural context' in the case law of the lower courts was discussed.
[1250] As suggested by Giesen 2007, p. 45.
[1251] See Giesen 2007, pp. 45-51; Korthals Altes 2005, no. 25; Teuben 2004, pp. 201-202, 229-230; Kristic, Van Tilburg & Verbruggen 2009, p. 200; E.J. Dommering, case note to HR 29 June 2007, ECLI:NL:HR:2007:BA3529 (*HBU/Groenendijk*), *NJ* 2007/639. Cf. Menting 2013, p. 120; Menting 2015, pp. 106-108.

discussed in this section do not even make mention of the provision.[1252] Furthermore, Article 79 RO has not withheld the Court in *Trombose* and *Achmea/Rijnberg* from *de facto* ruling on the manner in which the private rules at issue must be applied. The results of this have been aptly described by Dommering: the fact that private regulation in principle cannot be considered law for the purposes of Article 79 RO "does not prove an obstacle to the Supreme Court in explaining vague open norms or the specification of the standard of due care. Thus sailing around the tight law/facts scheme of Article 79 RO, various pseudo-legal sources sneak in and are 'interpreted' by the Supreme Court".[1253] Nonetheless, Article 79 RO still remains determinative as to the degree of control that the Court can exert.[1254] As such, it can still complicate the development of a more uniform approach.

However, neither the problematic nature of the cases nor the formal confines of Article 79 RO have to be an obstacle for the Supreme Court to rule on the legal relevance of industry codes in general terms and in a more explicit fashion. After all, in its capacity of developer of the law, the Supreme Court can seize questions of law concerning industry codes of conduct as an opportunity to expressly rule on the legal relevance of such codes, these procedural obstacles notwithstanding. Thus far, however, the Supreme Court has refrained from doing so. Rather, it mainly seems to proceed on the basis of a casuistic approach. As signaled by Kristic, Van Tilburg and Verbruggen, this leads to legal uncertainty as regards the legal relevance of codes of conduct and other forms of private regulation in Dutch private law.[1255] Therefore, it is time for the Supreme Court to step up a gear and to unequivocally express its opinion on the private law relevance of industry codes of conduct in general terms. How the Court should exactly go about in this regard will be discussed in Chapter 7.

6.4.3.4 Concluding remarks

The discussion in this section shows that, notwithstanding the orientation of Article 79 RO on 'public' rules, the Supreme Court has been willing to take industry codes of conduct on board and to assign them legal relevance. However, the Court does not seem to have unequivocally defined its position on the legal significance of industry codes as of yet. The contrasting of the Supreme Court judgments unveiled that the Court occasionally kept private rules at a distance. At the same time, however, in its for now latest judgment in the *Achmea/Rijnberg* case, the Court seems to have adopted a more open attitude. In this judgment, the Court not only attached more relevance to private regulation than in most of its previous rulings, but also appeared to tie in with the approach of the lower courts. However, it still remains to be seen whether the Court will continue to travel this path, as *Achmea/Rijnberg* was featured by a continuing background presence of Article 79 RO and did not contain general statements or

[1252] This may have to do with the issues that the appellant in cassation brings to the fore in the grounds for cassation. When these grounds contain explicit complaints as to the interpretation and application of private regulation by the appellate courts, then the Supreme Court brings into play Article 79 RO.
[1253] E.J. Dommering, case note to HR 29 June 2007, ECLI:NL:HR:2007:BA3529 (*HBU/Groenendijk*), *NJ* 2007/639, under 8.
[1254] Cf. also Giesen 2007, pp. 45-51; Korthals-Altes 2005, no. 25; Teuben 2004, pp. 201-202, 229-230.
[1255] See also Kristic, Van Tilburg & Verbruggen 2009, p. 203.

criteria on the legal relevance of private regulation (cf. the casuistic nature of the Court's approach).[1256] Hence, it cannot be ruled out that in a following judgment, the Court retraces its steps back to the more reticent approach that it adopted in *Kouwenberg/Rabo* and *Pretium/Tros*.

6.5 Conclusions

This chapter has sought to unveil how the Dutch judiciary deals with industry codes of conduct in civil law cases. As already follows from my choice of words in the foregoing, I have not committed myself to any firm conclusions at this point, since most courts are not particularly explicit about the reasons underlying their decision on the legal relevance of industry codes of conduct. Nonetheless, within the limitations that case law analysis entails, it has been possible to deduce some general lines from the judgments discussed. In this closing section, I will seek to tie these lines together.

6.5.1 The Dutch judicial approach

In 1989, Van Driel advocated that courts should make use of private regulations more often when delivering their judgments.[1257] Almost three decades later, it can be concluded that the Dutch judiciary has shown itself responsive to this call, at least in respect of industry codes of conduct. In 2008, Giesen already indicated that private regulation was attracting more attention in civil case law, at least optically.[1258] Either as a cause or as a consequence of the predominantly responsive attitude of the Dutch judiciary signaled above, judicial references to industry codes in the case law of the lower courts have continued to increase, going by the number of lower court judgments discussed in this chapter. In the case law of the Supreme Court, by contrast, industry codes are making less numerical headway.

Generally, lower courts as well as the Supreme Court have shown willing to take industry codes on board and to assign them legal relevance The private, non-legal nature of the codes has not withheld courts from doing so. Accordingly, industry codes have assumed legal relevance as a viewpoint, as an argument or as a standard for assessment in establishing civil law liability or, more generally, in deciding private law disputes. Particularly noticeable in this respect is the approach that appears to be taking shape in the case law of the lower courts, which has thus far not been observed in Dutch private law literature. When the binding force or applicability of a code of conduct is beyond dispute, district courts and courts of appeal readily take account of the code, without reservation. This approach contrasts sharply with the case-by-case approach that the Supreme Court takes. Thus, contrary to what Giesen observed in 2008, the lower courts rather than the Supreme Court appear to have taken the lead in

[1256] Menting 2015, p. 111.
[1257] Van Driel 1989, pp. 167-168.
[1258] Giesen 2008, p. 785.

assigning legal relevance to codes of conduct through their 'consensus = legal application' approach. Their reported hesitant attitude has vanished, at least for the most part.[1259]

At the same time, however, it should be noted that as of yet matters have not fully crystalized. The case law analysis included several judgments in which the litigants' reliance on an industry code was of little or no avail. In these cases, courts have distanced themselves from the private rules, either by disregarding the rules or by conferring upon them only limited legal relevance. At this point, the slightly ambiguous nature of the Dutch judicial approach comes to the surface. On the one hand, the private origins of industry codes have not prevented courts from taking account of the codes, sometimes even founding their judgments directly on these codes. On the other hand, it may have been precisely this non-legal nature that stood in the way of codes of conduct assuming legal significance in other judgments. Yet, without the courts clearly motivating their decisions at this point, it remains difficult to put a finger on the source of this reticence that courts occasionally display. More specifically, it remains unclear how the legal relevance of an industry code is to be determined in cases where the approach of the lower courts cannot be applied, i.e., cases in which there is **no** consensus between the parties to the proceedings on a code's binding force or applicability. The picture that emerges from the case law of the lower courts at this point varies. Whereas in some cases, codes were assigned legal relevance, in spite of the lack of consensus, they were denied such relevance in others, whereby courts advanced different arguments.[1260] The Supreme Court rulings in *Van der Tuuk Adriani/Batelaan* and *Trombose* might throw some light on the matter. Here, the Court dismissed the argument that the private rules at issue had internal legal effect only (i.e., in the relationship between the private regulator and the regulated actors) and assigned relevance to the rules in the external relationship between the parties to the proceedings. In both cases, the Supreme Court seems to found its decision on the fact that there was consensus about the rules in the internal regulator-regulated relationship.[1261] The legal relevance of the private rules in these judgments can thus be said to be implicit in the internal consensus about the rules.

However, these two judgments shed no definite light on the matter, as the Court is, in the end, not overly explicit about the reasons underlying its decision. To clear the issue of the legal relevance of industry codes in cases where consensus about the binding force or applicability of a code is lacking from the side of the judiciary, more case law is needed.[1262] Considering the findings of this chapter, the ball is also expressly in the court of the Supreme Court at this point, which can be said to stand at a crossroads here with its recent ruling in the *Achmea/Rijnberg* case.[1263] The Supreme Court can no longer hide itself away from the matter

[1259] See Giesen 2008.
[1260] As discussed in section 6.3.3.3 of this chapter.
[1261] HR 15 March 1996, *NJ* 1997/3 (*Van der Tuuk Adriani/Batelaan*), para 3.7: "as appears from the formation of the 'BACO Agreement', not only the professional organization of the physicians, but also that of the pharmacists have deemed reasonable the payment to be made by the pharmacists in cases such as the present one" and HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*), para 3.3.3 where the Supreme Court indicated that it was not in dispute that the protocol rested on consensus between the hospital and its physicians.
[1262] In Chapter 7, I will explore which possible legislative, judicial and private avenues exist to provide clarity in these situations.
[1263] Menting 2015, p. 111.

and will have to unequivocally express its opinion on the legal relevance of industry codes in general and on the aforementioned 'lack of consensus cases' in particular. Parties to the proceedings and their lawyers also have a role to play here. After all, it is in first instance up to them to bring the applicable private rules to the table in civil law disputes and to provide the information necessary to facilitate the judicial assessment of these rules.[1264] This interplay between parties to the proceedings and the judiciary can contribute to a further crystallization of the legal role of industry codes of conduct.

6.5.2 Binding force: Some theoretical reflections

In the course of the case law analysis, I implicitly parked the question on the source of the binding force to which several lower courts refer in their judgments. As noted in section 6.3.3.3, some judgments do make clear where this binding force comes from, while other judgments remain silent in this regard. The latter set of judgments provides food for some brief theoretical reflections on where this binding force stems from and on the implications of these judicial references.[1265]

Giesen has distinguished three ways in which industry codes of conduct and other forms of private regulation can gain binding force in Dutch private law.[1266] First of all, the **law** (or the legislator for that matter) can form the basis for this binding force. Examples included cases where a private regulatory scheme is formally recognized by the legislator, where private standards are incorporated into public regulation or where the private rules are adopted by a private actor that is statutorily empowered to regulate certain issues, as is the case with several professional bodies.[1267] Secondly, one can become bound to private regulation by choice or, as Giesen has termed it, on the basis of **consensus** (cf. the principle of private autonomy). Here, the fact that one has agreed to abide by the private rules renders the rules binding.[1268] Generally, this consensus is reflected in organizational or contractual commitments. The first category of commitments comprises instances in which private actors acquire membership of a trade association or professional body that has adopted the private rules (as is the case with many industry codes of conduct). Subscription to the rules then constitutes a condition for membership or 'automatically' follows on from the affiliation with the industry association through the association's bylaws. The second category of commitments refers to cases in which private regulation is included in a contract or where

[1264] Menting 2015, p. 111; Giesen 2007, p. 791-792. Cf. Vranken 2005, p. 85.
[1265] With the case law analysis, in line with the scope of this thesis, being limited to industry codes of conduct, this subsection will not address the specificities of corporate codes of conduct in this respect. On the binding force and judicial enforcement of these codes in a private law context, see, e.g., Beckers 2015 (for Germany and the UK); Vytopil 2015; Peterkova-Mitkidis 2015; Van der Heijden 2012.
[1266] Giesen 2007, pp. 60-75.
[1267] Giesen 2007, p. 60; Verbruggen 2013, p. 2; Verbruggen 2014a, pp. 273-275; Benvenisti & Downs 2012, pp. 132; Cafaggi 2011a, p. 22. Cf. Schwarcz 2002, pp. 324-326.
[1268] Giesen 2007, pp. 62-66. Cf. Cafaggi 2011a, p. 22, noting that once the subscription to a private regulatory scheme is a fact, compliance with the rules is no longer voluntary and can be enforced.

private actors become signatories to a private regulatory scheme that takes the shape of a contractual arrangement.[1269]

> It should be noted that the consensus to which Giesen refers is different from the consensus to which lower courts refer in assigning legal relevance to industry codes. Giesen refers to the internal consensus about the code as between the private regulator and the actors regulated by the code, as reflected in the associational or contractual commitment of the latter actors. The consensus to which the lower courts refer is that between parties to the proceedings: the private actor that applies the code (the regulated actor) and the other party.

Thirdly, private regulation can gain binding force through **open norms**. When courts use private regulation to substantiate open norms, they confer binding force upon these rules, according to Giesen.[1270]

The fact that the 'binding force references' are made *before* courts take an industry code into consideration implies that the source of the binding force lies outside the courtroom, i.e., either in the law or in consensus. Frequently, private actors subscribe to an industry code of conduct on the basis of consensus, i.e., an organizational commitment or a contractual commitment. These commitments are, broadly speaking, assumed in relation to the private regulator. Hence, the obligation to comply with the rules in principle arises in the private regulator-regulated actor relationship (and possibly also in relation to fellow-regulated actors). The source of the binding force of an industry code that is founded on consensus thus lies in this relationship. Viewed from this perspective, judicial enforcement of the code of conduct is limited to these internal relationships.

However, the civil law cases discussed in this chapter for the most part revolved around the legal relevance of industry codes in the relation between the private actor that applies the code (the regulated actor) and the third-party beneficiaries of these rules, i.e., actors that are the beneficiaries of the rules, yet stand outside the internal private regulator-regulated relationship (such as consumers).[1271] Arguably, the fact that many private regulatory schemes are accompanied by enforcement mechanisms that can also be invoked by the third-party beneficiaries reflects that there is also a commitment towards these actors. Yet, from a legal perspective, the binding force lies in the 'internal' relation between the regulator and the regulated, except in those cases where the private rules are formally declared applicable to the 'external' relationship between the regulated actor and the third-party beneficiaries, in one way or another (e.g., as part of the contract, as a clause in the general terms and conditions[1272] or simply by means of a declaration that the code is applicable). However, if such a declaration is lacking, the regulated actors are, strictly speaking, not under a formal obligation to comply with the rules in their external relationship with the third-party beneficiaries. After

[1269] Cafaggi 2012b, p. 3; Giesen 2007, p. 64-65; Menting 2017 (forthcoming).
[1270] Giesen in this respect explicitly refers to Article 3:12 DCC as a 'gateway' for private regulation to the realm of private law. More specifically, private regulation can be drawn in as an elaboration of 'the current juridical views in the Netherlands' that this provision refers to. See Giesen 2007, pp. 68-69.
[1271] Cafaggi 2011a, p. 32 describes these third-party beneficiaries as "those who are supposed to benefit from compliance with the regulation and are harmed by their violation".
[1272] See, e.g., Peterková Mitkidis 2015, pp. 153-163; Beckers 2015, pp. 47-58.

all, in these cases the regulated actors have only formally undertaken a commitment to follow the rules vis-à-vis the private regulator, not in relation to these beneficiaries.

Yet, the judgments in which the lower courts have pointed at the binding force of an industry code without referring to the source of this binding force remain silent in this regard. In these cases, courts readily assigned legal relevance to the codes, without pausing over any of the observations made above. On the one hand, this could imply that the binding force referred to did stem from an incorporation of the code into a contract or into general terms and conditions, or from the fact that the code was formally declared applicable to the external relationship. On the other hand, however, with references to the source lacking, it cannot be ruled out that the binding force referred to originated from the organizational or contractual commitment undertaken by the regulated actor vis-à-vis the private regulator. Should this hold true, it would imply that as soon as a private industry actor has 'internally' consented to abide by an industry code of conduct, through either an organizational or contractual commitment, the industry actor also takes on an obligation to comply with the code vis-à-vis third-party beneficiaries of the code once it engages in a (legal) relationship with these beneficiaries. As follows from the fact that lower courts have proceeded to assign legal relevance to codes of conduct that have binding force, this would be a legally enforceable obligation. The legal relevance that lower courts assign to codes of conduct in these cases would thus in effect build on 'internal consensus',[1273] which would stretch the scope of the binding force originally assumed beyond its confines.

6.5.3 Closing remarks

The general observation that Dutch civil courts are open to attributing legal significance to industry codes of conduct is not groundbreaking: several Dutch private law scholars have reached the same conclusion.[1274] However, the case law analysis shows that the scale on which this occurs is far greater than hitherto assumed. As a result of the predominantly 'open' approach of the Dutch judiciary towards industry codes of conduct, enabled by the open nature of the Dutch private law system,[1275] industry codes have entered the realm of private law. As Giesen indicates, this judicial reliance on industry codes has three effects running in parallel. First of all, it leads these codes to pass the 'judicial gate' of the framework legislation-adjudication and to gain legal binding force accordingly. Secondly, in passing this gate, the codes are enforced by the courts and in some instances subjected to judicial interpretation. Thirdly, judicial reliance on industry codes can lead to the local development of law, i.e., in respect of the private actors that have subscribed to the code and the third parties who are in a relationship to these actors where said relationship is covered by the code. According to Giesen, this 'law-creating effect' particularly arises when the courts use the

[1273] Cf. the discussion in section 6.5.1 on the implications of the Supreme Court judgments in *Van der Tuuk Adriani/Batelaan* and *Trombose*. Cf. at this point also Akkermans 2011, p. 513: "it would in any case probably be better to not conceive of this legal binding force as indirect, i.e., as stemming from the legislator or the judge, but as a quality that can be inherent to societal regulation in various degrees" (my own translation).
[1274] Notably, Giesen 2008 and 2007; Vranken 2006; Van Driel 1989; Kristic, Verbruggen & Van Tilburg 2009.
[1275] Giesen 2007, p. 72; Snijders 2007, p. 14.

code rules to give substance to an open norm under private law. The rules accordingly become an expression of what is right in law.[1276] Viewed from such a perspective and against the background of this chapter, this suggests, to speak with Vranken, that private regulation is, "on its way to acquire a place for itself in civil law".[1277]

[1276] Giesen 2007, pp. 97-102, 130; Giesen 2008, p. 785.
[1277] Vranken 2006, p. 74.

7 Conclusions

"Private law is not lacking any challenges."[1278]

7.1 Introduction

By raising the question on the legal relevance of industry codes of conduct in a multi-layered Dutch private law, this doctoral thesis broaches a subject that has thus far aroused relatively limited interest among Dutch civil lawyers. Generally, Dutch private law literature devotes only little attention to the notion of private regulation of B2B and B2C relationships. At the European level, by contrast, the regulatory nature of European private law and private regulation have managed to catch the attention of scholars of private law.[1279] A possible explanation for the relative lack of interest of Dutch civil lawyers in the topic can be found in the idea of codification (*codificatiegedachte*), enshrined in Article 107 of the Dutch Constitution.[1280] Following the belief that general private law rules should in principle be laid down in the Dutch Civil Code, Dutch civil lawyers automatically focus on the central, national legislator when confronted with issues of regulation.[1281] The prevailing doctrine when it comes to private regulation is still that of the 'exclusivity' of the legislator: it is the legislator that, in concerted action with the civil courts, develops private law,[1282] wrongly, as the findings of this research show. Codes of conduct are ubiquitous in European and Dutch private law, where they play an important (regulatory) role, both at the level of industry associations and at the level of individual companies.[1283] This doctoral thesis shows, on the basis of perspectives that are new to the Dutch private law debate (an empirical perspective, the functions, the perspective of the legislator and the European perspective), that these codes have legal relevance in Dutch private law through legislation and case law.

[1278] Smits 2015a, p. 546 (summary).
[1279] On the regulatory nature of European private law, see, e.g., Micklitz 2009; Cafaggi & Muir Watt 2009 and the European Regulatory Private Law' ('ERC-ERPL') project conducted at the European University Institute (<https://blogs.eui.eu/erc-erpl>, accessed 1 July 2016). The previous chapters of this doctoral thesis already referred to European private law literature on private regulation.
[1280] Article 107(1) reads as follows: "Civil law, criminal law and civil and criminal procedure shall be regulated by Act of Parliament in general legal codes without prejudice to the power to regulate certain matters in separate Acts of Parliament". Translation taken from the English translation of the Dutch Constitution (2008) provided by the Ministry of Interior and Kingdom Relations. This translation is available at <www.government.nl/topics/constitution/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> (accessed 1 July 2016).
[1281] Menting & Vranken 2014, pp. 7-8.
[1282] Vranken 2005, pp. 79, 82; Menting & Vranken 2014, p. 8.
[1283] For a private law perspective on corporate codes of conduct concerning CSR issues, see, e.g., Beckers 2015; Peterková Mitikidis 2015; Vytopil 2015; Van der Heijden 2012.

