Cross-border cooperation between national inspectorates

Conference paper to be presented at the International Conference on Enforcement in a Europe without Borders, February 23rd 2016, Amsterdam, The Netherlands.

2016

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nl EU 2016

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Introduction

The supply and demand of cross-border cooperation

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This edited volume examines how regulation, enforcement and compliance can be organized more effectively in the context of cross-border issues. More specifically, we discuss how the circle of regulation that currently governs cross-border issues can be effectively closed in order to improve levels of compliance across all member states. Without effective arrangements for inspection and enforcement, regulation is only partly delivered and will not produce the intended societal outcomes. Closing the circle would represent a crucial step, since inspection and enforcement to a large degree determine the outcomes of joint regulation. This, in turn, is essential for accomplishing the intended consequences of cross-border regulation.

The case for cross-border cooperation

There is a strong – if not self-evident – case for more cross-border cooperation in the field of inspection: there is a broad *demand* for more cross-border cooperation. National inspectorates face complex challenges that exceed the individual countries' jurisdiction. Goods travel across borders before they arrive in the places where they are used; transactions span countries; activities in one place have the potential to effect conditions to a significant degree in another; 'cyber-issues' exist beyond the jurisdiction of single countries, but nonetheless have tremendous implications for the safety and security of those very countries. Within the *single market* of the EU, all of this is a given; the market exceeds the borders of individual countries and has transformed the EU into a unitary regulatory space. This single space is begging for examination of how current regimes and arrangements for inspection and enforcement are matching up to the principles of joint regulation and standards in practice.

But there is more. The question of cross-border regimes and arrangements does not just apply to topics pertaining to the unified market: inspectorates face many other *cross-border issues* in which the single market is *not* a factor, where they would nonetheless benefit from cross-border cooperation of inspectorates. For example, a Youth Inspectorate or a Health Inspectorate might be investigating a clinic that has offices in The Netherlands and Spain, with patients/clients traveling between the two countries. Prison Inspectorates face similar cross-border quandaries when countries lease or share prison capacity, forcing institutions to work together on their inspection work. There are many issues concerning transnational cooperation outside the bounds of the unified EU market that call for cooperation by countries' inspectorates.

Furthermore, there can be *professional* arguments for working together across borders with inspectorates from other countries. Education Inspectorates in Europe face few cases of multinational schools, but nonetheless have an institutionalized tradition of exchanging professional standards and practices. Education Inspectorates cooperate not because the issues call for a joint approach, but because there are professional lessons to learn from each other's national practices and expertise. They share a joint professional interest, not a joint object of inspection or joint regulation. Inspectorates want to learn from their counterparts in other countries and organize cross-border programs for professional development.

Therefore, cross-border cooperation is a *solution* for a variety of possible issues and problems including, most clearly, joint regulation of the single market. In that case, member states are part of a joint regulatory space that requires arrangements in order to achieve the effective, comprehensive enforcement necessary for the market to succeed. However, there are other lighter issue-categories that can benefit from a more cooperative approach to inspection and compliance. Cooperation is not just limited to issues pertaining to the single market. Different issues warrant differing levels of *demand* for cooperation. It is important to take this *variety* into account when discussing cross-border cooperation of inspections. Cooperation can be a solution to a variety of problems, and different problems may ask for entirely different types, modes, and levels of cross-border cooperation.

A range of forms for cross-border cooperation

Just as *demand* for transnational cooperation may vary, so might its counterpart, *supply*. Cross-border cooperation can be achieved in a number of ways. One option could be to organize inspection agencies at the European level, e.g. in the form of European Inspection Agencies for particular sectors of the internal market. A single, shared inspection of this nature would have to work from local branches and deliver local outputs, but the operation's management and inspection protocol could be accomplished through a shared perspective and repertoire. Another option would be to organize shared protocols and standards for use by national inspectorates. Though this method wouldn't create *unified inspectorates*, it would still integrate and synchronize working methods and work practice across nations. A third option could involve organizing the interchange and interaction of methods and practices across different countries, while allowing for independent methods of practice, without any integration or synchronization across borders. In this scenario, inspectorates in separate countries have the option to make multilateral arrangements about accepting each other's protocols and judgments in more or less closely defined circumstances and cases. As such, individual inspectorates remain national entities that work according to national standards and protocols, but interactions between different national practices are organized, synchronized, and perhaps even codified. In this way, national practices still possess the potential for producing a comprehensive and cooperative international 'European' inspection-practice.