In this concluding chapter, I first of all present the main findings of the research, whereupon I answer the central research question (section 7.2). Having sketched the broader implications of these findings for Dutch private law (section 7.3), I step outside the confines of central research question and address the frequently raised question of the need for some form of regulation of the use of industry codes in Dutch private law on the basis of a brief exploration (section 7.4). I close the chapter with an outlook (section 7.5).

7.2 Findings and conclusion

7.2.1 Findings: New developments

In this section, I will discuss the main research findings, focusing on those findings that are new to the Dutch private law debate or have thus far remained underexposed. This means I will be discussing the following: the functions of industry codes of conduct (section 7.2.1.1), the European developments (section 7.2.1.2) and the developments in Dutch civil case law (section 7.2.1.3).

7.2.1.1 Empirical insights: Industry codes of conduct and their functions

The 80 European and Dutch industry codes of conduct studied in the course of the empirical inquiry into the functions of these codes highlight that many industry associations - small and large, European and national - use codes of conduct to regulate certain aspects of private law B2B and B2C relationships.[1284] These industry codes can have various functions, at both the European level and the Dutch level. Codes can, for instance, play a role in offering protection to consumers (protective function), in fleshing out public rules with sector-specific norms (complementary function), in setting and raising the quality standards within an industry (quality control function) and in positioning an industry vis-à-vis its stakeholders (e.g., as 'socially responsible' - signaling function). More specifically, the overview of the functions compiled on the basis of the empirical study shows that industry codes can have functions that are comparable to those of public regulation, and in some instances even take over these functions. Examples include industry codes that regulate a matter of public interest, such as advertising, consumer protection or privacy, and codes that are employed by the government as an alternative or complement to legislation and regulations (policy instrument function), as has for instance occurred in the field of consumer law and as part of the audiovisual media policy of the EU. These empirical insights contrast with the picture drawn in section 7.1, in which private law regulation is regarded as being exclusively within the domain of the legislator and the judiciary.

The research design set out in Chapter 1 of this doctoral thesis envisaged the functions to play a role as important reference points and building blocks in determining the legal relevance of industry codes in Dutch private law. However, it followed on from the analysis

[1284] See Annex 1.

of the case law of Dutch lower courts that the conferment of legal relevance on industry codes already takes place in a more or less settled way (see section 7.2.1.3). Consequently, the initial idea of using the functions as a yardstick, prompted by the, in retrospect, outdated picture outlined by Dutch private law literature was consigned to the dustbin. This means that the functions will not be considered as such when answering the central research question. Nonetheless, they can play a role in addressing the question about the need for regulation of industry codes, as will be discussed in section 7.4. However, this role is now different from the role that the functions were envisaged to play following the initial research design.

7.2.1.2 European Union

The European legislator and the Court of Justice of the European Union have expressly assigned legal relevance to industry codes in European private law. What stands out is that the way in which these actors proceeded in this respect partially differs from the approach taken by their Dutch 'counterparts'.

European legislator: References in European directives

The use of alternative regulatory instruments, such as codes of conduct, has grown into one of the cornerstones of EU legislative policy. Although doubts can be expressed as to the extent to which this policy is actually implemented,[1285] this has resulted in the use of industry codes of conduct as an alternative or complement to EU legislation in several European private law policy domains (e.g., a code of conduct for unfair B2B commercial practices and a code of conduct concerning age classification for online games). However, the EU has not limited itself to the deployment of codes as a policy instrument. Industry codes of conduct have also been given a place in several European private law directives that in this respect call upon the European Commission and the Member States to foster the development of industry codes or entail direct references to codes of conduct.[1286] The latter statutory references have as a result that codes of conduct become embedded in Dutch private law (through the implementation of the directives in the Dutch Civil Code) and can, in some instances, gain direct legal consequences.

> More specifically, as discussed in Chapter 4, the statutory references have resulted in: codes of conduct entering the realm of private law through pre-contractual information duties;[1287] codes that possibly assume a certain legal status;[1288] or even in codes gaining direct legal binding force on the basis of private law (under the Unfair Commercial Practices Directive[1289]). As a

[1285] See Chapter 4, section 4.3.1.6.
[1286] See the different European private law directives discussed in Chapter 4, section 4.4.1.1.
[1287] These duties can be found in the Consumer Rights Directive (2011/83/EU), the Services Directive (2006/123/EC), the E-Commerce Directive (2000/31/EC) and the Timeshare Directive (94/47/EC). See Chapter 4, section 4.4.1.1.
[1288] This is the case under the Data Protection Directive/General Data Protection Regulation (Directive 95/46/EC and Regulation (EU) 2016/679, respectively), the Food Safety Directive (2001/95/EC) and the Directive on Company Reporting (2013/34/EU). See Chapter 4, section 4.4.1.1.
[1289] Directive 2005/29/EC. See Chapter 4, section 4.4.1.1.

consequence, national courts in certain instances will *have to* apply the code of conduct at issue.[1290]

References in Dutch private law?

Dutch private law, by contrast, entails only few such references.[1291] The vast majority of direct statutory references to industry codes in Dutch private law stem from European directives. Hence, it can be concluded that the European legislator is far more active than the Dutch legislator when it comes to attaching legal consequences to codes of conduct.[1292]

Whether the EU is more active right across the board is however difficult to ascertain on the basis of this research. On both the European level and the national level, industry codes are also used as a policy instrument without references being made in legislation and regulations. One can for instance think of cases in which the government exerts pressure on an industry to self-regulate or indicates in a policy document that it leaves regulation, in partial at least, to the industry itself.[1293] For the want of sufficient empirical data at this point, it cannot be ascertained on which scale this occurs in the European Union and in the Netherlands. Further research would provide us with a more definite answer about the matter.

The functional approach of the CJEU in free movement and competition law cases

The case law of the Court of Justice of the European Union concerning private regulation diverges from Dutch civil case law at this point, in two respects. The first difference pertains to the context in which the legal proceedings are conducted. At the European level there are, broadly speaking, two possibilities: industry codes can be central to cases concerning free movement and competition or can play a role in the interpretation and application of European legislation, particularly when this legislation entails direct references to codes of conduct. Thus far, European judicial assessment of industry codes and other forms of private regulation has mainly taken place in free movement cases and competition law cases. By contrast, in the vast majority of Dutch civil law cases that I studied, industry codes were addressed under contract law or liability law.[1294] Given the direct references to codes of conduct in European private law directives discussed above, it is however conceivable that the CJEU, urged on by prejudicial questions, will have to rule on the legal relevance of industry codes in the context of these directives at some time.

The second difference pertains to the approach of the CJEU. When viewed from the strict public-private divide in which the Treaty is traditionally perceived to be rooted, industry

[1290] Chapter 6, section 6.3.1.9 includes examples of cases in which Dutch courts were asked to rule upon a code of conduct in the context of unfair commercial practices (Article 6:193a et seq. DCC).
[1291] In fact, Chapter 4, section 4.4.2 only mentioned the Media Act 2008 as entailing references relevant within the context of this doctoral thesis.
[1292] This conclusion was already drawn in Menting & Vranken 2014, pp. 11-12, 21, building on almost similar data.
[1293] Examples of such references were discussed in Chapter 4, sections 4.4.1.2 (EU) and 4.4.2 (NL).
[1294] It should be noted that industry codes of conduct also play a role in Dutch competition law cases (and other 'public law' cases). In the Netherlands, however, unlike in Europe, industry codes have also been subjected to judicial assessment in private law cases. With a view to the private law focus of this doctoral thesis, it was therefore decided not to take account of the Dutch 'public law' cases.

codes of conduct (of either a self-regulatory or co-regulatory nature) would readily fall outside the scope of both EU free movement law (addressed to Member States) and EU competition law (governing the economic conduct of private actors). However, private rules can just as well obstruct free movement or restrict competition. Against this backdrop, the CJEU found its way around the conceptual public-private obstacles by adopting a predominantly functional approach.[1295] More specifically, by taking the nature and the effects of the regulatory activities as a point of reference, rather than the (private or semi-private) origins of the rules, the CJEU has brought (collective) private regulation within the scope of EU free movement law and competition law.

> The functional approach of the CJEU results in a certain degree of regulation of industry codes and other forms of (collective) private regulation. Private rules will have to keep in line with the rules on free movement and competition, subject to sanctions under national private law. Furthermore, the Court has been held to regulate private regulation by exempting private regulatory schemes that meet certain good governance requirements (pertaining to e.g., the composition of the regulatory body) from free movement law and competition law scrutiny in certain particular instances.[1296]

Matters are partially different in Dutch civil case law, where the private origins of industry codes in some cases did appear to have played a role (see below).

7.2.1.3 Dutch civil case law

Lower courts

The picture that emerges from the analysis of Dutch civil case law is that the lower courts (i.e., district courts and courts of appeal) generally do not have much difficulty in assigning legal relevance to industry codes of conduct in civil law disputes. Nevertheless, there are also cases in which judges have kept their distance and assigned no legal relevance or only limited legal relevance to the code of conduct relied upon by parties to the proceedings. In few cases, the court's decision at this point appeared to be motivated by the private nature of the code at issue.[1297]

As regards the lower court judgments in which industry codes were assigned legal relevance, the following conclusions can be drawn. In part of the case law studied, the decision to assign legal relevance to an industry code was self-evident. This is because the code concerned was already legally binding at the time it was brought up in the legal proceedings (e.g., because it had been declared applicable to the relationship between the parties to the proceedings, because it was included in the contract between these parties, or because it was formally acknowledged by the government). However, lower courts also

[1295] As submitted in Chapter 5, the approach of the Court still embodies some formal elements that do link up with the (public or private) nature of the regulator, both in free movement law (goods) and in competition law (the *effect utile* doctrine). See Chapter 5, particularly sections 5.4.5 (free movement) and 5.5.3 (competition).
[1296] As already argued by Mataija (2016) and Schepel (2002), and explained in Chapter 5, section 5.6.
[1297] See Chapter 6, section 6.3.2.

pursued their own course and assigned legal relevance to industry codes of conduct, when, briefly stated, there was agreement between the parties to the proceedings on the fact that one of these parties was bound to the code or on the applicability of a code. Thus, the approach of the lower courts is as clear as it is simple: when an industry code already has legal binding force, or when there is consensus between the parties to the proceedings on the binding force or the applicability of an industry code, then the code also bears legal relevance (e.g., as a substantiation of an open-ended legal standard, in the interpretation of a contractual clause, or as a self-standing argument in the determination of the legality of certain conduct. This approach of the Dutch lower courts has not been identified in any previous private law research on the topic.

From a procedural point of view, the approach of the lower courts will not come as a particular surprise. Pursuant to Article 149(1) of the Dutch Code of Civil Procedure, lower courts have to accept as established "facts or rights stated by one party, that have not been or not sufficiently been contested".[1298] However, when contrasted with the arguments advanced in Dutch private law literature as regards the ways in which the legal relevance of private regulation is to be determined, the course steered by the lower courts can be called striking, with good reason. When the legal significance and quality of private regulation is brought up for discussion in private law literature, legal scholars usually put forward substantive (e.g., the comprehensibility and sustainability of the rules) as well as formal criteria (such as representativeness, level of support, public consultation, monitoring and accountability).[1299] Dutch lower courts, by contrast, do not apply such criteria.

Supreme Court

The Supreme Court has also assigned legal relevance to industry codes of conduct. The fact that these codes, due to their private origins, cannot be qualified as 'law' within the meaning of Article 79 RO did not prove to be an obstacle in this regard.[1300] Moreover, the ensuing limitation of the intensity of the review in cassation has not withheld the Court from giving more general considerations to the role and binding force of the private rules at issue in *Trombose* and *Achmea/Rijnberg*.[1301] Nonetheless, in some Supreme Court judgments the private nature of codes of conduct does seem to have played a role. In *Kouwenberg/Rabo* and *Pretium/Tros*, more specifically, the Court's reticent attitude towards the private rules concerned, reflected in its decision to assign only limited legal relevance to these rules,

[1298] Jongbloed 2006, p. 245. See also Asser Procesrecht/Asser *3* 2013, sections 4.2.1 and 4.2.2. On the influence of what I have termed 'procedural factors' on the lower courts' approach, see Chapter 6, section 6.3.3.2.

[1299] Kristic, Van Tilburg & Verbruggen 2009; Giesen 2007, pp. 138-142; Van Driel 1989, pp. 119-123; Akkermans 2011, pp. 513-514. Cf. also Vranken 2005, pp. 97, 100 and, in the context of administrative law, Scheltema 2016 and Polak 1986, pp. 220-222. For the European and transnational private law context, see, e.g., Cafaggi 2011b, pp. 124-125; Cafaggi 2014, p. 55; McHarg 2006, pp. 89, 93-94.

[1300] See Chapter 6, section 6.4.2.3.3 and the literature referred to in that section.

[1301] HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*) and HR 18 April 2014, ECLI:NL:HR:2014:942, *NJ* 2015/20 (*Achmea/Rijnberg*) (discussed in Chapter 6, sections 6.4.2.2.3 and 6.4.2.2.7, respectively).

appears to have been motivated by the private origins of the rules.[1302] However, it cannot be ruled out that the Supreme Court founded its decisions on other considerations and arguments.[1303]

With these observations, we arrive at the difference between the lower courts and the Supreme Court. Whereas in the case law of the lower courts, a more or less fixed approach to determining the legal relevance of industry codes is taking shape, the Supreme Court still appears to determine this relevance on a case-by-case basis.[1304] Considering this conclusion entirely on its own merits, it can be said that the lower courts are ahead of the Supreme Court at this point. In defense of the Supreme Court, it should be noted that the framework under procedural law within which the Court has to operate is different from that within which the lower courts have to take their decisions. The narrow conception of 'law' laid down in Article 79 RO limits the room of maneuver of the Supreme Court, in that the Court's review of industry codes is formally limited to an assessment of the comprehensibility of the lower court's reasoning in respect of a code of conduct.[1305] Furthermore, the cases presented to the Supreme Court are generally the ones in which disagreement exists as to the private rules at issue. However, these 'procedural limitations' do not derogate from the fact that the Supreme Court can still rule in general terms on the legal relevance of industry codes of conduct and other forms of private regulation. After all, given its general capacity of developer of the law, the Supreme Court can use questions of the law concerning industry codes as a stepping-stone to rule explicitly and in general terms on 'the legal relevance issue'. Thus far, however, the Court has refrained from giving a general opinion on the issue, remaining within the formal confines of Article 79 RO.[1306] This has resulted in a situation in which the Court does assign legal relevance to codes of conduct, yet seems to do so in a fairly casuistic fashion.[1307] From a legal certainty perspective, this is an undesirable situation, the more so since by now industry codes of conduct are knocking firmly at the door of Dutch private law. Therefore, it is time for the Supreme Court to show its colors and to take on its role as a developer of the law to unequivocally and expressly rule on the legal relevance of industry codes in private law (see section 7.4.2.2, under 'Supreme Court').

[1302] HR 11 July 2003, ECLI:NL:HR:2003:AF7419, *NJ* 2005/103 (*Kouwenberg/Rabo*) and HR 8 April 2011, ECLI:NL:HR:2011:BP6165, *NJ* 2011/449 (*Pretium/Tros*) (discussed in Chapter 6, sections 6.4.2.2.4 and 6.4.2.2.6, respectively).

[1303] Vranken for instance notes that the Supreme Court's reticent attitude in *Kouwenberg/Rabo* could also have been prompted by the interpretation of the private rules concerned (Vranken 2005, p. 91). The Court's decision in *Pretium/Tros* could also have been based on the settled line of Supreme Court case law on the legal significance of disciplinary rules (cf. Conclusion Advocate General Huydecoper in *Pretium/Tros*, ECLI:NL:PHR:2011:BP6165, under 23) or on the way in which the profession itself has dealt with the Guidebook for Journalistic Behavior (E.J. Dommering, case note to HR 8 April 2011, ECLI:NL:HR:2011:BP6165 (*Pretium/Tros*), *NJ* 2011/449, under 1-5). These 'alternative' considerations were also discussed in Chapter 6, sections 6.4.2.2.4 and 6.4.2.2.6.

[1304] Albeit that the Supreme Court in *Achmea/Rijnberg* seems to tie in with the approach of the lower courts. See Chapter 6, section 6.4.2.2.7. The fact that the Court adopts a case-by-case approach at this point was already signaled by Kristic, Van Tilburg & Verbruggen 2009, p. 205 and Giesen 2008, pp. 790-791.

[1305] More extensively: Chapter 6, section 6.4.2.3.3.

[1306] See also Chapter 6, section 6.4.2.3.3.

[1307] See also Kristic, Van Tilburg & Verbruggen 2009, p. 201.

Taking stock of Dutch civil case law: (lack of) clarity about legal relevance

Taking stock, it can be concluded that the lower courts as well as the Supreme Court have assigned legal relevance to industry codes of conduct. The lower courts have adopted a more or less uniform approach in this respect, as opposed to the Supreme Court, which takes a far more casuistic approach. The approach of the lower courts, however, does not cover cases in which there is **no** consensus between the parties to the proceedings on the binding force or applicability of an industry code. This raises the question as to how in these cases the legal relevance of a code of conduct should be determined. Decisions given in the lower court judgments in which this scenario was at issue differ. In some of these judgments, codes were denied legal relevance with reference to the fact that the binding force or applicability of the rules could not be established in the case at hand. However, this did not withhold the District Court of The Hague from applying the rules on pharmaceutical advertising (from the Foundation for the Code for Pharmaceutical Advertising) on an industry actor that had not subscribed to them.[1308] The Fire Insurance (Right of Recourse) Sectoral Regulations, by contrast, were not given such radiating effect.[1309] And while the contestation of the binding force and applicability of the Franchise Code constituted a reason for the court to immediately put forward the private nature of the Code and, subsequently, to disregard the Code altogether,[1310] the argument that the Fire Insurance (Right of Recourse) Sectoral Regulations only had internal binding force was brushed aside in another case, where in giving its judgment the court took account of the Regulations[1311]. Two Supreme Court judgments suggest that a difference of opinion on this point does not always have to affect the legal relevance of a code of conduct. In *Van der Tuuk Adriani/Batelaan*, more specifically, the Supreme Court passed over the argument that the private rules at issue, drawn up by two professional organizations, were just guidelines and hence did not have direct effect in the legal relationship between two members of these professional organizations.[1312] In a similar vein, in the *Trombose* case, the Court dismissed the claim that the hospital protocol only had internal binding force and therefore could not form a basis for liability of the physician to its patient.[1313] In both judgments, the Supreme Court seems to attach importance to the fact that there was consensus between the authors of the private rules on the rules *themselves*.[1314]

[1308] Rb. 's-Gravenhage 24 July 2004, ECLI:NL:RBSGR:2004:AQ5353 (discussed in Chapter 6, section 6.3.1.11).
[1309] Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316 (discussed in Chapter 6, section 6.3.1.5).
[1310] Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307, para 5.15 (discussed in Chapter 6, section 6.3.2.2.1).
[1311] Hof 's-Gravenhage 28 October 2008, ECLI:NL:GHSGR:2008:BG2213, para 6 (discussed in Chapter 6, section 6.3.1.5).
[1312] HR 15 March 1996, *NJ* 1997/3 (*Van der Tuuk Adriani/Batelaan*) (discussed in section 6.4.2.2.2).
[1313] HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*) (discussed in section 6.4.2.2.3).
[1314] See *Van der Tuuk Adriani/Batelaan*, para 3.7: "as appears from the formation of the 'BACO-agreement', not only the professional organization of the physicians, but also that of the pharmacists have deemed reasonable the payment to be made by the pharmacists in cases such as the present one" (my own translation) and *Trombose*, para 3.3.3, where the Supreme Court indicated that it was not in dispute that the protocol rested on consensus between the hospital and its physicians. On these judgments, see also Giesen 2007, pp. 59, 78-79.

7.2.2 The legal relevance of industry codes of conduct in a multi-layered Dutch private law

Considering the foregoing, the answer to the central research question on the legal relevance of industry codes of conduct in a multi-layered Dutch private law is that industry codes have legal relevance in Dutch private law as a regulatory instrument, as a policy instrument *and* as a viewpoint, as an argument or as a standard for assessment in civil case law in establishing liability under civil law or, more generally, in deciding private law disputes. As such, industry codes of conduct constitute an important manifestation of the (increasingly) multi-layered nature of Dutch private law.

In itself, this is not a new conclusion. In the relatively small body of Dutch private law literature on the topic, industry codes and other forms of private regulation are usually taken to have legal relevance.[1315] Nonetheless, matters have still not fully crystalized: the eventual legal, law-developing (*rechtsvormende*) status of private regulation and the criteria to be applied in that respect, as well as the related question on the need to develop a framework for private regulation, remain recurrent themes within the Dutch debate. In other words, the question remains: how exactly should private regulation be dealt with? The developments described in this doctoral thesis, particularly those on the European level and the developments in the case law of the Dutch lower courts, in any case shed new light on this question. These developments not only show that industry codes bear greater legal relevance in Dutch private law than is assumed in the literature, but also make clear that such relevance is being shaped by European developments and lines in the case law of Dutch lower courts that have thus far remained underexposed or undiscussed in the private law debate being conducted here in the Netherlands.

7.3 Broader perspective: Three (future) developments

The conclusion that industry codes have legal relevance as a regulatory instrument, as a policy instrument and in civil case law seems perhaps straightforward. However, this vanishes when taking a closer look at the implications of the conclusion. From a broader perspective, my conclusion reveals three related, fundamental developments within private law.

1) Unavoidable multi-layeredness

The conclusion first of all underlines the unavoidability of the multi-layered nature of the European and Dutch private law legal orders.[1316] Industry codes are present at the international, the European and the national level and play a well-established regulatory, steering role in many different fields. Nowadays, the legislator and the judiciary at both the European and the national level no longer keep themselves aloof from private regulation. As a

[1315] See, most notably, Akkermans 2011; Kristic, Van Tilburg & Verbruggen 2009; Giesen 2007; Vranken 2005; Van Driel 1989. Cf. also Vytopil 2015 and the contributions in Weyers & Stamhuis 2003.
[1316] See Smits 2011 (EU) and Vranken 2005, pp. 94-99 (NL). From a more general perspective, see Smits 2015a; Smits 2015b and Van Gerven & Lierman 2010, particularly pp. 109-172.

consequence, private rules are percolating through European and Dutch private law, introducing a new form of regulation and lending private law a more hybrid nature.[1317] Rules that are legally relevant to private law relationships no longer solely stem from the legislator and the judiciary,[1318] but also originate from private actors themselves. Put more succinctly: the formation of private law (*privaatrechtelijke rechtsvorming*) in a multi-layered private law legal order to an increasing extent also takes place through international, European and national forms of private regulation.[1319] Private law, as Smits puts it, has grown into "a network of various legal orders that exist side by side and overlap one another".[1320]

2) Tenability of the framework of legislation-adjudication

The first development strikes at the roots of the exclusiveness of the "framework of legislation-adjudication", which still dominates thinking in Dutch private law.[1321] The research findings of this doctoral thesis highlight private law regulation as no longer the exclusive prerogative of the central legislator[1322] and accordingly judges can no longer confine themselves to taking account of public regulation only when delivering a judgment. Neither the fact that the law-developing effect (*rechtsvormende werking*) of industry codes of conduct is ultimately still implemented by the legislator and the judiciary, nor the fact that this effect in the first instance occurs only at the local level (*lokale rechtsvorming*),[1323] detract from the fact that *private* rules constitute the applicable legal norm.[1324] Hence, it cannot be maintained that the legislator and the judiciary are the only developers of the law when it comes to private law: by now, industry codes are firmly and persistently knocking at the door of the framework of legislation and adjudication.[1325] Accordingly, Dutch private law is faced with a problem that also exists in international law: what rules should be designated as a source of law and, next, what hierarchy exists among these sources?[1326] In view of the developments that are taking place in (legal) practice, it is all but unavoidable that the framework of legislation and adjudication will be redeveloped at a certain point in time and that industry codes of conduct (and other forms of private regulation) will be given their own

[1317] Vranken 2005, p. 87 refers to this development as the 'privatization of private law'.
[1318] One can however question whether regulation has ever been the sole prerogative of the State; the phenomenon of private regulation already existed in the Middle Ages, where guilds undertook their own regulatory activities. See, e.g., Cafaggi 2015, pp. 884-888, Janczuk-Gorywoda 2012, pp. 17-18; Van Gestel 2000, pp. 25-27.
[1319] Giesen (2007, p. 104) in this regard speaks of private actors as a 'third law-developing authority' (next to the legislator and the judiciary). Akkermans (2011) refers to private regulation as a 'source of legal norms'. In the transnational context, see Calliess & Zumbansen 2010. For an impression of the regulatory role of private regulation at the international level, see, e.g., Haufler 2001; Dilling, Herberg & Winter 2008; Mattli & Woods 2009; Vogel 2010; Büthe & Mattli 2011.
[1320] Smits 2015a, p. 538 (my own translation).
[1321] Vranken 2005, p. 80.
[1322] Smits 2015a, pp. 523, 537; Vranken 2005, pp. 100-101.
[1323] That is to say that the effect of industry codes in terms of developing law is limited to the group of actors that have subscribed to the code and to those 'third' parties (i.e., parties that are affected by the private rules, yet are outside the private regulator-regulated relationship) that stand in a (legal) relation to the regulated actors covered by the code. See Giesen 2007, p. 102.
[1324] Akkermans 2011, p. 513.
[1325] Cf. Vranken 2005, p. 82.
[1326] For a recent discussion of this problem in international law, see, e.g., d'Aspremont 2013 and Thirlway 2014.

place as a source of law within that framework.[1327] However, before this step can actually be taken, practice will have to crystalize further and more empirical research and research into legal theory will have to be conducted in order to release private law thinking from the traditional conceptual paradigms (see section 7.5).

3) A new role for substantive private law

The two preceding developments reflect the growing regulatory and law-developing importance of industry codes of conduct for substantive private law. By the same token, such growing importance increases the significance of substantive private law for industry codes. This becomes apparent when considering how frequently industry codes of conduct include 'third party rules', i.e., rules that, broadly speaking, cover the (legal) relationship between the private actor applying the code and the other party to that relationship and, in doing so, grant certain 'rights'[1328] to this other party or, in very rare cases,[1329] impose obligations on them. Viewed from this perspective, a more prominent role of industry codes in private law will prompt questions under substantive private law that have thus far not been raised in Dutch civil case law. One such question is whether the person applying the code of conduct, i.e., the regulated actor, can be held directly responsible under civil law for non-compliance with an obligation following on from the code. Another question is whether performance of an obligation under the code is demandable.[1330] Thus, the rules of substantive private law retain their relevance, both in deciding upon the aforementioned questions and in establishing, for instance, whether an infringement of a code can give a right to compensation or can constitute a ground to suspend performance of an obligation.

In my opinion, we should value positively the legal role and relevance of industry codes of conduct and their ensuing law-developing role in European and Dutch private law. This legal role and relevance are in keeping with the regulatory importance and reality of industry codes on the international, the European and the national level. Considering the three developments outlined in this section, the challenge for private law at this point lies in finding a *modus vivendi* with industry codes of conduct. A discussion of the exact design of this *modus* and the

[1327] Cf. Giesen 2007, p. 75, 104; Akkermans 2011, pp. 510-512.

[1328] It should be noted that industry codes generally do not directly grant 'rights' to third parties. Rather, they impose obligations on the private actors that have subscribed to the code. The 'rights' granted to third parties are the mirror image of these obligations. Thus, for the purposes of this chapter the term 'rights' is taken to denote the fact that third parties can benefit from industry codes in the sense that they may derive claims from these codes. Given this rather specific interpretation, the term rights will be put in quotation marks. Cf. Cafaggi 2011a, p. 32 who in this respect speaks of 'third-party beneficiaries', which he describes as "those who are supposed to benefit from compliance with the regulation and are harmed by their violation".

[1329] The results of the empirical study suggest that industry codes very rarely impose obligations upon third parties. An example of such a code is the European Code of Ethics for Franchising, which imposes obligations on both the franchisor and the franchisee. The Code can be found at <www.eff-franchise.com> - Self Regulation/European Code of Ethics. Cf. also the Dutch Franchise Code (available at <www.franchise.nl/Franchise-Informatie/Nederlandse-Franchise-Code-ontwerp>). Websites accessed 1 July 2016.

[1330] Cf. Beckers 2015, who has researched which possibilities German and English private law offer to enforce and sanction non-compliance with corporate codes of conduct concerning CSR.

legal theoretical questions that it carries[1331] is beyond the scope of this doctoral thesis. However, the scope of this thesis does allow for a closer look at the more pragmatic question that the research findings and the three developments sketched above involve: the question of the need for regulation of industry codes of conduct in Dutch private law.

7.4 Towards regulation of industry codes in Dutch private law?

This section takes a closer look at the aforementioned regulation question, which is frequently raised in Dutch private law literature. In doing so, the section in fact steps outside the ambit of the central research question, yet without aspiring to conduct a full-fledged analysis (cf. Chapter 1, section 1.4.1). Rather, building on the findings and conclusions of this doctoral thesis, the aim is to throw some more light on the regulation issue in an exploratory way.

7.4.1 Private law literature versus the findings of this doctoral thesis

The pertinence of the question on the need for some form of regulation of industry codes of conduct is emphasized by the following two comments that can be made as regards the 'juridification' of these codes. First of all, Dutch civil case law fails to provide clarity as to how to determine the legal relevance of codes of conduct when the binding force or applicability of a code is a point of contention. Do codes have legal relevance in these cases? Secondly, it should be noted that industry codes also embody features that can be considered problematic from a legal perspective.[1332] Going by the literature at this point, these problems generally arise in relation to three areas: 'drafting process and competence', 'content and legal value', and 'supervision and accountability'.[1333] The problems within the context of 'drafting process and competence' in essence relate to the fact that from a traditional legal point of view, codes of conduct can lack democratic legitimacy.[1334] In concrete terms and translated to the topic of this doctoral thesis, this means that a code of conduct, drafted by private actors that were not democratically elected, can affect the (legal) position of the other party of the private actor that applies the code (e.g., consumers and industry peers) by granting 'rights' to that party or, very occasionally, imposing obligations on that party, without this other party having been involved in the regulatory process in any way whatsoever.[1335] Following on from

[1331] Such as the questions on the criteria that must be applied to designate certain rules as 'law' (cf. Article 79 RO) or as a source of law, the question on the relation between the different sources of law, and the question whether the place of private regulation as a source of law in the framework legislation–adjudication is to be an independent one or whether it will remain subject to legislation and adjudication in one way or another.

[1332] For a general overview of the advantages and disadvantages of private regulation, see, e.g., Baldwin, Cave & Lodge 2012, pp. 137-146; Ogus 1995, pp. 97-99; Buck-Heeb & Dieckmann 2010, pp. 217-240; Giesen 2007, pp. 35-39 and Verdoodt 2007, pp. 29-51, all with further references.

[1333] See Vranken 2005, pp. 92, 97; Baldwin, Cave & Lodge 2012, p. 139.

[1334] Baldwin, Cave & Lodge 2012, pp. 141-142, 145-146; Buck-Heeb & Bachmann 2010, p. 237; Verdoodt 2007, pp. 44-47; Vranken 2005, pp. 92, 97; Ogus 1995, pp. 98-99. For a detailed elaboration of the notion of legitimacy in the context of (transnational) private regulation, see for example Black 2008 and Casey & Scott 2011. Cf. McHarg 2006 on the 'constitutional dimension of self-regulation'.

[1335] Cf. Ogus 1995, pp. 98-99; Baldwin, Cave & Lodge 2012, p. 141; Verdoodt 2007, p. 44. For the sake of completeness, it should be noted that the notion legitimacy embodies an internal and external dimension. Internal legitimacy concerns the relationship between the private regulator and the regulated actors, while external

this problematic feature, one can find legal objections to codes of conduct pertaining to the lack of (public) supervision and accountability of private regulators, i.e., to the fact that these regulators do not have to account for their regulatory activities through the usual public accountability mechanisms that apply to public regulators.[1336] Another legal weakness of codes of conduct, according to the literature, is the lack of clarity on their legal value and binding force, which mostly results from the aforementioned lack of democratic legitimacy.[1337] The problems related to 'drafting process and competence' can also negatively affect the quality of private rules. When the drafting process of a code is turned into a (predominantly) unilateral undertaking, there is a risk that the private rules serve only the industry's own interests, at the expense of the interests of external stakeholders. In these cases, there is also a risk of cartel formation.[1338]

In Dutch private law literature, these partially overlapping comments regularly constitute the background against which legal scholars make a plea for the formulation of criteria for determining the legal relevance and quality of private regulation. In doing so, these scholars invariably put forward procedural and material criteria of a public law nature, such as representativeness, level of support, public consultation, supervision and accountability, accessibility, comprehensibility and durability of the rules.[1339] However, for the time being, the option of laying down these criteria in a *legal* framework is generally considered to overstep the mark. Rather, Dutch scholars of private law are in favor of imposing criteria on private regulators in the form of non-binding guidelines.[1340] The aforementioned type of public law criteria can indeed constitute an assessment framework for establishing the legal relevance and quality of industry codes of conduct and other forms of private regulation. However, the findings of this doctoral thesis show that in legal practice the issue is approached differently: the debate about industry codes conducted in case law is not at all of a public law nature. Dutch courts, like the CJEU, proceed in an entirely different way when assigning legal relevance to industry codes.[1341] Moreover, the legal risks of industry codes to which the public law criteria relate do not come the fore in civil case law, except for the issue of legal status, which did appear to play a role in a few cases. These observations raise the question as to whether the legal relevance and quality of industry codes should be measured

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legitimacy pertains to the relationship between the private actor that applies the code and its other parties. The way in which private rules can be rendered legitimate depends on whether internal or external legitimacy is at stake. See Cafaggi 2014, pp. 1-4.

[1336] Baldwin, Cave & Lodge 2012, pp. 142-144; Curtin & Senden 2011; Ogus 1995, p. 98. Private actors can compensate for the lack of democratic legitimacy and accountability, for instance by allowing (all) external stakeholders to participate in the regulatory process, ensuring that the private regulator can be deemed sufficiently representative and setting up monitoring and complain handling mechanisms. See Scott 2012, pp. 1337-1338; Akkermans 2012, pp. 513-514; Glinski 2014, p. 52. However, several scholars indicate, public consultation, representativeness and supervision are often lacking in private regulatory schemes. See Baldwin, Cave & Lodge 2012, pp. 142, 145-146; Vranken 2005, p. 97; Gunningham & Rees 1997, p. 370; Ogus 1995, pp. 98-99.

[1337] Vranken 2005, pp. 92, 97; Verdoodt 2007, p. 45; Buck-Heeb & Dieckmann 2010, pp. 229-231.

[1338] Verdoodt 2007, pp. 41-42; Buck-Heeb & Dieckmann 2010, pp. 231-233.

[1339] Kristic, Van Tilburg & Verbruggen 2009; Giesen 2007, pp. 138-142; Van Driel 1989, pp. 119-123. See also Akkermans 2011, pp. 513-514; Vranken 2005, pp. 97, 100.

[1340] Van Driel 1989, pp. 111, 119; Giesen 2007, pp. 134-136.

[1341] See section 7.2.1.3 of this chapter and, more extensively, Chapter 6, section 6.3.3.

against public law criteria. Can some other courses be pursued at this point or is there no escape from the further regulation of industry codes by means of public law criteria?

7.4.2 Alternative avenues? An exploration

In this section, I ascertain whether alternative avenues, i.e., ways other than the imposition of public law criteria, are available under Dutch private law to cope with the lack of clarity that still exists in respect of the legal relevance of industry codes in cases where the applicability of a code is disputed, and to meet possible problems concerning the quality of these codes. This discussion has the express character of an *exploration*, inspired by the private law literature, legislation and case law. I only touch upon some possibilities, without fully elaborating on them. In doing so, I will focus on three actors: the legislator, the judiciary and the private actors themselves.[1342] The relationship between these actors resembles that of 'communicating vessels': if one of the actors refrains from providing clarity, this task will be assigned to the other two. When these actors in turn also fail to take action, the status quo is maintained.

Before commencing my exploration, it is important to differentiate between the different reasons that can underlie the lack of consensus between the parties to the proceedings on the applicability of an industry code. Three scenarios can be distinguished. All three scenarios concern the legal relevance of industry codes in *external*[1343] relationships, i.e., the (contractual) B2B or B2C relationship between the private actor applying the code and the other ('third')[1344] party to that relationship. The first scenario is that in which the private actor that applies an industry code defends itself against the reliance of the other party on the code by claiming that the code lacks legal binding force in external relationships (e.g., because the rules only have internal effect, or because the rules are of an advisory nature). This scenario, which will hereafter be referred as the 'internal effect only' scenario, concerns cases in which the private actor that is called into account has subscribed to the industry code. Matters are different in the second situation, which covers cases in which a code of conduct is invoked against a private actor that is part of the branch of industry or profession within which the code is applied, yet has not subscribed to the code itself. This second scenario will hereafter be called the scenario of the 'non-subscribing actor'. Whereas both the first and the second scenario concern industry codes that grant 'rights' to third parties, the third scenario pertains to cases in which industry codes impose obligations on the other party of the private actor that applies the code. It should be noted, however, that this scenario has thus far not been at issue in Dutch civil case law. This might remain the case: practice as reflected in the findings of the empirical study into the functions suggests that industry codes of conduct almost always only

[1342] For a similar exploration of the different possibilities to control general terms and conditions via the government, the judiciary and 'the administrative route', see Hondius 1978.
[1343] As opposed to the internal relationship between the private regulator and the regulated actor, i.e., the actor that has subscribed to the code and, accordingly, applies the code.
[1344] I.e., a party that is affected by the private rules, yet stands outside the private regulator–regulated relationship.

grant 'rights' to these other parties. Nonetheless, I will take account of the third scenario in my exploration, which I will refer to as the 'binding the other (third) party' scenario.

> As the focus of my exploration lies on cases in which the legal relevance of industry codes of conduct has thus far remained unclear, I do not go into the scenario where clarity has been provided as to this relevance (consensus on the binding force or applicability of a code). From a private law perspective, it will not be particularly surprising that public law criteria do not play a part in this scenario. After all, consensus constitutes a legitimizing factor in private law.[1345] Moreover, every time this scenario played out it involved industry codes that granted 'rights' to the other party of the private actors applying the code. Accordingly, the from the perspective of this other party pertinent risk of one-sided rules played no role. From this perspective, industry codes require no regulation here.[1346]

7.4.2.1 The legislator

The legislator has several means at its disposal to provide more clarity on the legal relevance of industry codes of conduct and to safeguard the quality of these codes. The experiences with the legal regime on the Standard Regulation (*standaardregeling*, see Article 6:214 DCC), which to date (mid-2016) has never been used, show that the option of enacting a regulation should in any case not involve too many stringent formalities.[1347]

A statutory regulation after the example of the statutory provisions on general terms and conditions

When considering possible actions from the side of the legislator, comparison with the statutory regulation of general terms and conditions (hereafter: general conditions) soon comes to mind. It is conceivable that the legislator links up with this regulation.[1348] After the example of general conditions, the legal binding force of an industry code in the relationship between the private actor that applies the code and his other party could be made dependent on the consent of the other party on the applicability of the code ('offer and acceptance'). The quality of the content of the code could be safeguarded by applying a test similar to the 'unreasonable onerousness test' that applies to general conditions. In doing so, the risk of the rules being too one-sided and reflecting the interests of the regulated actors only can be overcome.[1349] When formulating the viewpoints that can play a role in fleshing out the open

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[1345] In these cases, consensus (in a broad sense) functions as a legitimization and as a factor for binding force, according to Giesen 2007, p. 66, footnote 76, with reference to G. Bachmann, 'Privatrecht als Organisationsrecht', in: *Jahrbuch Junger Zivil-Rechtswissenschaftler* 2002, Stuttgart: Richard Boorberg Verlag, pp. 17-19.

[1346] Cf. Korthals Altes 2005, no. 29.

[1347] See also Menting & Vranken 2014, p. 8; Giesen 2007, pp. 21-22. Differently in the context of administrative law: Scheltema 2016, p. 120.

[1348] According to Vranken, the enactment of the statutory regulation of general conditions (Articles 6:231-247 DCC) more or less solved the problems as to the legal value, legitimacy and quality of general terms and conditions. See Vranken 2005, p. 97.