The options discussed above all possess great potential for producing comprehensive inspection practices that close the circle of regulation to increase societal outcomes. They are especially applicable to the single market, which represents the clearest instance of strong 'demand' for cooperative inspection practices. It isn't necessarily essential that the institutional form be unified in order to yield synchronized and comprehensive organizational practices of cross-border inspection; such cooperation may actually be better achieved via 'lighter' forms of cooperation that also achieve synchronized results. Cooperation is partly a matter of synchronized *structures* that organize multiple actors, but it is also a matter of *agency*; local practices, carried out by local people, according to local cultures, within local networks. There is barely evidence supporting the argument that supranational institutions will yield in terms of productive local solutions. Moreover, supranational institutions can be especially ineffective in instances where inspection fails to consider the necessity for direct contact with stakeholders, or lacks emphasis on the locality, place, local culture, and local intelligence.

Furthermore, there are a number of non-comprehensive options for cross-border cooperation by inspectorates that should be considered with equal weight. Many issues that are not related to the internal market could benefit from ad hoc 'issue-based' cooperation. The same goes for professional cooperation and learning from shared practices. These do not require entirely synchronized organizations, but function better when provided a certain foundation of shared means and processes to support cooperation. In domains of the Health and Education Inspectorates, these institutionalized practices for transnational 'ad hoc' and/or professional cooperation are already quite strong; there exists a tradition of transnational exchange built into the very institutional structures and platforms of these inspectorates. This represents a possible option for other domains to pursue, where inspectorates want to improve their basic infrastructure in order to attract and support future cooperation.

Outline of this volume: a critical reflection on cross-country cooperation

In this volume, we have collected a number of essays that reflect on a variety of perspectives on the supply and demand of cross-border cooperation of inspections. The essays critically reflect on the opportunities and obstacles that national inspectorates encounter in regulating cross-border issues; e.g. because of the increasing influence of EU regulation or the presence of different regulation routines and cultures across EU member states. In short, the essays explore some of the most important *problems* faced by inspection in cross-border settings, but also look into the possible *benefits* of a comprehensive transnational approach.

Florentin Blanc describes how, over time, more areas have become subject to European regulation. He argues that although joint regulation was already established, the circle of the regulatory system was never entirely closed with joint inspection regimes. This creates a gap in the single market that reduces regulatory effectiveness and causes high societal costs. Blanc analyses four regulatory areas that make up a significant part of European regulations and of regulatory enforcement: food safety, the safety of non-food products, occupational health and safety (OHS), and environmental protection. Then, he describes regulatory developments in these four fields and shows how these fields have moved in separate directions, at different paces, and have resulted in different outcomes. From this empirical analysis, he identifies possible institutional forms for further cooperation with the potential for achieving greater harmonization of inspections within the internal market. There is a more centralized, formalized, and also more top-down route towards formalized harmonization. But Blance also points at a more bottom-up and evolving process leading to a less formalized, but equally effective variety of harmonization with the potential to still achieve the intended societal outcomes of cooperation.

Esther Versluis and *Josine Polak* also look empirically at different areas of cross-border cooperation in inspections, but focus on the pragmatic consequences of joint regimes. Their main argument is that although it is possible to reach formal agreement on protocols, norms, and standards, inspection is essentially a *local* practice; it is carried out by local inspectors, according to local cultures, within long-grown local traditions, and with local levels of professionalization, technology, and effectiveness. Even if inspectors in different countries carry out the exact same protocol, the outcome of their inspection will probably be different because of the importance of local context. Instances of this are clearly visible when looking at the capacity exerted across borders to inspections of similar cases; Versluis & Polak show that when similar inspections are working under joint protocols, they are in fact doing very dissimilar things. Therefore, Versluis and Polak argue that in many fields, local context is too important to be defined away in highly standardized and formalized agreements for supra-country harmonization. Instead, they argue that a more viable strategy involves taking local context as a given and making it a starting point for designing cross-border cooperation arrangements. Moreover, they argue that a *culture of informality*, *mutual trust*, and *a sense of mutual dependency* are crucial drivers for successful and 'real' cross-border cooperation. These cannot be designed or implemented hierarchically, but Versluis and Polak single out interventions with the potential of achieving them from a grassroots perspective. One such example would be the establishment of a Commission to promote these cooperative processes

bottom-up. In order to achieve more cross-border cooperation it may be important not to press too hard for it, to provide more space for open debate about cooperation, and to keep the Commissions' profile in the discussion low and supportive.

Martijn Groenleer and *Fay Kartner* investigate why, when and how national inspectorates cooperate. They argue that cooperation is not prevalent across a broad set of issues, but is instead issue-specific and related to a unique set of problems. Decisions about cooperation should be made from an analysis of the nature and scope of any given problem, and the societal outcomes being pursued by solving it. The authors identify a range of arguments for making such a decision that can help policy-makers to define their own strategies for cooperation. Furthermore, Groenleer and Kartner argue that cooperation is a strategy that not only requires the right mindset, but also demands a particular skillset. Cooperation involves a range of professional dilemmas that need to be dealt with by highly skilled professionals, and that cannot be tackled solely through joint protocols, systems, or structures. Therefore, apart from institutional arrangements between inspections, cross-border cooperation for inspections also requires a joint effort for professionalization in order to function properly. Cross-country cooperation requires investment in joint institutional structures, but also in improved professional agency.

Ferdinand Mertens provides us with a close case study of professional development in the field of regulatory oversight in the Netherlands. He shows how the field has undergone considerable changes over past decades, in terms of professionalization, the level of political attention for inspections, and the appreciation of the work of inspections. On the professional side, a steep increase in political attention has resulted in an oversight system that is now more comprehensible and organized, with a high degree of professionalization and a strong sense of methodological rigor. Political attention fueled strong efforts for an improved, more systematic, and more professional field of inspections. However, expectations regarding the promise of regulatory oversight became inflated and reached unsustainable levels. A series of critical incidents flipped the appreciation of inspections. They became instead characterized as burdensome, as lacking economic and societal oversight, and as lacking proper levels of effectiveness and compliance. This flip in fortune draws attention to two lessons. First, expectations of the results promised by inspections should not be raised too high. Closing the circle of joint regulation with harmonized inspections will not prevent streams of critical incidents from occurring. Second, according to Mertens, there is a strong resulting argument for a more intense professional exchange between inspections of different countries.

A better-synchronized and systematic approach to professional development across all of the European countries – which can be achieved through more professional interaction – will more effectively tame inevitable future crises than joint institutional arrangements. Mertens argues that professional exchange should precede more institutionalized harmonization. Cross-border cooperation will not be capable of solving anything if it is not accompanied by a deep and thorough investment into the professional knowledge and practices of the various inspectorates.

The essay by *Haiko van der Voort* adds an extra dimension to the issue of cross-border cooperation. Van der Voort draws attention to the already widespread and further developing issue of co-regulation in many of our regulatory fields. According to Van der Voort, co-regulation, which he defines as the cooperation between public and private regulators, is a dynamic phenomenon. The aims and logic of public and private regulators will inevitably conflict and cause dynamic interaction. He explores these dynamics for two types of regulation: in instances of private parties executing oversight activities within a public regulatory framework, and in instances of public and private parties regulating and executing oversight side-by-side. These are accepted practises and oft-applied arrangements in many countries, but are more difficult to handle in a cross-border context. How should one country deal with a co-regulated regime in another country? How can national inspections relate to private oversight bodies that already work across borders, for multi-national organizations? Does a certificate issued under a co-regulation regime in one country automatically apply in another country as well? And who is responsible for making agreements with private regulators about transnational norms and standards? These are interesting questions that become increasingly pressing in a context of increasing cross-border inspection.

A vocabulary and grammar for the debate about cross-border cooperation

The essays show that there is practical and conceptual variety in national inspectorates that establish cross-border cooperation. The promise of cooperation comes with pitfalls, challenges, and dilemmas. None of the essays included provide an ultimate analysis or the definitive answer to obstacles faced by transnational cooperation. Rather, these essays reveal a diverse set of directions and arguments for considering cooperation. Assessed as a collection, these essays provide readers with a broad perspective on the *supply* and *demand* of cross-border cooperation. Comprehension offers a *vocabulary* and a *grammar* that will hopefully foster a more precise transnational debate about issues' specific conditions, and the potential means of cooperation to distinguish between them and address them.