[1349] Compiling a black or grey list in respect of industry codes will however prove a daunting task, considering the variety of industry codes. Nonetheless, in assessing a code of conduct, judges could link up with the statutory

norm of 'unreasonable onerousness', the legislator could tie in with the viewpoints already in place for general conditions (such as the way in which the conditions were drafted; unilaterally or on the basis of bilateral consultations).[1350] Factors such as the involvement of the government with a code of conduct could equally play a role in this regard. A statutory regulation of this kind would offer the courts, which eventually have to assess compliance with the regulation, a framework on the basis of which they can establish the legal relevance of industry codes and assess the quality of the contents of these codes. As regards the three scenarios distinguished in the introduction to this section, it can be said that the statutory regulation would in any case produce a result for the third scenario ('binding the other (third) party').[1351] Strictly speaking, it also provides clarity as to the first and the second scenario (the 'internal effect only' scenario and the 'non-subscribing actor' scenario, respectively), in the sense that an industry code lacks legal relevance when there is no case of offer and acceptance. However, as set out in section 7.2.1.3 (under 'taking stock'), case law suggests that a code can still assume legal relevance when this consent is absent, albeit that general criteria at this point are still lacking. Thus, the present option of enacting a statutory regulation cannot fully clarify the first and second scenario. Accordingly, this task is passed on to the judiciary (see section 7.4.2.2).

Regulation of the drafting process

As a second option, the legislator could create a framework that regulates the process of drafting industry codes of conduct. The Collective Agreements Act (*Wet op de collectieve arbeidsovereenkomst*, hereafter: CAA), for instance, could serve as a template in this respect. The CAA lays down rules concerning, among other things, the authority to conclude collective agreements, the form in which these agreements are to be concluded and their binding force, and has as such provided clarity on the issue of authority as well as on the legal effects of collective agreements.[1352] The legislator could adopt a similar regulation for industry codes, entailing requirements for the drafting process as well as rules pertaining to the binding force and legal effect of industry codes drawn up in accordance with the formation requirements. The task of supervising and enforcing the regulation could be undertaken by the legislator itself, but could also be assigned to the judiciary.[1353] By thus regulating the drafting process, the legislator can throw some light on the legal relevance of

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provisions at this point (Articles 6:236-237 DCC) with respect to code rules that resemble the clauses that are on these lists.

[1350] See article 6:233 DCC, which, insofar relevant, reads: "A stipulation in general conditions may be annulled (a) if it is unreasonably onerous to the other party, taking into consideration the nature and the further content of the contract, the manner in which the conditions have arisen, the mutually apparent interests of the parties and the other circumstances of the case". Translation taken from Haanappel & Mackaay 1990, p. 333.

[1351] And would in effect codify the approach taken by Dutch lower courts in cases where consensus existed on the applicability of an industry code.

[1352] Hondius 1978, pp. 546-547, from which this option was derived.

[1353] Even though the legislator would thus not directly be concerned with the quality of the contents of industry codes, it can exert influence at this point via the requirements it sets on the drafting process. These requirements (e.g., in the shape of criteria tailored to the legal risks of industry codes, such as representativeness, level of support and public consultation) can play a role as preconditions for high quality codes. However, as Van Driel signals, these requirements do not constitute a necessary condition in this regard. See Van Driel 1989, p. 119.

industry codes in the first scenario ('internal effect only'), in the sense that private actors that have subscribed to the code can no longer successfully resort to the argument that the code only has internal effect. However, the regulation would not provide a solution for the second ('non-subscribing actor') and third scenario ('binding the other (third) party'), since it merely covers the drafting stages and as such only affects the subscribing actors.

Governmental approval of the result

Another, far-reaching possibility is the creation of a regime that subjects industry codes to the approval of a government body, meaning that codes can only assume legal relevance when they have received a public stamp of approval. Unlike the option of regulating the drafting process, this regime would involve an assessment of both the drafting process and the content of an industry code.[1354] Accordingly, substantive as well as formal, procedural criteria will have to be developed.[1355] Tailoring the formal assessment criteria to the legal risks of industry codes is an obvious option and this would lead to the development of public law criteria such as representativeness, level of support and public consultation. The content of a code could be reviewed for conflicts with the applicable (mandatory) provisions, including competition law, and tested for, e.g., their durability, comprehensibility and accessibility.[1356] The legislator could decide to declare universally binding codes of conduct that meet the procedural and substantive criteria. As a result, the binding effect of a code extends beyond the private actors that have subscribed to it, to all of the actors operating within the industry or profession concerned. Accordingly, the option of governmental approval can provide clarity on the legal relevance issue in the first scenario ('internal effect only') and, provided that the legislator has declared a code universally binding, in the second scenario ('non-subscribing actor'). As this declaration by its nature only affects industry peers, it does not clarify matters in the third scenario ('binding the other (third) party').

FACILITATING ROLE – The legislator could also take on a more 'facilitating' role. In this role, the legislator could focus on creating enabling conditions for the drawing up of high-quality industry codes of conduct, without, as was the case with the previous option, attaching formal legal consequences to the fact that a code meets these conditions. The legislator could for example develop a framework after the example of the Wbp, under which industry codes can, at the discretion of the private regulator, be submitted to a public law body for approval.[1357] With a view to the successful institutionalization of the drafting process of general conditions within the Social and Economic Council (SER), the legislator could also choose to facilitate the drafting process of industry codes by bringing it under the auspices of an independent consultative body.

[1354] Cf. in the administrative law context, Scheltema 2016, pp. 116-133, who pleads for the development of a legal recogntion scheme for transnational private regulatory schemes on which the Dutch legislator wishes to rely.
[1355] In formulating these criteria, the legislator could for instance take account of the requirements that apply to codes that have been relied upon by the legislator as alternatives to regulation. The European requirements can be found in the Principles for Better Self- and Co-regulation, while the Dutch requirements are spread through general legislative policy. See Chapter 4, section 4.5.
[1356] Van Driel 1989, pp. 122-123.
[1357] Cf. Scheltema 2016, pp. 120-133. The regime of the Wbp was discussed in Chapter 4, section 4.4.1.1.3 under i.

Although in both cases it is eventually up to the private actors themselves to provide clarity on the legal relevance of their codes, the legislator could rule that a declaration of approval or the fact that a code has been drawn up under the supervision of an independent body, lend industry codes a certain degree of legal value in legal proceedings.[1358]

7.4.2.2 The judiciary

Judges, in turn, can provide clarity on the legal relevance and standards for the substantive quality of industry codes of conduct by adopting a uniform approach, encompassing a fixed set of assessment criteria or viewpoints, in cases that are of a similar nature. If the criterion 'consensus = judicial application of the code', used by Dutch lower courts, was to be applied strictly to the three scenarios distinguished for the purposes of this section, in all three scenarios codes of conduct would lack legal binding force in the relationship between the private actor applying the code and its other party.[1359] This observation is also reflected in the case law of the lower courts, where industry codes were occasionally disregarded because the binding force or applicability of the code on the litigant against whom the code was invoked could not be established.[1360] At the same time, however, several judgments suggest that a lack of consensus between parties to the proceedings on the applicability of a code does not always preclude industry codes from assuming legal relevance. Yet, for industry codes to actually assume legal relevance in cases where such consensus is absent (cf. the three scenarios), it is necessary that courts are willing to see beyond the private nature of these codes and refrain from using this nature as an argument to *a priori* preclude industry codes from having legal relevance, as seems to have occurred in a few judgments.

Open norms and custom

In the first ('internal effect only') and second ('non-subscribing actor') scenario, courts could assign legal relevance to industry codes via one of the open norms that can be found throughout the Dutch Civil Code.[1361] Then the line of argument would be that the importance, scope of application and weight of a code within the industry or profession are of such significance that the code has external legal binding force (first scenario) or is applicable to all members of the industry or the profession ('radiating effect',[1362] second scenario), as, for instance, a further specification of a general duty of care under civil law, as a rule of

[1358] It is for instance conceivable that the legislator, after the example of general conditions, provides that industry codes drawn up on the basis of bilateral or multilateral consultations with external stakeholders, under the auspices of an independent body, are less likely to be considered unreasonably onerous. Private actors applying the code could benefit from this legal value when defending themselves by invoking their code in legal proceedings. This could provide an incentive for private parties to use these possibilities.
[1359] Cf. Giesen 2007, p. 66.
[1360] Chapter 6, section 6.3.2.1 briefly touched upon some of these lower court judgments.
[1361] It should be noted that codes of conduct can also permeate into the legal sphere through these open norms where there is consensus on the applicability of the code. Cf. Chapter 6 of this doctoral thesis as well as Giesen 2007, pp. 68-75.
[1362] See also Chapter 6, section 6.3.3.3.

unwritten law pertaining to proper social conduct (Article 6:162 DCC)[1363] or as an expression of the prevailing juridical views in the Netherlands (Article 3:12 DCC). Furthermore, courts could find that given the importance and weight of the code within the industry the principles of reasonableness and fairness require application of the code.[1364] In certain cases, one could also think of qualifying an industry code as 'custom'.[1365] In this way, courts could use open norms and custom to assign legal relevance to an industry code, and thus pass over the claim that the code has internal effect only (first scenario) or that the code is not binding on the non-subscribing actor (second scenario).

However, the few judgments in which such an approach was taken, with varying outcomes, show that courts do not take matters lightly, at least not in the second scenario. The criteria that have to be applied in this regard are strict. Here onr could think of criteria such as the level of support, representativeness. However, case law rather seems to focus on the scope of application and the weight of the private rules within the industry.[1366] That is not surprising: after all, without legislative or judicial interference, private regulation in principle only has binding force upon private actors that have consented to be bound by the rules.[1367] This observation signals that the option of using open norms and custom to assign legal relevance to an industry code of conduct will be of only limited use when the issue of binding the other (third) party to the code is at issue (third scenario). Under the present option, this 'third-party effect' could only be achieved through a classification of a code as custom, which implies that strict criteria will have to be met.[1368] Thus, in case law, the legal relevance of an

[1363] Cf. Hof Arnhem-Leeuwarden 24 December 2013, ECLI:NL:GHARL:2013:9929, para 3.11, where it was held that in being widely supported, the Code of Conduct on Pharmaceutical Advertising could be used to flesh out this open norm (discussed in Chapter 6, section 6.3.1.11).

[1364] Cf. Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, paras 4.3-4.10 (discussed in section 6.3.1.5); Van Gerven & Lierman 2010, pp. 314-315; Giesen 2007, pp. 59, 70, 79. Which norms can eventually be used, depends on whether the legal dispute is of a contractual nature or concerns a wrongful act.

[1365] Cf. Giesen 2007, pp. 70-71; Rb. 's-Gravenhage 10 July 2007, ECLI:NL:RBSGR:2007:BA9210 (discussed in in Chapter 6, section 6.3.1.3). Differently: Hof Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620, where the fact that the guiding Rules for bankruptcy trustees put down in writing the customary rules of conduct within the profession was deemed insufficient to qualify the Rules as customary law. See Chapter 6, section 6.3.2.2.3

[1366] The Amsterdam Court of Appeal for instance dismissed the argument that the Fire Insurance (Right of Recourse) Sectoral Regulations were also binding on an insurer that had not subscribed to the Regulations. The court, among other things, found that the recourse to the principle of reasonableness and fairness in this regard was of no avail, as the Regulations, in short, were not of such significance that insurers that had not subscribed to the code were under a legally enforceable obligation to apply the Regulations. Furthermore, the court of appeal held that the Regulations could not be considered customary law, as they were not generally accepted within the industry (subscription to the Regulations was optional). See Hof Amsterdam 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, paras 4.3-4.10 (discussed in Chapter 6, section 6.3.1.5). The rules on pharmaceutical advertising of the Foundation for the Code for Pharmaceutical Advertising, by contrast, were applied to a private actor that had not subscribed to the rules. In doing so, the court referred to the fact that the rules constituted a further specification of the law, that the rules were repeatedly referred to in case law, that the validity of the rules was generally accepted in case law and that almost the entire industry was bound to the rules. See Rb. 's-Gravenhage 26 July 2004, ECLI:NL:RBSGR:2004:AQ5353, para 3.3 (discussed in Chapter 6, section 6.3.1.11).

[1367] See also Korthals Altes 2005, no. 26.

[1368] Cf. Hof Arnhem 11 September 2007, ECLI:NL:GHARN:2007:BB8620 (*supra* n 1365). The second and third scenario in essence concern the same issue: imposing a code on an actor that is not bound to that code. The difference between the two scenarios pertains to the fact that the second scenario is about imposing a code on an industry peer or professional colleague, whereas the third scenario concerns binding private actors that do not

industry code in the third scenario depends primarily on whether the code has been 'offered' to and 'accepted' by the other party.[1369]

A pragmatic approach

As regards the cases in which the private actor that applies the code seeks to block judicial application of the code by arguing that it lacks external legal binding force (first scenario), the case law studied in Chapter 6 provides a basis for a more direct, pragmatic approach. This approach entails that the said internal nature of the code is brushed to one side and that account is taken of the fact that the code content-wise covers the external relationship between the private actor applying the code and the other party at issue. Under this approach, the consensus about the code that exists between the private regulator and the 'subscribers' to the code (i.e., the private actors applying the code, the regulated actors) constitutes the basis for assigning it legal relevance. Thus, the pragmatic approach entails courts extending the internal consensus on the code rules to legal relevance of the code in external relationships, with a view to the fact that the rules of the code cover the (legal) relationship at issue.[1370] I deduced this pragmatic approach from the following judgments, in which this approach resounds.

The first two judgments that are reflective of a pragmatic approach are the Supreme Court judgments in *Van der Tuuk Adriani/Batelaan* and *Trombose*. In these cases, the Supreme Court disregards the arguments pertaining to the advisory nature and the internal effect of the private rules, respectively, and assigns legal relevance to the private rules concerned with reference to the fact that the rules rest on consensus between the private regulators.[1371] In a similar vein, the Court of Appeal of The Hague passed over the claim that the Fire Insurance (Right of Recourse) Sectoral Regulations had internal effect only. The court in this regard referred to the qualification that the Supreme Court had given to these Regulations, namely that the Regulations are of a general nature and extend to third parties that were not involved in the drafting process.[1372] This led the court of appeal to conclude that the Regulations do apply to the external relation between the insurer and the other party.[1373] Considering that internal consensus on the private rules thus eventually constitutes the basis for external legal relevance under the pragmatic approach, it can be concluded that this approach cannot be used to assign legal relevance to industry codes in the second ('non-subscribing actor') and third ('binding the other (third) party') scenario.

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belong to the same industry or profession (e.g., consumers). As regards the third scenario, this implies that if the other (third) party would be a non-subscribing industry peer, the aforementioned options could be used to bind said party to the code.

[1369] See also Korthals Altes, no. 26-29.

[1370] Cf. the theorethical reflections in Chapter 6, section 6.5.2.

[1371] As already indicated in section 7.2.1.3 of this chapter.

[1372] See HR 16 May 2003, ECLI:NL:HR:2003:AF4621, *NJ* 2003/470, para 3.3.2 (discussed in Chapter 6, section 6.3.1.5).

[1373] Hof 's-Gravenhage 28 October 2008, ECLI:NL:GHSGR:2008:BG2213, para 6 (discussed in Chapter 6, section 6.3.1.5).

Substantive quality

When it comes to an assessment of the (minimum) substantive quality of an industry code, judges can make use of several private law norms. However, given the fact that most industry codes are beneficial to third parties, it is likely that judges will only very occasionally, if at all, have to conduct such an assessment. Nonetheless, the starting point of the assessment would in all cases be that the rules of a code should not be contrary to the law, to good morals or to public order (Article 3:40 DCC). In case a code seeks to impose obligations on a third party, the key question, by analogy with general conditions, will be whether these obligations are not unreasonably onerous. The legal basis for this test can be found in the 'unreasonable onerousness test' that applies to general conditions (Article 6:233(a) DCC) or, more generally, in the restrictive operation of the principle of reasonableness and fairness (Article 6:248(2) DCC).[1374]

Role of the functions

In clarifying the issue of the legal relevance of industry codes of conduct, courts could also rely upon the functions of these codes.[1375] The protective function and the policy instrument in particular can play a role in determining the importance and weight of an industry code. For instance, a plea that a code of conduct lacks external binding force (first scenario) will hardly catch on when the code has either or both of these functions, precisely because the functions are of an 'external' nature. These functions can be of equal value in cases revolving around the binding force of an industry code upon a 'non-subscribing actor' (second scenario). Courts could for example take into consideration, especially when the private rules function as an alternative or complement to public regulation, that limiting the scope of application of an industry code with a protective function to the subscribing actors could lead to an unequal level of consumer protection. Where industry codes have a policy instrument function, courts could argue that the tacit or express involvement of the government with the code implies that the code bears significance for the entire industry.[1376] Furthermore, the policy instrument function can play a role in the assessment of the content of an industry code: as indicated above, the presence of an element of government involvement with the code could be a relevant factor in establishing that the rules are not unreasonably onerous.[1377]

Supreme Court

The Supreme Court also has a vital role to play in throwing some light on the legal relevance of industry codes in Dutch private law. To begin with, when faced with questions pertaining to this issue, the Court will have to state the reasons for taking a code of conduct into

[1374] After all, it is up to the party entitled to choose the legal basis on which it wishes to found its claim. See HR 14 June 2002, ECLI:NL:HR:2002:AE0659, *NJ* 2003/112 (*Bramer/Hofman Beheer*).
[1375] See also Menting & Vranken 2014, p. 41.
[1376] This has the additional benefit of strengthening the policy instrument function. After all, the starting point that the scope of application of an industry code is in principle (i.e., without legislative or judicial interference) limited to the private actors that have subscribed to the code, also goes for codes that have a policy instrument function. Courts can extend the scope of the rules *ex post* so as to cover the entire industry or profession.
[1377] See section 7.4.2.1, under 'A statutory regulation after the example…'. Cf., more generally, Scott 2012, pp. 1334 et seq. on governmental involvement with private regulation as a legitimizing factor.

consideration and for assigning legal relevance to the code in an explicit, well-reasoned fashion, as it already did in *Trombose* and *Achmea/Rijnberg*.[1378] However, the Supreme Court cannot limit itself to providing a more explicit, well-founded explanation of its approach. The unavoidable multi-layeredness of Dutch private law, the role of industry codes in the development of the law, the use of industry codes as a policy instrument and the legal uncertainty that still surrounds their legal relevance, urge that clarity and an unequivocal approach are provided and necessitate action from the side of the Court. This implies that the Supreme Court in its capacity as developer of the law must also indicate in general terms what room judges have to take into account industry codes and other forms of private regulation and thereby direct the lower courts.[1379] In doing so, the Court will in any case have to give an (preferably positive) opinion on the approach of the lower courts as well as on what applies when there is a lack of consensus between litigants about the legal relevance of a code of conduct. As Vranken already indicated, at some time, in parallel with the development of industry codes into a source of law that I signaled earlier, the narrow conception of 'law' included in Article 79 RO will have to be reconsidered.[1380] The fact that this time is yet to come, does not alter the fact that the Supreme Court cannot continue to hide behind this conception. However, all this does require the Court to be given the opportunity to rule on the matter, that is to say, it has to be presented with a case in which the legal relevance of a code of conduct is at issue. This is where the private actors, and their lawyers, enter the scene.

7.4.2.3 Private actors

Finally, private actors themselves, i.e., private regulators, private actors that apply an industry code of conduct and litigants, can contribute to the elucidation of the ambiguities surrounding the legal relevance and quality of industry codes. The most direct contribution of private actors in this respect would be the incorporation of (a reference to) an industry code in a contract or in the general terms and conditions applicable to the contract. Alternatively, private actors could explicitly declare their industry code applicable to the legal relationships that they enter into. Once the other party to this legal relationship has accepted, broadly speaking, the applicability of the code of conduct, the code assumes legal binding force. With the legal value of the code thus established *a priori*, i.e., before any legal proceedings are commenced, obscurities as to the legal relevance of the code are prevented from arising in court.[1381] Private regulators, more specifically, can also influence the quality of the contents of their code of conduct. After all, it is eventually up to them to ensure that the private rules are not unreasonably onerous, that, at a minimum, mandatory legal provisions are respected

[1378] HR 2 March 2001, ECLI:NL:HR:2001:AB0377, *NJ* 2001/649 (*Trombose*) and HR 18 April 2014, ECLI:NL:HR:2014:942, *NJ* 2015/20 (*Achmea/Rijnberg*). Giesen 2008, pp. 790-791 is of a similar opinion.
[1379] Giesen also calls upon the Supreme Court to be more general and explicit in its reasoning as regards private regulation. See Giesen 2008, pp. 791-792.
[1380] Vranken 2005, p. 92.
[1381] Cf. Giesen 2007, pp. 62-66 on consensus as a basis for the legal binding force of private regulation.

and that the rules are in compliance with the law, good morals and public order.[1382] Additionally, private actors can play a more indirect role by explicitly raising the problems that might arise as regards the legal relevance and quality of a code of conduct in legal proceedings so that courts have to give a reasoned opinion on the matter.[1383] However, private actors can equally decide not to do so and to leave the status quo intact, knowing that if they consent on the applicability of a code, it is at least in lower court proceedings likely that the code is assigned legal relevance, without there being a need to address any further problems.