1. Harmonizing enforcement in product markets and establishments safety at the European level – approaches, outcomes, lessons learned

Florentin Blanc, World Bank Group

Introduction

Regulations and enforcement

"Regulation" has many elements, and many discontents. Some complain about its burden, some lament its insufficient strength. What interests us here is not the *contents* of regulations of economic activities, but how they are "delivered" to the regulated entities and stakeholders, including through control and enforcement, to achieve compliance and public welfare
The expectation of protection by regulations underpins the trust in the food we eat, the products we buy, the air we breathe – and relies on an expectation of compliance. In practice, however, regulations can sometimes be ineffective, or counter-productive. Much attention has been given over the past two decades, within the "Better Regulation" agenda, to improving the *design* of regulations. As the OECD itself pointed out[1], "enforcement" broadly speaking[2] (all activities aimed at implementing regulations –also called "regulatory delivery"), and its components (in particular inspections) have seen far less research and improvement efforts. However, effective and adequate enforcement is indispensable to achieve regulatory goals, sustain the legitimacy of regulatory systems.

Inadequate enforcement can mean regulations remain "on paper", or impose more burden on economic operators (and citizens) than needed (potentially triggering resistance). To improve enforcement, several countries have launched initiatives over the past decade (*Vernieuwing Toezicht* in the Netherlands, *Hampton Review* and creation of the Better Regulation Delivery Office in the UK etc.), and the World Bank3 and OECD4 have developed guidance documents. For members of the European Union, however, many regulations are adopted at the European level, and economic operators operate and compete across national boundaries. This raises the question of *consistency* in enforcement of European regulations when it is done by national authorities (or local ones, but within a national framework). It also requires to consider the "delivery" side within the European "smart regulation" agenda. These questions are essential for businesses, citizens and consumers, and regulators. Indeed, the latter have to act in a context where national boundaries are increasingly irrelevant in the areas covered by the Single Market. Excessively different practices or outcomes between Member States may lead to gaps in effectiveness, unfair competition, and ultimately to a breakdown in trust and legitimacy.

1 *Best Practice Principles for Regulatory Enforcement and Inspections*, 2014, Foreword

2 In the narrow sense, "enforcement" refers only to measures taken when violations of regulations are identified.

3 *How to Reform Business Inspections*, 2011

4 Op.cit.

The significance of European regulations

Over time, areas subject to European regulations have increased considerably, and they are of considerable relevance to businesses, consumers and citizens. We will consider here four regulatory areas that make up a significant part of European regulations and of regulatory enforcement: food safety, safety of non-food products, occupational health and safety (OHS), and environmental protection. These have in common that they relate to immediate safety concerns, have a significant "technical" dimension, and are highly "visible" to economic operators and the general population[5].

The 1957 Treaty of Rome included both long-term goals and specific requirements, measures and steps. Among the former was the "essential objective" of "constant improvement of the living and working conditions"[6]. Among the latter, the (gradual) implementation of the "four freedoms" (of movement, for goods, persons, services and capital)[7]. The gradual transformation of the EEC into the EC and then EU saw a significant increase of powers delegated to the European levels on non-strictly-economic issues, related broadly to the "living and working conditions" goal.

Logically, the European institutions[8] long focused primarily on rules that were indispensable for the development of the "four freedoms", and the establishment of a "Common Market" and then "Single Market". Among these, the freedom of movement for *goods* clearly came first, and with it the development of regulations for product markets was at the forefront of European regulatory activity. Among these four freedoms, the "most highly developed" is undeniably the free movement of goods, and "around 75% of intra-EU trade is in goods"[9]. By contrast, freedom of movement of people, capital and services have faced more political resistance and hurdles, and are still to an extent incomplete.
The different pace and manner at which European regulation (and enforcement) developed in these four areas gives us the opportunity to consider how circum-

5 We do *not* cover here financial regulations, where enforcement structures and methods tend to be significantly different from those in technical fields. We *cover regulatory* spheres rather than economic sectors, as this corresponds to how regulators in Member States, and institutions at the European level, are mostly organized (cf. OECD 2014) – a given sector (e.g. automobiles) can be covered by several regulatory spheres (environment, product safety, OHS).

6 Preamble, point 3

7 Article 3, points a and c

8 Be it Commission, Council or Parliament

9 *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – More Product Safety and better Market surveillance in the Single Market for Products*, 2013, p. 2

stances and policy choices led to certain structures and outcomes, what the latest evolutions suggest and, most importantly, what cross-learning could help make enforcement more effective, efficient, transparent and conducive to growth.

Product markets regulation – food and non-food safety

Origins

The Rome Treaty's Article 3 foresaw "the elimination(...) of customs duties and of quantitative restrictions on the import and export of goods, *and of all other measures having equivalent effect*" (emphasis ours), as well as "the abolition (...) of obstacles to freedom of movement for persons, services and capital" and "the approximation of the laws of Member States to the extent required for the proper functioning of the common market". This made the EEC different from a simple customs union by ensuring the common market was not distorted by what would now be called "technical barriers to trade" in the WTO's vocabulary[10]. The Treaty also created a litigation mechanism, with a jurisprudence-making European Court of Justice (ECJ).

In the EEC's early years, there was relatively little done on food safety regulations. The focus was increasing food *production*, something the CAP (which entered into force in 1962) aimed at doing[11]. Regulations started with animanl health issues (first veterinary directive in 1964, poultry meat in 1971 , fresh meat in 1972 , and first mandatory inspections requirements in 1977). In parallel to these directives initiated by the Agriculture Directorate General (DG) of the Commission, environmental regulations set in 1976 the first Maximum Residue Levels (MRLs) for pesticides in food (EU 2007, p. 22).

Limited awareness of risks seems to explain this relatively slow development. Changes in food supply and risk perceptions drove regulatory changes, as seen in other contexts, with a "rising demand for easy-to-prepare, processed food, large-scale manufacturing" leading to expanding, increasingly complex supply chains (*ibid.*, p. 16). Regulations, however, remained sector-specific, not looking at food safety in a comprehensive way. Consumer issues were handled by a separate DG from agriculture. Rules tended to be highly prescriptive, mandating the exact characteristics a product had to comply with.

Turning points – towards a stronger European regulatory integration

Several important decisions in the 1970s paved the way for deeper changes: the 1974 *Dassonville* ECJ case, the adoption of a directive on food labels in 1979, the creation of the Rapid Alert System for Food and Feed (RASFF) in the same year – and the 1979 *Cassis de Dijon* ECJ decision. With *Dassonville*, the ECJ drew radical conclusions from the clause about "measures with equivalent effect" to quantitative restrictions – and severely curtailed the power of Member States to restrict free trade inside EEC borders. With the food labels directive, the EEC started using information regulations rather than standardization of contents and processes to facilitate trade. By setting up the RASFF[12], the Commission acknowledged the limit of regulations, and the need to respond to problems rapidly and effectively.

Arguably an even more important "turning point" was the ECJ's 120/78 case, nicknamed "*Cassis de Dijon*", after the product that was at issue in the dispute. The ruling enabled regulation (more broadly than *Dassonville*), but put requirements on its contents and effects that significantly shaped further European regulatory efforts in product markets. The ECJ found for the plaintiff and struck down the regulation (which prevented fruit liquors with less than 25% alcohol to be marketed in Germany), but it also clarified the parameters for *legitimate* regulation. These should be allowed to safeguard "mandatory requirements" such as "the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer" could justify restrictions to trade (Purnhagen 2014, p. 9).

The decision formulated two principles of European regulation: reliance on information rules whenever sufficient (*ibid.*, p. 12) and "principle of mutual recognition" which grants "the right to circulate a product, once lawfully marketed in one Member State[13]" throughout the European market (*ibid.*, p. 14) – and a benchmark of "confident consumer", that refuses to "take the ignorant consumer as a yardstick since such an approach would ultimately require the prescription of uniform products" (*ibid.*, p. 29-30). All these principles have enforcement

[10] And clearly the TBT and SPS Agreements owe much to the development of EEC law and jurisprudence over several decades.

[11] And succeeded at, notwithstanding the many problems the CAP also led to.

[12] The RASFF network was strengthened by the General Food Law in 2002. It includes EU, EFTA/EEA states and EC institutions, and enables the rapid exchange of information on all foodstuffs and animal feed, specifically when a national authority has identified a risk to human health and taken measures, such as withholding, recalling, seizure or rejection of the products concerned, ensuring coherent and simultaneous actions across the EU and protecting the safety of consumers. (EC 2007, p. 20)

[13] With limited exceptions possible to safeguard key public interests but always subject to proportionality.

effects: a more selective, risk-focused approach, risk-proportional regulatory instruments, and a certain level of "risk acceptance". These principles also mean that regulators have to actively promote consumer information.