Whether all this actually leads to legally binding, high-quality industry codes of conduct will however depend greatly on the interest that private regulators and the regulated industry actors take in applying such a code. For example, if a code has been drawn up with the aim of preventing public regulation, it is in the industry's own interest to ensure that the code functions properly. By contrast, if a code has symbolic value only or seeks precisely to protect the industry's own interests, private regulators will not address its legal relevance.

7.4.3 Conclusion

The exploration of the alternative avenues that might be available under Dutch private law shows that there is no need for public law criteria to determine the legal relevance and (substantive) quality of industry codes of conduct within the framework of Dutch private law, at least not when these issues are up for discussion in civil law proceedings.[1384] Courts can use the rules of substantive private law to rule on these issues, to solve problems that might arise and to provide the necessary clarity, without having to seek recourse to public law criteria.[1385] This implies that there is no need to take the course advocated by other scholars; that of employing public law criteria as preconditions that have to be met by an industry code before courts can assign it legal relevance.[1386] Considering the fact that industry codes most often grant 'rights' to third parties, this would in my opinion in any case have been an undesirable course to take, as it could for instance lead to cases in which courts establish that consensus exists about the applicability of a code that grants 'rights' to a third party, yet still withhold legal relevance from the code because of a lack of representativeness.

[1382] To ensure that its code reflects all interests involved in a well-balanced fashion, a private regulator could for instance involve (representative organizations of) external stakeholders in the drafting process of the code. Worthy of mention in this regard are the various private meta-regulatory regimes that have been set up at the international level. These regimes set standards that regulate the drafting process of private regulation, with the aim of enhancing its legitimacy and effectiveness. Private regulators can join these regimes. Two well-known examples are ISEAL Alliance (concerning voluntary sustainability standards) and the European Advertising Standards Alliance (EASA, concerning European self-regulation of advertising). On the meta-regulation of private regulation, see, e.g., Cafaggi 2016 and Meuwese & Bomhoff 2011.

[1383] On the role of parties to the proceedings at this point, see also Giesen 2008, pp. 791-792.

[1384] The fact that the legislator will not be able to evade the application of public law criteria (except with regard to the option of enacting a regulation after the example of the statutory provisions on general conditions) is due to the timing of the legislator's assessment. The legislator assesses the legal relevance and quality of industry codes *ex ante*, i.e., before the codes come to cover a specific (legal) relationship. Judicial assessment, by contrast, takes place at a later stage, namely when a specific dispute exists and the parties to the proceedings have already expressed their opinion on the applicability of the code.

[1385] Similarly: Korthals Altes 2005, nos. 26-29.

[1386] See Kristic, Van Tilburg & Verbruggen 2009.

With the above, I am in fact already well on my way to providing an answer to the question on the need to regulate the use of industry codes of conduct in Dutch private law. In my opinion, neither the lack of clarity that still exists as to the legal relevance of industry codes nor the problems that might arise in respect of the quality of such codes necessitates the use of industry codes (in concrete legal relationships) being subjected to further requirements. Although the option of issuing a regulation on the drafting process and quality of industry codes has the advantage of being a relatively fast way of clarifying the remaining ambiguities as regards the legal relevance of these codes, it is questionable whether this is a workable option, given the quantity and diversity of industry codes in practice.[1387] As empirical data on the actual opportunities and risks of industry codes are lacking, it is also difficult to ascertain whether such a regulation would produce the desired effect. Furthermore, it should be noted that none of the options available to the legislator can provide full clarity in respect of all three scenarios in which the legal relevance of industry codes remains unclear. The legislator cannot do without the judiciary at this point. Moreover, the introduction of public law requirements might make matters needlessly more complicated. After all, when viewed from the perspective of substantive private law, industry codes of conduct are not by definition a problematic phenomenon, as Dutch civil case law and my exploration in this section show.

Therefore, for now I give preference to a 'growth model' which charges the judiciary with the task of giving further shape to the legal role of industry codes of conduct on the basis of substantive private law or procedural law.[1388] This means that courts will have to continue to engage with industry codes of conduct, preferably without being ruled by the private origins of these codes. With respect to the situations in which the legal relevance of industry codes is still unclear, the courts will have to develop an unequivocal approach which builds on fixed assessment criteria or fixed viewpoints. The model also expressly awards a role to the Supreme Court at this point. The Supreme Court has to take the lead and direct the lower courts. This implies that the Court will have to rule on the legal relevance of industry codes of conduct in a more explicit and more reasoned way than it has done so far (see section 7.4.2.2). A drawback of this growth model is that it can take some time before the legal relevance of industry codes fully crystalizes. In providing the necessary clarity, courts are after all dependent on the facts and arguments advanced by parties to the proceedings.[1389] Furthermore, for the 'new' judicial approach to settle in the case law of the lower courts, a number of judgments will be needed, which underlines the importance of the role of the Supreme Court. However, it is precisely this relatively slow pace that enables the judiciary to be flexible when responding to the developments in practice, which is an advantage given the relative lack of empirical data on the actual use of industry codes of conduct. Thus, through this model, the development of industry codes of conduct into a source of law can be

[1387] See also Giesen 2007, p. 136; Van Driel 1989, pp. 111, 119.

[1388] This model fits with the greater role the judiciary will play in the private law of the future, as expected by Smits 2015a, p. 528. It should be noted that the choice for a 'judicial model' does not imply that the legislator is fully sidelined. The legislator can, for instance, develop guidelines for codes of conduct or take on the facilitating role described in section 7.4.2.1.

[1389] As Vranken notes, "coincidence and financial wherewithal are factors" that play an important role in this regard. See Vranken 2006, p. 69.

gradually given shape.[1390] The growth model at this point also involves a role for parties to the proceedings and their lawyers: they are the ones that will have to bring industry codes to the attention of the courts.[1391] If, however, they decide to keep the codes outside the judicial sphere, their legal relevance will not further crystalize in case law, leaving intact the ambiguities that still exist at this point.

In sum, in my opinion, the preferred option to provide the necessary clarity on the legal relevance of industry codes of conduct in Dutch private law is that of a judicial growth model, which leaves intact the approach of the lower courts in the 'binding force and consensus cases', yet calls for a more express and unequivocal approach in cases where the legal relevance of industry codes has thus far remained unclear. Both the lower courts and the Supreme Court will have to give shape and substance to the legal role of industry codes on the basis of substantive private law and procedural law, whereby the Supreme Court will have to take the lead.

The conclusion that there is no need to regulate industry codes from the perspective of the application of these codes in concrete legal relationships does not imply that further regulation by means of public law criteria cannot be useful in other respects. The fact that (the drafting process of) a code of conduct meets these criteria can have a positive effect on the (substantive) quality of the code and, as such, maybe on the code's legal relevance as well.[1392] In view of this possible quality impulse, there are no objections in this regard to linking up with the proposals made in private law literature to develop non-binding guidelines or models for codes of conduct,[1393] so as to support the growth model described above. Additionally, it should be noted that the development of industry codes into a source of private law raises pertinent questions on the integration of this source in the framework legislation–adjudication, such as the question concerning the relation between legislation, case law and private regulation, which could throw new light on the question on the regulation of industry codes. Addressing these questions however requires a deeper understanding of the actual use of industry codes of conduct in private law and of the extent to which and the moments when the legal risks of industry codes actually materialize (see section 7.4).

7.5 Outlook

"Private law is not lacking any challenges", said Smits in his reflections on the private law of the future.[1394] Industry codes of conduct are one of these challenges. By now, private regulators are pervasively present in European and Dutch private law. Given the ever-increasing process of globalization, these regulators are expected to claim their place in the private law legal order even more forcefully in future.[1395] Hence, new and other

[1390] Also in another respect, case law can be an indicator for practice: from a very black-and-white perspective, the fact that certain cases are not submitted to the court can be said to imply that the use of industry codes in these cases does not lead to legal problems.
[1391] See also Giesen 2008, pp. 791-792 and Menting 2015, p. 111.
[1392] Giesen 2007, pp. 133-138; Van Driel 1989, pp. 111, 119.
[1393] Giesen 2007, pp. 133-140; Van Driel 1989, pp. 119-123.
[1394] Smits 2015a, p. 546 (summary).
[1395] Smits 2015a, pp. 536-538, 542-543.

confrontations between industry codes of conduct and private law lie in wait. These confrontations not only require a response from the side of the legislator and the judiciary, but also urge the topic of private regulation be given a more prominent place on the research agenda of private law scholars.

In view of the theoretical focus of the European and Dutch private law debate, the main research challenge would be that of collecting empirical data on the effectiveness, the opportunities and risks, and the actual use of industry codes of conduct. The opportunities and risks of codes of conduct, for example, are a much-discussed topic, yet in most cases this discussion is not based on systematic empirical research as to whether these opportunities and risks actually materialize and, if so, when and how.[1396] The same observations apply when the use of industry codes is concerned: also at this point, there is very little empirical data. How do private actors themselves deal with industry codes in the B2B and B2C relationships covered by these codes?[1397] What are the actual results of the European and Dutch legislative strategies to deploy alternative regulatory instruments? The answers to such empirical questions constitute an important basis to take yet another step ahead in the theoretical discussion on industry codes of conduct in private law.[1398] The developments outlined in section 7.3 of this chapter show that scholars of private law will also have to face several theoretical and conceptual challenges. Considering these developments, building on empirical data and the developments that are already taking place in private-law practice, private law research will have to focus particularly on the implications of the regulatory role of industry codes for the formation of law within private law,[1399] on the role of substantive private law in that regard and, eventually, on the fundamental question of the tenability of the traditional paradigm of the origins of legal norms: the framework of legislation and adjudication.[1400]

These conclusions lead us back to the quotation from Enschedé, stemming from 1984, with which this doctoral thesis started:

> "The legal order cannot function in the best possible way, unless it finds its proper place among *other* systems of norms, both internally, among the different national and international systems of norms, and externally."[1401]

[1396] Exceptions in this regard include Cafaggi 2014 (report on the basis of 11 case studies on the legitimacy, quality, enforcement and effectiveness of transnational private regulation and the interrelatedness of these four elements) and Van Boom et al. 2009, followed by Van Boom et al. 2011 (empirical study into the factors for the success and failure of private regulation). Noticeable with a view to the design of empirical research into the effectiveness of private regulation: Scheltema 2014 and Cafaggi & Renda 2014.

[1397] In answering this question, one could link up with the empirical studies into the ways in which multinational companies deal with their rules on corporate social responsibility. See Vytopil 2015 and Peterková-Mitkidis 2015.

[1398] Cf. Akkermans 2011, p. 514, footnote 51.

[1399] The multi-layered nature of private law for instance raises the question as to how to safeguard the consistency and quality of the law (cf. Smits 2015a, p. 523). For a discussion of this issue in relation to European private law, see Van Schagen 2013.

[1400] See also Akkermans 2011. On the framework legislation-adjudication, see Vranken 2005, pp. 79-86.

[1401] Enschedé 1984, p. 140 (my own translation). In Dutch: "*De rechtsorde kan niet optimaal functioneren, tenzij zij zowel inwendig, tussen de onderscheiden nationale en internationale normenstelsels, als uitwending, ten opzichte van àndere normenstelsels haar positie juist bepaalt*".

The findings of this doctoral thesis and the developments outlined in this chapter show that the call has lost none of its relevance, the more so indeed since the issues touched upon in this thesis are not limited to industry codes of conduct, but also come up in respect of other forms of private regulation, such as technical standards, binding corporate rules and corporate social responsibility codes.[1402] The regulatory role of industry codes and other forms of private regulation on the international, the European and the national level, urge us once more to reconsider and reflect upon the very foundations of private law. The new perspectives on the legal relevance of industry codes of conduct in Dutch private law that this doctoral thesis has unveiled pave part of the way for that.

[1402] See, e.g., Schepel 2005 (technical standards); Moerel 2012 (Binding Corporate Rules); Beckers 2015 (CSR codes), all with further references.

Summary

Chapter 1 - Introduction

The object of my study in this doctoral thesis, industry codes of conduct, has assumed an important role in regulating private law B2B and B2C relationships on the global, the European and the national level, as have other forms of private regulation. Despite this regulatory significance, however, the phenomenon of private regulation has to date received only little attention from Dutch private law scholars. Furthermore, as follows on from Dutch private law literature that does address the subject, the Dutch legislator and Dutch civil courts have thus far not engaged extensively, or at least not unequivocally, with private regulation either. As a result, the legal relevance of private regulation in Dutch private law is still surrounded by ambiguities. However, considering the fact that private regulation seems to be making more headway in European private law – a development that will impact the legal relevance of private regulation in Dutch private law given the interrelatedness of the European and the Dutch legal orders – and the aforementioned regulatory relevance, future encounters between private regulation and Dutch private law are inevitable. This urges the legislator, civil courts and legal scholars to further contemplate the relationship between private regulation and Dutch private law. Against this backdrop, this doctoral thesis investigated the legal relevance of industry codes of conduct by addressing the following central research question:

What is the legal relevance of industry codes of conduct in a multi-layered Dutch private law?

I answered this question based on the findings under the three pillars on which the thesis was built:

I. An empirical study into the functions of European and Dutch industry codes of conduct (Chapters 2 and 3)
II. The approach of the European and Dutch legislators to industry codes of conduct (Chapter 4)
III. The approach of the CJEU and the Dutch civil courts to these codes (Chapters 5 and 6).

In doing so, I took a more comprehensive approach than the ones hithero taken in Dutch private law literature and added four new perspectives to the Dutch private law debates on the legal relevance of private regulation: an empirical perspective, the functions of European and Dutch industry codes of conduct, the perspective of the legislator and the European perspective (including an assessment of the European influence on the legal relevance of industry codes of conduct in Dutch private law). Additionally, going beyond the scope of the central research question, in the final part of this thesis (Chapter 7, section 7.4), I threw some new light on a recurrent issue in Dutch private law literature: the need to regulate the use of industry codes of conduct.

Chapter 2 - The empirical study: Research design and methodology

The first part of this thesis, Chapters 2 and 3, centered upon the functions of European and Dutch industry codes of conduct. The functions were identified on the basis of an empirical study, which formed a continuation of an exploratory empirical inquiry into these functions that I conducted as part of my Master's thesis (2011).[1403] The aim of the study was to identify the possible functions of said codes of conduct as completely and specifically as possible.

The scene for the empirical study was set in Chapter 2 by explaining the design of the empirical study and the methodology applied to identify the functions. Firstly, the Chapter set out the different steps that were taken to compose the sample of European and Dutch industry codes of conduct. These steps eventually led to a sample of 80 industry codes of conduct (34 European codes and 46 Dutch codes) that pertain to private law B2B and B2C relationships.[1404] These codes were drawn from 6 pre-selected industry sectors[1405] in a steered, at random way.[1406] The steering element of the selection process first of all entailed the inclusion of 44 industry codes of conduct that I had already studied as part of the empirical study conducted in my Master's thesis. Secondly, when applicable, it entailed the inclusion of Dutch equivalents of the selected European codes of conduct (4 in total), so as to, on the one hand, gain insight into the interaction between European and Dutch industry codes and, on the other hand, to facilitate a comparison of the functions of European and Dutch industry codes.

Secondly, I introduced the framework of analysis used to identify the functions of the selected European and Dutch industry codes of conduct. This purpose-built framework, which builds on the one I applied in my Master's thesis, consists of seven core elements: drafters and target group; reason; aim; type, nature and binding force of the rules; enforcement; influence of the government; accessibility.

[1403] Menting 2011.
[1404] A list of the industry codes of conduct studied is included as Annex 1.
[1405] 1) Manufacturing, 2) Wholesale and retail trade, 3) Information and Communication, 4) Financial institutions, 5) Consultancy, research and other specialized activities, and 6) Renting and leasing of tangible goods and other business support activities.
[1406] Industry codes of conduct solely concerned with technical standards, codes of conduct adopted by Dutch professional organizations designated as a regulatory authority drawn from the profession (*publiekrechtelijke beroepsorganisaties*) and private regulatory schemes that did not meet the working definition of an 'industry code of conduct' applied in this thesis were excluded from the sampling process.

Framework of analysis

Element	Question
General	
Drafters	1. Who has drawn up the code of conduct?
Target groups	2. Who is the target group?
Scope	3. What is the scope of the code of conduct?
Reason	4. What were the reasons for drawing up (and, if applicable, revising) the code of conduct?
Aim	5. What is the aim of the code of conduct?
Rules	
Type	6. What types of rules does the code of conduct contain? c. Rules of a concrete, substantive nature, or d. Rules of a moral/ethical nature, expressing aspirations
Nature	7. What is the nature of these rules (specific or general)?
Binding force	8. Does the code of conduct have binding force?
Enforcement	
General	9. Does the code of conduct contain rules with respect to monitoring, compliance and enforcement?
Monitoring actor	10. Is there a monitoring actor and, if so, is this actor independent?
Complaint handling	11. Is there a system in place to handle complaints?
Sanctions	12. In case of non-compliance, does the code of conduct provide for the possibility of imposing sanctions? 13. Does the code provide an enforcement mechanism?
Code, legislator and legislation	
Code - legislator	14. Has the European and/or the Dutch legislator influenced or been involved in drawing up and developing the code of conduct, i.e., what is/was the interaction between the legislator and the private actors?
Code - legislation	15. Is there a relation/interaction between the code of conduct and European and/or Dutch legislation and regulations and, if so, what is the nature of said relation?
Accessibility	16. Are explanatory notes provided, does the code contain provisions for review and amendment, is the code reviewed and revised on a regular basis and, if so, why, and can third parties easily access the code (e.g., for readability)?

The questions were answered on the basis of the text of the industry code of conduct concerned and, where available, written information on the code of conduct derived from publicly available secondary sources. Although suitable to reach the aim of identifying the possible functions, this method of textual analysis comes with a two-fold caveat: it can involve an element of interpretation and it does not allow for insight into the actual objectives and effectiveness of the industry codes of conduct studied. Accordingly, the functions that were assigned to an industry code on the basis of the empirical study might differ from the actual functions of this code.

Chapter 3 - The functions of European and Dutch industry codes of conduct

The functions of the selected European and Dutch industry codes of conduct were presented in Chapter 3. In identifying and assigning these functions, I drew on the answers to the questions included in the framework of analysis, whereby the functions of legislation and my own inventory of functions served as preliminary 'sources of inspiration'. This analysis resulted in a general overview of 15 different, yet interconnected functions, which can be assigned to both European and Dutch industry codes.

General overview of the functions

General overview functions	
1. Corporate governance function	9. Compliance function
2. Harmonization function	10. Safeguarding function
3. Framework function	11. Signaling function
4. Code of conduct as standard contract term	12. Image-building function
	13. Quality control function
5. Policy instrument function	14. Quality mark function
6. Alternative to public regulation	15. CSR function
7. Preventive function	
8. Complementary function	

Source: My own empirical study

I further categorized and detailed this general overview so as to reflect the interconnectedness of the functions and the role that 'perspective' proved to play in defining and assigning the functions.[1407] More specifically, by adding three umbrella functions - the regulatory function, the governance function and the signaling function - the following multi-layered overview was created:

[1407] I.e., the fact that the question about the functions of an industry code of conduct might be answered differently depending on whether we take the perspective of the private regulator (an organizational perspective) or that of the legislator (a governance perspective), particularly when the legislator has been involved with an industry code.

Multi-layered overview of the functions

Overview functions: pillars, layers and connections

1. Regulatory function

1.1. Corporate governance function
1.2. Harmonization function
1.3. Framework function
1.4. Code of conduct as standard contract term
1.5. Preventive function
- Complementary function
- Compliance function

1.6. Complementary function
1.7. Compliance function
1.8. Safeguarding function
- 'Consolidating' function (internal safeguarding function)
- Protective function (external safeguarding function)

2. Governance function

2.1. Policy instrument function
- Alternative to public regulation
- Complementary function
- Harmonization function
- Safeguarding function
  - 'Consolidating' function (internal safeguarding function)
  - Protective function (external safeguarding function)

3. Signaling function

3.1. Image-building function
3.2. Quality mark function

3.3. Quality control function*
3.4. CSR function*

** Although these functions are in effect situated at the interface of regulation and communication, I have placed them under the signaling function, as rules relating to quality control and CSR are often drawn up in response to societal pressure.*

A comparison between the functions resulting from the empirical study and the functions, objectives and motives of industry-level private regulation mentioned in the literature showed that, with the exception of the framework function, every function that I identified could be traced back in the literature. Conversely, however, not all functions listed in the literature studied came to the fore during the empirical study. Nonetheless, as these functions either did not pertain directly to the legal relevance of industry codes of conduct or could be subsumed under the functions that did follow on from the empirical study, I decided not to adapt my own overview of functions. Against this backdrop, I concluded that by putting together the different functions and highlighting the interconnectedness between them, my overview of

functions as presented in Chapter 3 is of a more comprehensive nature than those that can be found in the aforementioned literature.

Chapter 4 – Industry codes of conduct in European and Dutch legislative policies

In Chapter 4, the focus shifted to the approach of the European and Dutch legislators to industry codes of conduct in European and Dutch private law and the implications of these approaches for the legal relevance of such codes of conduct. In addressing these issues, a three-step-approach was adopted.

General legislative policies of the EU and the Netherlands

As a first step, the place of alternative regulatory instruments, including self-regulation and co-regulation,[1408] in the general legislative policies of the EU and the Netherlands was researched.

In EU legislative policy, the use of alternatives to legislation was given a kick-start at the beginning of the 2000s with the issuing of the White Paper on European Governance (2001) and the Better Regulation Action Plan (2002), and the conclusion of IIA 2003 between the Commission, the Parliament and the Council. Following the fundamental principles of proportionality and subsidiarity, enshrined in Article 5 TEU, these policy documents explicitly emphasized and promoted the use of alternative regulatory instruments, such as self-regulation and co-regulation. Additionally, the IIA 2003 introduced a general framework for the use of self-regulation and co-regulation. Under the succeeding Smart Regulation Strategy (2010) and the REFIT program (2012), however, the use of alternative regulatory instruments was pushed into the background, albeit that the Impact Assessment Guidelines continued to require consideration of the use of such instruments during policy-making processes. This relative 'dormancy' was broken in May 2015 with the adoption of the Better Regulation Package, which seems to bring these instruments back to the forefront of the EU Better Regulation Strategy. Yet, with the IIA 2016 - which has replaced the IIA 2003 that prominently featured self-regulation and co-regulation - remaining entirely silent upon the use of alternative to legislation, it remains to be seen whether and to what extent these alternatives will actually return to the forefront. At the same time, however, it should be noted that the initial stages of the Better Regulation Strategy, which vigorously aimed at the use of alternative regulatory instruments, do not seem to have resulted in a great deal of self-regulatory and co-regulatory initiatives. Thus, even though the use of alternatives to legislation constitutes one of the cornerstones of EU legislative policy, the ambivalent attitude towards such alternatives makes it difficult to predict what the future will hold for the use of self-regulation and co-regulation as regulatory alternatives in the European context.

A similar picture emerged as regards the place of self-regulation and co-regulation in Dutch legislative policy. Following the emphasis put on self-regulation in the reports of the Geelhoed Committee (1984) and the Legislative Projects Review Committee (1987),

[1408] In order to avoid conceptual mix-ups, I followed the terminology used in the European and Dutch policy documents studied, i.e., self-regulation and co-regulation, in sections 4.2, 4.3, 4.4 and 4.5.

respectively, the government report 'A view on legislation' (1990) assigned alternative regulatory instruments a central role within Dutch legislative policy. Government reports that followed 'A view on legislation' affirmed this role and continued along the lines set out by that report. Accordingly, both the Legislative Drafting Instructions and the Integrated Framework for Policy Analysis and Legislation require that the Dutch legislator investigates the possibility of using alternative regulatory instruments, including self-regulation and co-regulation, at several stages in the process of *ex ante* evaluation of legislative and policy initiatives. Nonetheless, there are only few cases in which the legislator explicitly and visibly considered the use of alternative policy options in this process.

Private law references to codes of conduct

By describing several examples of references to industry codes of conduct inside (i.e., references in legislation) and outside (i.e., references in policy documents or informal 'references' in practice, such as a call upon an industry sector to self-regulate) private law legislation, the second step was to investigate how the European and Dutch legislators have employed such codes of conduct in European and Dutch private law.

At the European level, we can first of all find references to industry codes of conduct in several private law directives, covering a diverse range of topics, such as unfair commercial practices, consumer rights, audiovisual media services, e-commerce and the protection of personal data. Some of these references merely entail a call upon the Commission and/or the Member States to encourage the use of European-wide and national codes of conduct aimed at contributing to the attainment of the goals and the implementation of the directive concerned. The European legislator has however also referred to industry codes in a more direct, explicit fashion, namely by marking non-compliance with a code of conduct as a misleading commercial practice (Unfair Commercial Practices Directive), by imposing pre-contractual information duties in respect of codes of conduct (Directive on Timeshare, Consumer Rights Directive, E-Commerce Directive, Services Directive), by establishing a regime for the formal approval of codes of conduct, which approval lends a certain legal status to these codes (EU framework on personal data protection) and by designating codes of conduct as a yardstick to substantiate the open-ended legal norm of a 'safe product' (Product Safety Directive). Secondly, the European legislator has actively initiated the development of industry codes of conduct 'outside' legislation, resulting in several cases in which such codes function as a policy instrument within the field of European private law.

The Dutch legislator, by contrast, has thus far introduced very few direct references to industry codes of conduct: the vast majority of references to such codes in Dutch private law legislation have their origins in European directives. Like its European counterpart, the Dutch legislator has however on several occasions employed industry codes of conduct as a policy instrument, leaving regulation of certain private law issues wholly or partially in the hands of the industry.

Criteria

As a third step, I discussed the criteria that the European and Dutch legislators have imposed on the use of alternative regulatory instruments. At the European level, these criteria have been brought together in a general framework, which was initially – that is to say until the entering into force of the IIA 2016 - to be found in the IIA 2003. Currently, the Principles for Better Self- and Co-regulation seem to constitute the new framework for the use of self-regulation and co-regulation within EU legislative policy. At the Dutch level, by contrast, such a general framework is lacking. Consequently, the conditions under which the Dutch legislator is allowed to seek recourse to self-regulatory or co-regulatory initiatives have to be inferred from different policy documents.

The European and Dutch criteria were found to bear close resemblance; at both levels, the use of self-regulation and co-regulation is subjected to more or less similar procedural and substantive requirements. Whereas the first type of requirements reflects principles of good governance (e.g., transparency, representativeness and accessibility), the latter type of requirements generally concerns compliance with European and national legislation and regulations. However, it remains shadowy as to whether and how compliance with these criteria is actually being monitored and assessed.

Thus, the three-step-approach adopted in Chapter 4 showed that the use of alternatives to legislation, including industry codes of conduct, is one of the cornerstones of both European and Dutch legislative policies. In European and Dutch private law, this has resulted in the employment of industry codes as a policy instrument as well as in several, predominantly European direct references to such codes in private law legislation. Both practices affect the legal relevance of industry codes of conduct in Dutch private law. The reliance of the European and Dutch legislators on such codes - either as an alternative for or as a complement to public regulation - leads them to assume legal relevance as a policy instrument. The direct (EU) legislative references, in turn, reflecting the impact of the European legislative approach on Dutch private law, also result in industry codes of conduct gaining a certain legal status or even legal binding force in Dutch private law, as I summarized above, under 'Private law references to codes of conduct'.

Chapter 5 – The approach of the Court of Justice of the European Union

In Chapter 5, I described how the CJEU has approached private regulation in its case law.[1409] Broadly speaking, European cases involving private regulation can be situated in two different settings: 1) the interpretation of European directives and regulations and 2) free movement and competition law. As my search for CJEU judgments involving private regulation yielded only two judgments situated in the first setting, the vast majority of confrontations between the CJEU and private regulation can be said to have thus far taken

[1409] As the case law of the CJEU has developed along the lines of several categories of private regulation, I decided to use the broader concept of 'private regulation', rather than the specific notion 'industry codes of conduct' in describing the Court's case law.

place in the free movement and competition law context. However, contrary to what this observation suggests, the application of the rules on free movement and competition to private regulatory arrangements is not an obvious matter. After all, the TFEU is traditionally perceived to rest on a strict public-private divide: free-movement law is addressed to the Member States, while competition law covers the conduct of private economic actors. Abiding strictly to this divide implies that private regulation obstructing free movement and anti-competitive hybrid regulatory schemes fall outside the scope of free movement law and competition law, respectively. In subjecting private regulation to free movement and competition law scrutiny, the CJEU thus had to find its way around these conceptual barriers. The analysis of the Court's case law in the field of free movement and competition showed that it proceeded as follows at this point.

Free movement law

In the fields of the free movement of workers, the freedom of establishment and the freedom to provide services, the CJEU has brought several types of private action, including restrictive and discriminatory private collective regulation (cf. industry codes of conduct), within the scope of free movement law by attributing horizontal effect to the Treaty provisions concerning these freedoms (i.e., Articles, 45, 49 and 56 TFEU). In doing so, the Court has taken a functional approach, looking beyond the formal legal status of the private actor (cf. the traditional public-private divide) to the restrictive or discriminatory nature of the contested private measure.

In the field of the free movement of goods, by contrast, the CJEU has adopted a far more formal stance. It has repeatedly rejected arguments pertaining to the horizontal applicability of the rules in this field (Articles 34 and 35 TFEU) with reference to the fact that these rules concern public measures, rather than private actions. Nonetheless, private regulatory measures do not always fall outside the scope of Articles 34 and 35 TFEU. Firstly, the CJEU has extensively interpreted the concept of the 'Member State' included in these provisions so as to encompass semi-private bodies that have strong links to the State. Once the influence of the State on a body can be considered 'considerable', the activities of the body fall within the scope of Articles 34 and 35 TFEU. Secondly, in *Fra.bo*, the CJEU went beyond the formal personal scope of Article 34 TFEU, albeit in a rather case-specific way. It held that Article 34 TFEU was applicable to the activities of a private law body, considering that this body *de facto* held the power to take regulatory decisions that restrict the free movement of goods in a State-like way. Thus, the formal approach of the CJEU in the field of goods does embody some functional elements.

Competition law

As a result of the CJEU's functional interpretation of the notion 'association of undertakings' included in Article 101(1) TFEU, industry-level private regulation restricting intra-Community competition can in principle be subjected to competition law scrutiny. However, the Court did not go as far as bringing all private regulatory activities within the scope of EU competition law: in certain instances, co-regulatory regimes and regimes involving a public

interest dimension can be excluded from this traditionally private scope. At this point, the formal elements of the CJEU's functional approach under competition law come to the fore.

In cases in which the private regulator itself is held accountable, these formal elements follow on from the Court's rulings in *Wouters* and related judgments. Here, the CJEU has held that a *professional* regulatory body that has ties with the State does **not** qualify as an 'association of undertakings' within the meaning of Article 101(1) TFEU when 1) it is composed of a majority of representatives from public authorities and 2) it is required by national legislation to observe public-interest criteria. If these criteria - which have their origins in the Court's *effet utile* doctrine - are met, the professional body is considered to act in the public interest and accordingly falls outside the 'private' reach of Article 101(1) TFEU. In a more or less similar vein, the CJEU in *Wouters* established that restrictive private regulatory measures can be justified when, in short, they pursue legitimate public interest objectives (*Wouters* test).

A similar observation applies when the State is called into account for public measures related to anti-competitive private activities. Following on from the *effet utile doctrine*, a State is - in brief - neither allowed to require or favor restrictive private conduct, or to reinforce the effects of such conduct, nor to deprive its legislation from its official character delegating regulatory authority to take decisions that affect the economic sphere. In establishing whether the first two scenarios ('require of favor' and 'reinforce') apply, it is relevant whether the private body in question can be considered an association of undertakings for the purposes of Article 101(1) TFEU. Here, the aforementioned composition requirement and the requirement of legal public interest criteria apply. As regards the delegation-scenario, whether the State has retained the power to supervise and control the private activities in last resort is relevant. When these public interest related criteria are met, the aforementioned scenarios do not materialize. Accordingly, the State does not incur competition law liability under the 'private' rules on competition.

In sum, through its predominantly functional approach, the CJEU has brought private regulation (including industry codes of conduct) within the realm of free movement law and competition law. The significance of this approach for the legal relevance of industry codes of conduct and other forms of private regulation lies in the fact that the CJEU has accordingly created a European legal framework for private regulation. Private regulators will have to ensure that their regulatory activities do not hamper free movement or restrict intra-Community competition, subject to sanctions under national private law. Furthermore, as others have argued in legal literature, the Court has subjected private regulatory schemes to certain good governance criteria. This has been held to result in the regulation of the use of private regulation: private regulators that meet these criteria can escape free movement and competition law liability. In Chapter 5, this meta-regulatory approach most visibly came to the fore in the competition law part of the chapter. In line with the argument advanced in legal literature at this point, this part showed that where co-regulatory regimes are concerned, private regulators (i.e., following *Wouters* and related judgments, at least professional bodies) and States (following the *effet utile* doctrine) can escape competition law liability when

certain procedural good governance requirements (i.e., the composition of the regulatory body, a legal obligation to observe public interest criteria and the presence of State supervision and control as a last resort) are met.

Chapter 6 – The approach of the Dutch civil courts

Chapter 6 focused on the ways in which the Dutch civil courts, that is to say district courts, courts of appeal and the Supreme Court, have dealt with industry codes of conduct. It proceeded on the basis of a case law analysis, which comprised both judgments mentioned in Dutch private law literature and judgments found through my own search for relevant case law.[1410]

Lower courts

The analysis of the lower courts' case law unveiled that Dutch district courts and appellate courts are generally willing to attribute legal relevance to industry codes of conduct when delivering their judgments, without being held back by the private, non-legal nature of such codes. To this end, the courts have used the following three 'judicial techniques': 1) using industry codes to substantiate open-ended legal standards, 2) transforming industry codes into existing private law concepts, and 3) referring to industry codes as a self-standing argument. There are also cases in which lower courts have refrained from taking account of the code of conduct relied upon by parties to the proceedings or assigned only limited relevance to this code. In some cases, this was self-evident, as the code in question was inapplicable. In other cases, however, this reticent stance appeared to center upon the private origins of the rule.

In taking account of industry codes, the lower courts proceed along the lines of what appears to be a more or less fixed approach, as followed on from the case law analysis: if the legal binding force of an industry code of conduct can be established or when there is consensus between the parties to the proceedings on the binding force or applicability of a code, the courts assign legal relevance to the code. From a procedural perspective, this approach is not particularly surprising, given that Article 149 of the Dutch Code of Civil Procedure obliges lower courts to establish facts and rights as given when not contested or insufficiently so. Conversely, however, in cases where there is no consensus between the parties about the binding force or applicability of the code, the exact approach of the courts remains unclear. Whereas in some judgments, codes were denied legal relevance with reference to either the lack of binding force or applicability of the code, or the private nature of the rules, they were assigned such relevance in others, in spite of the aforementioned lack of consensus.

Supreme Court

The Supreme Court, in turn, has also been faced with cases involving industry codes of conduct. In some cases, the Court could limit itself to endorsing the use of an industry code

[1410] The sample of case law thus gathered comprised 30 Supreme Court rulings, 43 court of appeal rulings and 112 district court decisions.

by the court of appeal. Other cases, however, did require the Court to rule upon the legal relevance of the industry code concerned. As regards the latter set of cases, it was observed that in all judgments, the Court did assign legal relevance to the private rules relied upon by the parties to the proceedings, notwithstanding the fact that industry codes do not qualify as law within the meaning of Article 79 RO. In fact, in *Trombose* and *Achmea/Rijnberg*, it dedicated more general considerations to the role and binding force of the private rules at issue. Nonetheless, the picture that emerges from the Court's case law at this point is one of ambiguity. Judgments in which industry codes were assigned considerable legal weight (*Van der Tuuk Adriani/Batelaan*, *Trombose*, *HBU/Groenendijk* and *Achmea/Rijnberg*) alternate with judgments in which the Supreme Court keeps the private rules at a distance and mitigates their legal weight, seemingly because of their private nature. This ambiguity is also reflected in the fact that the Court still appears to decide upon the legal relevance of industry codes on the basis of a case-by-case- approach.

A possible explanation for this ambiguity in the Court's case law concerning industry codes of conduct was found in the peculiar procedural context in which the Supreme Court has to maneuver. In this respect, I pointed at the limited number of cases involving such codes that reach the Supreme Court, at the fact that these cases tend to be the 'problematic' ones and at the procedural framework of Article 79 RO, which limits the degree of control that the Court can exert. Accordingly, establishing a fixed approach towards industry codes is more difficult for the Supreme Court than it is for the lower courts, which proceed in a different procedural environment. At the same time, however, I submitted that these procedural barriers do not derogate from the fact that, in its capacity of developer of the law, the Court can seize questions of law concerning industry codes of conduct as a possibility to rule on the legal relevance of such codes in general and express terms. The fact that the Supreme Court has thus far refrained from doing so and rather adopted a casuistic approach, has led to legal uncertainty as regards the legal relevance of industry codes in Dutch private law. For that reason, I expressly called upon the Supreme Court to clarify this issue in unequivocal and general terms.

In sum, the case law analysis conducted in Chapter 6 unveiled that - the private nature of the rules notwithstanding - lower courts as well as the Supreme Court have assigned legal relevance to industry codes of conduct as a viewpoint, as an argument or as a standard for assessment in establishing civil law liability or, more generally, in deciding private law disputes. Contrary to what existing case law analyses suggest, rather than the Supreme Courts, it are the lower courts that have taken the lead in this regard by adopting a 'consensus = legal application approach' - as opposed to the Supreme Court which still proceeds on the basis of a case-by-case approach. This approach of the Dutch lower courts has not been identified in any previous private law research on the topic.

However, as the lower court approach does not cover cases in which there is no consensus between parties to the proceedings on the binding force or applicability of an industry code, it remains unclear how the legal relevance of industry codes is to be determined in these cases. The lower court decisions at this point differ: in some cases the

code concerned was assigned legal relevance, while in other cases the private rules at issue were – with the advancement of different arguments - denied such relevance. I submitted that a lead might be found in this respect in the Supreme Court rulings in *Van der Tuuk Adriani/Batelaan* and *Trombose*. These rulings seem to suggest that the 'external' legal relevance of an industry code of conduct in relationships between the regulated actor applying the code and the other party to that relationship is implicit in the 'internal' consensus about the industry code between the private regulator and the regulated actor.

Chapter 7 - Conclusions

Central research question

The answer to the central research question on the legal relevance of industry codes of conduct in a multi-layered Dutch private law was that industry codes have legal relevance in Dutch private law as a regulatory instrument, as a policy instrument *and* as a viewpoint, as an argument or as a standard for assessment in civil case law, in establishing liability under civil law or, more generally, in deciding private law disputes. As such, industry codes of conduct constitute an important manifestation of the increasingly multi-layered nature of Dutch private law.

Although this conclusion is in itself not a new one, as private regulation is usually taken to have legal relevance in Dutch private law literature on the topic, it does shed new light on the Dutch private law debate. The developments described in this doctoral thesis not only show that industry codes of conduct bear greater legal relevance in Dutch private law than is assumed in the literature, but also make clear that such relevance is being shaped by European developments and lines in the case law of Dutch lower courts that have thus far remained underexposed or undiscussed in the Dutch private law debate.

The functions were eventually not considered in answering the central research question. As the analysis of the case law of the Dutch lower courts showed that industry codes are already assigned legal relevance on the basis of a more or less fixed approach, there was no need to use the functions as a yardstick for determining the legal relevance of these codes, as was initially envisaged by the research design set out in Chapter 1. They did, however, play a role in addressing the question about the need for regulation of industry codes (see Chapter 7, section 7.4)

Broader perspective: Three future developments

The answer to the research question revealed three related, fundamental developments within private law.

First of all, it underlines the unavoidability of the multi-layered nature of the European and Dutch private law legal orders. With industry codes of conduct playing a regulatory role in many different fields of private law, and the legislator and the judiciary at both the European and national level no longer keeping themselves aloof from private regulation, private rules are percolating through European and Dutch private law. The formation of private law (*privaatrechtelijke rechtsvorming*) in a multi-layered private law legal order to an

increasing extent also takes place through international, European and national forms of private regulation.

Secondly, the research findings of this doctoral thesis show that the development of private law is no longer the exclusive prerogative of the legislator and the judiciary: by now, industry codes of conduct also play their part in this respect. Considering the developments that are taking place in legal practice, I submitted it is all but unavoidable that the framework of legislation-adjudication, which still dominates thinking in Dutch private law, will have to give way to its exclusiveness at a certain point in time and that industry codes of conduct (and other forms of private regulation) will be given their own place as a source of law within that framework.

Thirdly, it was held that the growing regulatory and law-developing importance of industry codes of conduct will give rise to questions under substantive private law that have thus far not been raised in Dutch civil case law. This signifies a new role for the rules of substantive private law, which will retain their relevance in deciding upon these questions and in establishing the consequences of infringements of industry codes.

A need for regulation?

In the final part of Chapter 7, i.e., section 7.4, I stepped outside the ambit of the central research question and, in an explorative fashion, addressed the question on the need for regulation of industry codes of conduct in Dutch private law. Several Dutch scholars of private law have already addressed this issue, arguing that public law criteria should be formulated for determining the legal relevance and quality of private regulation. However, the findings of this doctoral thesis show that the CJEU and Dutch civil courts do not apply public law criteria when assigning legal relevance to industry codes of conduct and that the problems to which the public law criteria are an answer do not come to the fore in civil law cases, except for the issue of non-legal status.

For that I reason, I explored whether *alternative* avenues, that is to say, ways other than the imposition of public law criteria, are available to the legislator, the judiciary and the private parties themselves under Dutch private law to cope with the lack of clarity about the legal relevance of industry codes in cases where there is no consensus between the parties to the proceedings on the applicability of a code of conduct, and to meet possible problems concerning the quality of these codes. In doing so, I distinguished between three scenarios in which there can be a lack of consensus - all of which concerned the legal relevance of industry codes in external (legal) relationships between the regulated actor and the other (third) party - and ascertained for each 'alternative avenue' whether it could provide clarity in respect these scenarios. The exploration showed that the legislator, the judiciary and the private actors themselves have several means at their disposal to elucidate the ambiguities surrounding the legal relevance and quality of industry codes of conduct.

Considering what my exploration found, I argued that there is neither a need for public law criteria to determine the legal relevance and quality of industry codes of conduct, nor for further regulation of the use of these codes. Rather, at this point in time, preference should be given to a 'judicial growth model', meaning that it is up to the judiciary to clarify the legal

relevance of industry codes on the basis of substantive private law or procedural law. Within this model, the Supreme Court is to take on the leadership role. The Court will not only have to clarify its own approach to industry codes of conduct in a well-reasoned, explicit fashion, but, in its capacity as developer of the law, it will also have to indicate in general terms what room judges have to take account of industry codes of conduct (and other forms of private regulation).

Outlook

I concluded Chapter 7 with a call upon private law scholars to put the topic of private regulation more prominently on their research agendas. Empirical data on the effectiveness, the opportunities and risks, and the actual use of industry codes are much needed in order to address the theoretical and conceptual challenges that industry codes of conduct and other forms of private regulation pose to the very foundations of private law.

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Hof Arnhem-Leeuwarden 11 August 2015, ECLI:NL:GHARL:2015:5952
Hof Arnhem-Leeuwarden 12 April 2016, ECLI:NL:GHARL:2016:2876
Hof Arnhem-Leeuwarden 26 May 2016, ECLI:NL:GHARL:2015:3705

Hof 's-Gravenhage
Hof 's-Gravenhage 11 November 2008, ECLI:NL:GHSGR:2008:BG8142
Hof 's-Gravenhage 16 November 2010, ECLI:NL:GHSGR:2010:BO4175

Hof 's-Hertogenbosch
Hof 's-Hertogenbosch 21 September 2010, ECLI:NL:GHSHE:2010:BN9270
Hof 's-Hertogenbosch 1 May 2012, ECLI:NL:GHSHE:2012:BW4879
Hof 's-Hertogenbosch 29 May 2012, ECLI:NL:GHSHE:2012:BW7211
Hof 's-Hertogenbosch 4 September 2012, ECLI:NL:GHSHE:2012:BX9465
Hof 's-Hertogenbosch 18 September 2012, ECLI:NL:GHSHE:2012:BX7795
Hof 's-Hertogenbosch 19 March 2013, ECLI:NL:GHSHE:2013:BZ5106
Hof 's-Hertogenbosch 15 July 2014, ECLI:NL:GHSHE:2014:2143
Hof 's-Hertogenbosch 15 December 2015, ECLI:NL:GHSHE:2015:5258

Hof Leeuwarden
Hof Leeuwarden 26 June 2012, ECLI:NL:GHLEE:2012:BW9768

District court (*Rechtbank*)

Rechtbank Alkmaar
Rb. Alkmaar 6 May 2010, ECLI:NL:RBALK:2010:BN1637

Rechtbank Amsterdam
Rb. Amsterdam 28 August 1986, ECLI:NL:RBAMS:1986:AH1325, *KG* 1986, 404
Rb. Amsterdam 22 November 2006, ECLI:NL:RBAMS:2006:AZ3700
Rb. Amsterdam 13 December 2006, ECLI:NL:RBAMS:2006:AZ5732
Rb. Amsterdam 7 March 2012, ECLI:NL:RBAMS:2012:BV9330
Rb. Amsterdam 11 April 2013, ECLI:NL:RBAMS:2013:BZ7028
Rb. Amsterdam 18 July 2013, ECLI:NL:RBAMS:2013:5253
Rb. Amsterdam 4 December 2013, ECLI:NL:RBROT:2013:9884
Rb. Amsterdam 2 January 2014, ECLI:NL:RBAMS:2014:10
Rb. Amsterdam 8 January 2014, ECLI:NL:RBAMS:2014:9
Rb. Amsterdam 7 May 2014, ECLI:NL:RBAMS:2014:3455
Rb. Amsterdam 31 December 2014, ECLI:NL:RBAMS:2014:9091
Rb. Amsterdam 15 December 2015, ECLI:NL:RBAMS:2015:8976

Rechtbank Arnhem
Rb. Arnhem 17 May 2006, ECLI:NL:RBARN:2006:AY0882
Rb. Arnhem 26 March 2008, ECLI:NL:RBARN:2008:BC8904
Rb. Arnhem 16 February 2011, ECLI:NL:RBARN:2011:BP6166
Rb. Arnhem 11 April 2012, ECLI:NL:RBARN:2012:BW3674
Rb. Arnhem 12 September 2012, ECLI:NL:RBARN:2012:BX8182

Vzr. Rb. Arnhem 2 December 2012, ECLI:NL:RBARN:2012:BV5455

Rechtbank Assen
Rb. Assen 25 July 2007, ECLI:NL:RBASS:2007:BH6215
Rb. Assen 16 November 2011, ECLI:NL:RBASS:2011:BU6547

Rechtbank Breda
Rb. Breda 7 September 2011, ECLI:NL:RBBRE:2011:BT7273
Rb. Breda 7 March 2012, ECLI:NL:RBBRE:2012:BV8015

Rechtbank Dordrecht
Rb. Dordrecht 24 February 2010, ECLI:NL:RBDOR:2010:BL6070
Rb. Dordrecht 27 December 2012, ECLI:NL:RBDOR:2012:BY8127

Rechtbank Gelderland
Rb. Gelderland 3 September 2014, ECLI:NL:RBGEL:2014:5645
Rb. Gelderland 9 September 2014, ECLI:NL:RBGEL:2014:6306
Rb. Gelderland 10 June 2016, ECLI:NL:RBGEL:2015:5231

Rechtbank 's-Gravenhage/Den Haag
Vzr. Rb. 's-Gravenhage 24 July 2004, ECLI:NL:RBSGR:2004:AQ5353
Rb. 's-Gravenhage 10 July 2007, ECLI:NL:RBSGR:2007:BA9210
Rb. 's-Gravenhage 31 December 2008, ECLI:NL:RBSGR:2008:BG8465
Rb. 's-Gravenhage 6 March 2009, ECLI:NL:RBSGR:2009:BH8906
Rb. 's-Gravenhage 20 July 2010, ECLI:NL:RBSGR:2010:BN2040
Rb. 's-Gravenhage 20 July 2010, ECLI:NL:RBSGR:2011:BR0796
Rb. 's-Gravenhage 23 March 2011, ECLI:NL:RBSGR:2011:BP9631
Rb. 's-Gravenhage 22 September 2011, ECLI:NL:RBSGR:2011:BU3540
Rb. 's-Gravenhage 9 February 2012, ECLI:NL:RBSGR:2012:BV7111
Rb. 's-Gravenhage 1 March 2012, ECLI:NL:RBSGR:2012:BV9587
Rb. 's-Gravenhage 13 August 2012, ECLI:NL:RBSGR:2012:BX7262
Rb. Den Haag 24 July 2013, ECLI:NL:RBDHA:2013:9259
Rb. Den Haag 23 October 2013, ECLI:NL:RBDHA:2013:14241
Rb. Den Haag 5 March 2014, ECLI:NL:RBDHA:2014:3581
Rb. Den Haag 25 May 2016, ECLI:NL:RBDHA:2016:5695

Rechtbank Groningen
Rb. Groningen 4 May 2006, ECLI:NL:RBGRO:2007:BA7177

Rechtbank Haarlem
Vzr. Rb. Haarlem 16 July 2009, ECLI:NL:RBHAA:2009:BJ3060

Rechtbank 's-Hertogenbosch
Rb. 's-Hertogenbosch 18 August 2010, ECLI:NL:RBSHE:2010:BN4531
Rb. 's-Hertogenbosch 17 July 2012, ECLI:NL:RBSHE:2012:BX3136

Rechtbank Leeuwarden
Rb. Leeuwarden 4 December 2002, ECLI:NL:RBLEE:2002:AF2583
Rb. Leeuwarden 11 February 2009, ECLI:NL:RBLEE:2009:BH2709

Rechtbank Limburg
Rb. Limburg 26 February 2014, ECLI:NL:RBLIM:2014:2557
Rb. Limburg 10 September 2014, ECLI:NL:RBLIM:2014:7819
Rb. Limburg 3 September 2015, ECLI:NL:RBLIM:2015:7621

Rechtbank Maastricht
Rb. Maastricht 28 March 2011, ECLI:NL:RBMAA:2011:BP9762

Rechtbank Middelburg
Rb. Middelburg 29 September 2010, ECLI:NL:RBMID:2010:BO9418

Rechtbank Midden-Nederland
Vzr. Rb. Midden-Nederland 10 June 2013, ECLI:NL:RBMNE:2013:CA3500
Rb. Midden-Nederland 12 June 2013, ECLI:NL:RBMNE:2013:CA3498
Rb. Midden-Nederland 30 July 2014, ECLI:NL:RBMNE:2014:3030
Rb. Midden-Nederland 21 August 2014, ECLI:NL:RBMNE:2014:3653

Rechtbank Noord-Holland
Rb. Noord-Holland 5 March 2014, ECLI:NL:RBNHO:2014:1519
Rb. Noord-Holland 23 April 2014, ECLI:NL:RBNHO:2014:3627
Rb. Noord-Holland 26 June 2014, ECLI:NL:RBNHO:2014:5555
Rb. Noord-Holland 22 January 2015, ECLI:NL:RBNHO:2015:876
Rb. Noord-Holland 20 May 2015, ECLI:NL:RBNHO:2015:11544

Rechtbank Noord-Nederland
Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307
Rb. Noord-Nederland 26 November 2014, ECLI:NL:RBNNE:2014:6661
Rb. Noord-Nederland 4 March 2015, ECLI:NL:RBNNE:2015:1112
Rb. Noord-Nederland 2 September 2015, ECLI:NL:RBNNE:2015:4185

Rechtbank Oost-Brabant
Rb. Oost-Brabant 22 May 2014, ECLI:NL:RBOBR:2014:2701
Rb. Oost-Brabant 29 June 2016, ECLI:NL:RBOBR:2016:3383

Rechtbank Oost-Nederland
Rb. Oost-Nederland 21 March 2013, ECLI:NL:RBONE:2013:BZ5412

Rechtbank Overijssel
Rb. Overijssel 25 June 2014, ECLI:NL:RBOVE:2014:3607
Rb. Overijssel 13 November 2015, ECLI:NL:RBOVE:2015:5020

Rechtbank Roermond
Rb. Roermond 1 September 2004, *NJF* 2004, 578
Rb. Roermond 23 November 2011, ECLI:NL:RBROE:2011:BU5452
Rechtbank Rotterdam
Rb. Rotterdam 20 May 2005, ECLI:NL:RBROT:2005:AT8525
Rb. Rotterdam 6 January 2010, ECLI:NL:RBROT:2010:BK9798
Rb. Rotterdam 24 March 2010, ECLI:NL:RBROT:2010:BM2022
Rb. Rotterdam 31 March 2010, ECLI:NL:RBROT:2010:BM0821
Rb. Rotterdam 20 May 2010, ECLI:NL:RBROT:2010:BM5231
Rb. Rotterdam 3 November 2010, ECLI:NL:RBROT:2010:BO9900
Rb. Rotterdam 14 April 2011, ECLI:NL:RBROT:2011:BQ1281
Rb. Rotterdam 4 May 2011, ECLI:NL:RBROT:2011:BQ3835
Rb. Rotterdam 18 January 2012, ECLI:NL:RBROT:2012:BV1966
Rb. Rotterdam 15 February 2012, ECLI:NL:RBROT:2012:BV9671
Rb. Rotterdam 19 April 2012, ECLI:NL:RBROT:2012:BW3358 (*Celldorado*)
Rb. Rotterdam 24 October 2012, ECLI:NL:RBROT:2012:BY3650
Rb. Rotterdam 13 December 2012, ECLI:NL:RBROT:2012:BY6184
Rb. Rotterdam 25 April 2013, ECLI:NL:RBROT:2013:BZ8775
Rb. Rotterdam 28 May 2014, ECLI:NL:RBROT:2014:4578
Rb. Rotterdam 28 May 2014, ECLI:NL:RBROT:2014:6171
Rb. Rotterdam, 9 July 2014, ECLI:NL:RBROT:2014:5378
Rb. Rotterdam 17 September 2014, ECLI:NL:RBROT:2014:7637
Rb. Rotterdam 26 November 2015, ECLI:NL:RBROT:2015:8642
Rb. Rotterdam 11 April 2016, ECLI:NL:RBROT:2016:2802

Rechtbank Utrecht
Rb. Utrecht 10 January 2007, ECLI:NL:RBUTR:2007:AZ6197
Rb. Utrecht 16 July 2008, ECLI:NL:RBUTR:2008:BF8825
Rb. Utrecht 25 August 2010, ECLI:NL:RBUTR:2010:BO1767
Rb. Utrecht 17 November 2010, ECLI:NL:RBUTR:2010:BO5222
Rb. Utrecht 15 February 2012, ECLI:NL:RBUTR:2012:BW0548
Rb. Utrecht 29 February 2012, ECLI:NL:RBUTR:2012:BV8187
Rb. Utrecht 12 December 2012, ECLI:NL:RBUTR:2012:BY6869

Rechtbank Zeeland-West-Brabant
Rb. Zeeland-West-Brabant 14 January 2013, ECLI:NL:RBZWB:2013:BY983
Rb. Zeeland-West-Brabant 26 June 2013, ECL:NL:RBZWB:2013:7313
Rb. Zeeland-West-Brabant 26 February 2014, ECLI:NL:RBZWB:2014:313
Rb. Zeeland-West-Brabant 16 September 2014, ECLI:NL:RBZWB:2014:6382

Rechtbank Zutphen
Rb. Zutphen 9 May 2007, ECLI:NL:RBZUT:2007:BB1491
Rb. Zutphen 7 November 2007, ECLI:NL:RBZUT:2007:BB8032
Rb. Zutphen 14 July 2009, ECLI:NL:RBZUT:2009:BJ2559
Rb. Zutphen 8 October 2009, ECLI:NL:RBZUT:2009:BK4206
Rb. Zutphen 12 December 2012, ECLI:NL:RBZUT:2012:BY6138

Rechtbank Zwolle-Lelystad
Rb. Zwolle-Lelystad 19 August 2009, ECLI:NL:RBZLY:2009:BJ9081
Rb. Zwolle-Lelystad 4 May 2011, ECLI:NL:RBZLY:2011:BV6594
Rb. Zwolle-Lelystad 29 August 2012, ECLI:NL:RBZLY:2012:1648

Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*)

ABRvS 2 February 2011, ECLI:NL:RVS:2011:BP2750
ABRvS 25 May 2011, ECLI:NL:RVS:2011:BQ5921

Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*)

CBb 19 July 2013, ECLI:NL:CBB:2013:69
CBb 28 November 2013, ECLI:NL:CBB:2013:260
CBb 25 August 2015, ECLI:NL:CBB:2015:285

Annex 1 Overview of the European and Dutch industry codes of conduct studied

The empirical study was conducted between March 2012 and July 2012. All codes of conduct were in force at that time.

* = Code of conduct studied in the exploratory empirical study included in my Master's thesis (Menting 2011).
** = National code of conduct with a European equivalent.

Manufacturing

European codes of conduct (9)

1. Code of Conduct on Corporate Social Responsibility in the Sugar Industry *
2. UNESDA Code for the Labelling and Marketing of Energy Shots
3. Code of Labour Practices for the Apparel Industry Including Sportswear *
4. Code of Conduct European Co-Packers Association (ECPA) *
5. Code of Conduct for the Paper Industry
6. Code on the promotion of prescription-only medicines to, and interactions with, healthcare professionals (European Federation of Pharmaceutical Industries and Associations, EFPIA) *
7. Code of Ethics European Diagnostic Manufacturers Association (EDMA)
8. Code of Practice on HFCs Use in Aerosols
9. Code of Conduct European Committee of Manufacturers of Domestic Equipment (CECED)

Dutch codes of conduct (8)

10. Gedragscode Mededingingsrecht Federatie Nederlandse Levensmiddelen Industrie (FNLI)
11. Gedragscode 'Verantwoord gewicht' (Nederlandse Vereniging Frisdranken, Waters, Sappen, FWS)

12. Product Stewardship Gedragscode (Nederlandse Stichting voor Fytofarmacie, Nefyto)
13. A Code of Conduct for the natural stone sector
14. Gedragscode Farmaceutische Bedrijfstak
15. Gedragscode Diagnostica-Industrie Diagned
16. Gedragscode inzake het verwerken van persoonsgegevens farmaceutische industrie *
17. Gedragscode Nederlandse Vereniging MuziekinstrumentMakers (NVMM)

Wholesale and retail trade

European codes of conduct (5)

18. Code of Conduct in the relations with EU Institutions (European Ship Suppliers Organization, OCEAN)
19. European Direct Selling Code of Conduct towards Consumers (European Direct Selling Association, Seldia)
20. European Direct Selling Code of Conduct towards direct sellers, between direct sellers and between companies (Seldia)
21. Convention on Cross Border Distance Selling (European Multi-Channel and Online Trade Association, EMOTA) *
22. Code of Conduct European Federation of Parquet Importers (EFPI)

Dutch codes of conduct (3)

23. Gedragscode Erkend Leverancier FOCWA
24. Gedragscode Thuiswinkelwaarborg (Thuiswinkel.org) *
25. Gedragscode Consument en Energieleverancier (Energie-Nederland) *

Information and communication

European codes of conduct (3)

26. Pan-European Game Information (PEGI) Code of Conduct *
27. Code of Conduct for e-auctions (International confederation for printing and allied industries, Intergraf) *
28. Code of Professional Practice European Association of Directory Publishers (EADP)

Dutch codes of conduct (4)

29. Gedragscode SMS-Dienstverlening *
30. Gedragscode Abonnementen Nederlands Uitgeversverbond (NUV) *
31. Gedragscode Notice-And-Take-Down *
32. Gedragscode ICT~Office

Financial institutions

European codes of conduct (4)

33. European Code of Conduct for Clearing and Settlement *
34. A Code of Conduct for the European Investment Management Industry (European Fund and Asset Management Association, EFAMA) *
35. Common Principles for Bank Account Switching
36. Principles of Ethical Conduct European Federation of Financial Analyst Societies (EFFAS)

Dutch codes of conduct (14)

37. Principles of Fund Governance Dutch Fund and Asset Management Association (DUFAS) *
38. Code of Ethics Vereniging van Institutionele Beleggers in Vastgoed Nederland (IVBN)
39. Gedragscode verkoop (complexen) huurwoningen IVBN
40. Gedragscode consumptief krediet Nederlandse Vereniging van Banken (NVB) *
41. Gedragscode consumptief krediet Vereniging van Financieringsondernemingen in Nederland (VFN) *
42. Gedragscode Nederlandse Vereniging van Participatiemaatschappijen (NVP)
43. Gedragscode Goed Zorgverzekeraarschap
44. Gedragscode Verzekeraars *
45. Governance Principes Verzekeraars
46. Gedragscode Registermakelaar in Assurantiën
47. Gedragscode VBA (Vereniging van BeleggingsAnalisten) Beleggingsprofessionals */**[1411]
48. Gedragscode Nederlandse Vereniging van Financieringsadviseurs (NVF)
49. Adfiz Code of conduct on integrity and independent advice
50. Gedragscode Verwerking Persoonsgegevens Financiële Instellingen *

Consultancy, research and other specialized business services

European codes of conduct (9)

51. European Deontological Code for Providers of Architectural Services (Architects' Council of Europe, ACE)*
52. Code of Professional Conduct and Practice European Institute of Golf Course Architects (EIGCA)

[1411] European equivalent: EFFAS Principles of Ethical Conduct

53. Engineering Consultancy Code of Conduct (European Federation of Engineering Consultancy Associations, EFCA)
54. Code of Conduct for European Surveyors (Council of European Geodetic Surveyors – Geometer Europas, CLGE – GE)
55. IAB Europe EU Framework for Online Behavioural Advertising *
56. List Council Code of Practice (Federation of European Direct and Interactive Marketing, FEDMA)
57. Code of Ethics European Association of Communications Agencies (EACA)
58. European Veterinary Code of Conduct (Federation of Veterinarians of Europe, FVE) *
59. Code of Conduct European Public Affairs Consultancies Association (EPACA)

Dutch codes of conduct (11)

60. Gedragscode NLingenieurs **[1412]
61. Gedragsregels Bond van Nederlandse Architecten (BNA) **[1413]
62. Gedragsregels Nederlandse Vereniging voor Tuin- en Landschapsarchitectuur (NVTL)
63. Gedragscode streetmarketing Dutch Dialogue Marketing Association (DDMA) *
64. Gedragscode Geneesmiddelenreclame
65. Nederlandse Reclame Code *
66. Reclamecode Reisaanbiedingen *
67. Reclamecode Voor Voedingsmiddelen *
68. Gedragscode voor Onderzoek & Statistiek *
69. Code voor de Dierenarts (Koninklijke Nederlandse Maatschappij voor Diergeneeskunde, KNMvD)**[1414]
70. Erecode Vereniging Zelfstandige Vertalers (VZV)

Renting and leasing of tangible goods and other business support services

European codes of conduct (4)

71. Eurociett Code of Conduct
72. European Code of Ethics for Franchising (European Franchise Federation, EFF) *
73. Code of Ethics European Mentoring & Coaching Council (EMCC)
74. Code of Conduct Resort Development Organisation (RDO)

[1412] European equivalent: Engineering Consultancy Code of Conduct (EFCA)
[1413] European equivalent: European Deontological Code for Providers of Architectural Services
[1414] European equivalent: FVE European Veterinary Code of Conduct

Dutch codes of conduct (6)

75. Gedragsregels voor uitzendondernemingen (Algemene Bond Uitzendondernemingen, ABU)
76. Ethische Gedragscode Nederlandse Orde van Beroepscoaches (NOBCO)
77. Code Verantwoordelijk Marktgedrag Schoonmaal- en glazenwassersbranche
78. Gedragscode voor duurzame eindgebruikers (Facility Management Nederland, FMN)
79. Gedragscode CLC-VECTA Centrum voor Live Communication
80. Privacygedragscode sector particuliere onderzoeksbureaus (Vereniging van Particuliere Beveilingsorganisaties, VPB) *

Annex 2 Overview of the functions per industry code of conduct

This Annex includes an overview of the functions that were assigned to each of the 80 European and Dutch industry codes of conduct on the basis of the empirical study.[1415] The industry codes that were not found to have a specific function reflecting their regulatory nature were assigned the general 'regulatory function'. As indicated in Chapter 3, section 3.3.3.2, this overview is of a general nature: it does not reflect the pillars and layers of the final overview (included as Figure 3.5 in Chapter 3) because these details were added afterwards on the basis of the insights gained through the empirical study (cf. the interconnectedness of the functions and the role of perspective). Finally, it should be re-emphasized that the functions were assigned on the basis of my analysis and interpretation of both the text of the industry code of conduct concerned and the written information about this code following on from secondary sources (where available). Hence, it cannot be ruled out that in practice, an industry code of conduct has more or different functions than those following on from the empirical study.[1416]

Manufacturing

1. **Code of Conduct on Corporate Social Responsibility in the Sugar Industry**
   Version studied: 2003/2004

   - Harmonization function
   - Compliance function
   - Policy instrument function
   - Signaling function
   - Image-building function
   - CSR function

[1415] For each code, a paper copy of the version studied is on file with the author. These copies are available on request, as are the empirical data used to identify the functions, i.e., the answers to the questions included in the framework of analysis.
[1416] Cf. also Chapter 2, section 2.6.

2. **UNESDA Code for the Labelling and Marketing of Energy Shots**
   Version studied: May 2011

   - Harmonization function
   - Complementary function
   - Signaling function
   - Image-building function

3. **Code of Labour Practices for the Apparel Industry Including Sportswear**
   Version studied: as available on the Clean Clothes Campaign website in May 2012

   - Harmonization function
   - Code of conduct as standard contract term
   - Safeguarding function: Protective function
   - Signaling function
   - CSR function

4. **Code of Conduct European Co-Packers Association (ECPA)**
   Version studied: as available on the ECPA website in May 2012

   - Regulatory function
   - Signaling function
   - Quality control function

5. **Code of Conduct for the Paper Industry**
   Version studied: 2005

   - Framework function
   - Policy instrument function
   - Signaling function
   - Image-building function
   - CSR function

6. **Code on the promotion of prescription-only medicines to, and interactions with, healthcare professionals (European Federation of Pharmaceutical Industries and Associations, EFPIA)**
   Version studied: 2011

   - Harmonization function
   - Framework function
   - Compliance function

- Complementary function
- Policy instrument function
- Signaling function
- Image-building function
- Quality control function

7. **Code of Ethics European Diagnostic Manufacturers Association (EDMA)**
   Version studied: as available on the EDMA website in June 2012

   - Harmonization function
   - Framework function
   - Compliance function
   - Signaling function
   - Image-building function

8. **Code of Practice on HFCs Use in Aerosols**
   Version studied: 29 March 2011

   - Regulatory function
   - Signaling function
   - Image-building function
   - CSR function

9. **Code of Conduct European Committee of Manufacturers of Domestic Equipment (CECED)**
   Version studied: November 2005

   - Harmonization function
   - Compliance function
   - Signaling function
   - Image-building function
   - CSR function

10. **Gedragscode Mededingingsrecht Federatie Nederlandse Levensmiddelen Industrie (FNLI)**
    Version studied: July 2008

    - Compliance function
    - Complementary function

11. **Gedragscode 'Verantwoord gewicht' (Nederlandse Vereniging Frisdranken, Waters, Sappen, FWS)**
    Version studied: as available on the FWS website in June 2012

    - Complementary function
    - Policy instrument function
    - Signaling function
    - Image-building function

12. **Product Stewardship Gedragscode (Nederlandse Stichting voor Fytofarmacie, Nefyto)**
    Version studied: December 2011

    - Complementary function
    - Signaling function
    - Image-building function
    - CSR function

13. **A Code of Conduct for the natural stone sector**
    Version studied: November 2007

    - Harmonization function
    - Signaling function
    - Image-building function
    - Quality mark function
    - CSR function

14. **Gedragscode Farmaceutische Bedrijfstak**
    Version studied: November 2002

    - Compliance function
    - Signaling function
    - CSR function

15. **Gedragscode Diagnostica-Industrie Diagned**
    Version studied: 2003

    - Compliance function
    - Signaling function
    - CSR function

16. **Gedragscode inzake het verwerken van persoonsgegevens farmaceutische industrie**
    Version studied: 2009

    - Code of conduct as standard contract term
    - Complementary function
    - Compliance function
    - Safeguarding function: Protective function
    - Policy instrument function
    - Signaling function
    - Quality control function

17. **Gedragscode Nederlandse Vereniging MuziekinstrumentMakers (NVMM)**
    Version studied: as available on the NVMM website in June 2012

    - Regulatory function
    - Signaling function
    - Image-building function
    - Quality control function

Wholesale and retail trade

18. **Code of Conduct in the relations with EU Institutions (European Ship Suppliers Organization, OCEAN)**
    Version studied: 4 November 2011

    - Regulatory function
    - Signaling function

19. **European Direct Selling Code of Conduct towards Consumers (European Direct Selling Association, Seldia)**
    Version studied: 10 May 2011

    - Harmonization function
    - Framework function
    - Compliance function
    - Safeguarding function: Protective function
    - Signaling function
    - Image-building function

20. **European Direct Selling Code of Conduct towards direct sellers, between direct sellers and between companies (Seldia)**
    Version studied: 10 May 2011

    - Harmonization function
    - Framework function
    - Compliance function
    - Safeguarding function: Protective function
    - Signaling function
    - Image-building function

21. **Convention on Cross Border Distance Selling (European Multi-Channel and Online Trade Association, EMOTA)**
    Version studied: 2005

    - Framework function
    - Complementary function
    - Compliance function
    - Safeguarding function: Protective function
    - Signaling function
    - Image-building function
    - Quality mark function

22. **Code of Conduct European Federation of Parquet Importers (EFPI)**
    Version studied: 2009

    - Regulatory function
    - Signaling function
    - Image-building function
    - CSR function

23. **Gedragscode Erkend Leverancier FOCWA**
    Version studied: September 2006

    - Compliance function
    - Safeguarding function: 'Consolidating' function
    - Signaling function
    - Image-building function
    - CSR function

24. Gedragscode Thuiswinkelwaarborg (Thuiswinkel.org)
Version studied: 15 January 2009

- Complementary function
- Compliance function
- Safeguarding function; Protective function
- Signaling function
- Image-building function

25. Gedragscode Consument en Energieleverancier (Energie-Nederland)
Version studied: 15 August 2011

- Preventive function
- Complementary function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Image-building function

Information and communication

26. Pan-European Game Information (PEGI) Code of Conduct
Version studied: as available on the PEGI website in March 2012

- Complementary function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Image-building function
- Quality mark function

27. Code of Conduct for e-auctions (International confederation for printing and allied industries, Intergraf)
Version studied: March 2005

- Harmonization function
- Safeguarding function: 'Consolidating' function
- Signaling function
- Image-building function

28. Code of Professional Practice European Association of Directory Publishers (EADP)
Version studied: as available on the EADP website in March 2012

- Compliance function
- Signaling function
- Quality control function

29. Gedragscode SMS-Dienstverlening
Version studied: March 2012

- Code of conduct as standard contract term
- Complementary function
- Preventive function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Image-building function

30. Gedragscode Abonnementen Nederlands Uitgeversverbond (NUV)
Version studied: 1 April 2007

- Complementary function
- Safeguarding function: Protective function
- Signaling function
- Image-building function

31. Gedragscode Notice-And-Take-Down
Version studied: October 2008

- Complementary function
- Policy instrument function

32. Gedragscode ICT~Office
Version studied: as available on the ICT~Office website in March 2012

- Safeguarding function: 'Consolidating function'
- Signaling function
- Image-building function
- Quality control function

Financial institutions

33. European Code of Conduct for Clearing and Settlement
Version studied: 2006

- Harmonization function
- Preventive function
- Policy instrument function

34. A Code of Conduct for the European Investment Management Industry (European Fund and Asset Management Association, EFAMA)
Version studied: 12 January 2006

- Corporate governance function
- Framework function
- Preventive function
- Safeguarding function: Protective function
- Signaling function
- Image-building function

35. Common Principles for Bank Account Switching
Version studied: 2008

- Harmonization function
- Framework function
- Preventive function
- Safeguarding function: Protective function
- Policy instrument function

36. Principles of Ethical Conduct European Federation of Financial Analyst Societies (EFFAS)
Version studied: 2011

- Framework function
- Compliance function
- Signaling function
- Quality control function

37. Principles of Fund Governance Dutch Fund and Asset Management Association (DUFAS)
Version studied: 2008

- Corporate governance function
- Framework function
- Preventive function
- Complementary function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function

38. Code of Ethics Vereniging van Institutionele Beleggers in Vastgoed Nederland (IVBN)
Version studied: July 2008

- Framework function
- Compliance function
- Signaling function (internal and external)
- Image-building function
- Quality control function

39. Gedragscode verkoop (complexen) huurwoningen IVBN
Version studied: 2007

- Code of conduct as standard contract term
- Safeguarding function**:** Protective function
- Signaling function
- Image-building function

40. Gedragscode consumptief krediet Nederlandse Vereniging van Banken (NVB)
Version studied: 1 April 2012

- Complementary function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Image-building function

41. Gedragscode consumptief krediet Vereniging van Financieringsondernemingen in Nederland (VFN)

Version studied: 1 January 2012

- Complementary function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Image-building function

42. Gedragscode Nederlandse Vereniging van Participatiemaatschappijen (NVP)

Version studied: as available on the NVP website in May 2012

- Regulatory function
- Signaling function
- Image-building function

43. Gedragscode Goed Zorgverzekeraarschap

Version studied: as available on the *Zorgverzekeraars Nederland* website in May 2012

- Preventive function
- Complementary function
- Compliance function
- Safeguarding function: Protective function
- Signaling function
- Image-building function

44. Gedragscode Verzekeraars

Version studied: June 2011

- Framework function
- Preventive function
- Safeguarding function: Protective function
- Signaling function
- Image-building function

45. Governance Principes Verzekeraars

Version studied: 2010/2011

- Corporate governance function
- Complementary function

- Signaling function
- Image-building function

46. Gedragscode Registermakelaar in Assurantiën
Version studied: as available on the RMiA website in May 2012

- Regulatory function
- Signaling function
- Image-building function
- Quality control function

47. Gedragscode VBA (Vereniging van BeleggingsAnalisten) Beleggingsprofessionals
Version studied: 11 January 2012

- Compliance function
- Signaling function
- Image-building function
- Quality control function

48. Gedragscode Nederlandse Vereniging van Financieringsadviseurs (NVF)
Version studied: 2011

- Complementary function
- Compliance function
- Safeguarding function: Protective function
- Signaling function
- Image-building function

49. Adfiz Code of conduct on integrity and independent advice
Version studied: as available on the Adfiz website in May 2012

- Regulatory function
- Signaling function
- Image-building function

50. Gedragscode Verwerking Persoonsgegevens Financiële Instellingen
Version studied: May 2010

- Complementary function
- Compliance function
- Safeguarding function: Protective function

- Policy instrument function
- Signaling function
- Quality control function

Consultancy, research and other specialized business services

51. European Deontological Code for Providers of Architectural Services (Architects' Council of Europe, ACE)
Version studied: September 2009

- Framework function
- Compliance function
- Policy instrument function
- Signaling function

52. Code of Professional Conduct and Practice European Institute of Golf Course Architects (EIGCA)
Version studied: March 2010

- Regulatory function
- Signaling function
- Quality control function

53. Engineering Consultancy Code of Conduct (European Federation of Engineering Consultancy Associations, EFCA)
Version studied: 26 May 2011

- Harmonization function
- Framework function
- Policy instrument function
- Signaling function
- Image-building function
- Quality control function

54. Code of Conduct for European Surveyors (Council of European Geodetic Surveyors – Geometer Europas, CLGE – GE)
Version studied: 12 September 2009

- Framework function
- Compliance function

- Policy instrument function
- Signaling function
- Image-building function
- Quality control/safeguarding quality

55. IAB Europe EU Framework for Online Behavioural Advertising
Version studied: April 2011

- Preventive function
- Complementary function
- Safeguarding function: Consolidating function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Image-building function
- Quality mark function

56. List Council Code of Practice (Federation of European Direct and Interactive Marketing, FEDMA)
Version studied: as available on the FEDMA website in July 2012

- Regulatory function
- Signaling function

57. Code of Ethics European Association of Communications Agencies (EACA)
Version studied: as available on the EACA website in July 2012

- Regulatory function
- Signaling function
- CSR function

58. European Veterinary Code of Conduct (Federation of Veterinarians of Europe, FVE)
Version studied: as available on the FVE website in July 2012

- Harmonization function
- Framework function
- Policy instrument function
- Signaling function
- Image-building function

- Quality control function
- CSR function

59. Code of Conduct European Public Affairs Consultancies Association (EPACA)
Version studied: as available on the EPACA website in July 2012

- Preventive function
- Signaling function
- Image-building function
- Quality control function

60. Gedragscode NLingenieurs
Version studied: 24 June 2012

- Compliance function
- Signaling function
- Quality control function
- CSR function

61. Gedragsregels Bond van Nederlandse Architecten (BNA)
Version studied: as available on the BNA website in July 2012

- Regulatory function
- Signaling function
- Image-building function
- Quality

62. Gedragsregels Nederlandse Vereniging voor Tuin- en Landschapsarchitectuur (NVTL)
Version studied: as available on the NVTL website in July 2012

- Regulatory function
- Signaling function
- Quality control function
- Quality mark function

63. Gedragscode streetmarketing Dutch Dialogue Marketing Association (DDMA)
Version studied: as available on the DDMA website in July 2012

- Compliance function
- Safeguarding function: Protective function

- Signaling function
- Image-building function
- Quality control function

64. Gedragscode Geneesmiddelenreclame

Version studied: January 2012

- Preventive function
- Complementary function
- Policy instrument fuction
- Signaling function
- Image-building function

65. Nederlandse Reclame Code

Version studied: as available on the website of the *Nederlandse Reclame Code* in July 2012

- Harmonization function
- Compliance function
- Preventive function
- Complementary function
- Alternative to legislation (Policy instrument function)
- Safeguarding function: Protective function
- Signaling function
- Image-building function
- Quality control function

66. Reclamecode Reisaanbiedingen

Version studied: as available on the NRC website in July 2012

- Complementary function
- Alternative to legislation (Policy instrument function)
- Safeguarding function: Protective function
- Signaling function
- Image-building function

67. Reclamecode Voor Voedingsmiddelen

Version studied: as available on the NRC website in July 2012

- Preventive function
- Alternative to legislation (Policy instrument function)

- Safeguarding function: Protective function
- Signaling function

68. Gedragscode voor Onderzoek & Statistiek
Version studied: June 2010

- Complementary function
- Compliance function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Quality control function

69. Code voor de Dierenarts (Koninklijke Nederlandse Maatschappij voor Diergeneeskunde, KNMvD)
Version studied: 2010

- Compliance function
- Signaling function
- CSR function

70. Erecode Vereniging Zelfstandige Vertalers (VZV)
Version studied: as available on the VZV website in July 2012

- Regulatory function
- Signaling function
- Image-building function
- Quality control function

Renting and leasing of tangible goods and other business support services

71. Eurociett Code of Conduct
Version studied: as available on the Eurociett website in June 2012

- Harmonization function
- Framework function
- Compliance function
- Signaling function
- Image-building function
- Quality control function

72. European Code of Ethics for Franchising (European Franchise Federation, EFF)
Version studied: 5 December 2003

- Framework function
- Complementary function
- Compliance function
- Signaling function
- Image-building function

73. Code of Ethics European Mentoring & Coaching Council (EMCC)
Version studied: December 2008

- Compliance function
- Signaling function
- Quality control function

74. Code of Conduct Resort Development Organisation (RDO)
Version studied: January 2010

- Complementary function
- Compliance function
- Safeguarding function: Protective function
- Signaling function
- Image-building function

75. Gedragsregels voor uitzendondernemingen (Algemene Bond Uitzendondernemingen, ABU)
Version studied: June 2011

- Complementary function
- Compliance function
- Safeguarding function: Protective function
- Signaling function
- Quality control function
- CSR function

76. Ethische Gedragscode Nederlandse Orde van Beroepscoaches (NOBCO)
Version studied: as available on the NOBCO website in June 2012

- Safeguarding function: Protective function
- Signaling function

- Image-building function
- Quality control function

77. Code Verantwoordelijk Marktgedrag Schoonmaal- en glazenwassersbranche
Version studied: 25 May 2011

- Compliance function
- Safeguarding function: Protective function
- Signaling function
- Image-building function
- CSR function

78. Gedragscode voor duurzame eindgebruikers (Facility Management Nederland, FMN)
Version studied: 2011

- Regulatory function
- Signaling function

79. Gedragscode CLC-VECTA Centrum voor Live Communication
Version studied: as included in the CLC-VECTA bylaws (dated 29 August 2010)

- Regulatory function (internal)
- Signaling function (internal)

80. Privacygedragscode sector particuliere onderzoeksbureaus (Vereniging van Particuliere Beveilingsorganisaties, VPB)
Version studied: 2009

- Complementary function
- Compliance function
- Safeguarding function: Protective function
- Policy instrument function
- Signaling function
- Quality control function