The "New Approach"

In the late 1970s and early 1980s, complaints of Brussels bureaucrats wanting to standardize sausages or vegetables multiplied. Producers and consumers, scholars and policymakers, were dissatisfied with what came to be known as the "Old Approach" to product market regulation, which relied on "vertical", product-specific, content-oriented standards. This approach was seen as excessively rigid, but also to narrow to really integrate the market. In response, in 1985 was adopted Council Resolution 85/C 136/01 "on a new approach to technical harmonization and standards". "New Approach" came to designate the way in which the EC/EU has developed its product market regulations since then – a term normally used for non-food products, but an approach which also permeates food safety.

The first change was breadth: "general rules which are applicable to sectors or families of products[14] as well as types of hazard[15]". The second was that mutual recognition would apply to "the results of tests", and the decision to "establish harmonised rules on the operation of certification bodies" – thus clarifying the practicalities of mutual recognition, and moving towards harmonization of control[16].

The Resolution (in line with the *Cassis de Dijon* principles) established that "legislative harmonisation is limited to essential safety requirements (or other requirements in the general interest) with which products put on the market must conform", while compliance with harmonized standards gives a "presumption of conformity". The Resolution was also concerned with building trust in the system, and covered also *enforcement*: "the public authorities must ensure the protection of safety (or other requirements envisaged) on their territory. This is a necessary condition to establish mutual trust between Member States."

The "New Approach" is significant also by the emphasis it puts on the effectiveness of post-market control. Growth in market volumes and complexity, even before 1985, led to "an increasing realization that only pre-market measures (…) would not suffice and could not ensure European product safety" (Purnhagen 2014, p. 34) and that "post-market measures" could not be left to Member States to avoid a divergence in marketing of hazardous products, which would be contrary to the goal of the single-market integration (*ibid.*).

To address this, European efforts involved *enforcement* and *liability.* Steps were made to make "market surveillance" more uniform (to the extent possible) and effective, including through successive "general product safety" Directives (92/59/EEC then 2001/95/EC). These required Member States to effectively supervise the safety of products, and to this aim gave them specific powers including ordering the withdrawal of products from the market. A European system of notification and withdrawal of products was also put in place (RAPEX). A 1994 Communication by the Commission requested Member States to ensure "uniform enforcement". At the same time, stronger economic incentives were sought through operators' liability ("Product Liability Directive" 85/374/EEC).

While the "New Approach" *stricto sensu* applies only to non-food products, the same evolution was seen in food safety regulations. Several important "horizontal" directives were adopted (under the auspices of the Industry DG) in the 1980s and early 1990s (sampling and testing in 1985, "Official Control" in 1989, "Hygiene of Foodstuffs" in 1993) – while, at the same time, DG Agriculture continued to develop a number of "vertical" directives covering milk, eggs, fishery products, game etc. Some additional factors, however, led to a more complete transformation of the food safety sphere.

Food scares and increased integration in food safety

Over the 1980s and 1990s, a series of food safety crises "led to an increase in the demand for regulatory protection, at the same time as the European construction moved from the "Common Market" to the "Single Market".These crises included the beef hormone case (1980-85, EU 2007, p. 26), followed by outbreaks of botulism, salmonella and *E.coli* over the decade, (*ibid.*) - but the most significant by its regulatory impact was the Bovine Spongiform Encephalopathy (BSE) crisis. This crisis cast doubts on the science used as basis for regulations, on the credibility of the authorities and their reassurances, on the controls' effectiveness– and led to border closings, a significant breakdown of the European market integration process.

[14] Cf. Purnhagen (2014), p. 34: "the 'new approach' was the first systematic regulation to be applied to several product groups".

[15] This quote and subsequent ones from Council Resolution 85/C 136/01 accessible at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l21001a.

[16] The Resolution also set an early "better regulation" goal: "keep a constant check on the technical regulations which are applied so as to withdraw those which are deemed obsolete or superfluous" (a kind of "sunset clause", which has been inconsistently applied).

This coincided with the transformation process of the "Common Market" into a "Single Market" based on the 1986 Single European Act. By January 1993, physical border posts (including customs) were to disappear. Whereas food markets were to a significant extent segmented until December 1992, they made one from January 1993.
No additional requirement could be imposed (except in emergency circumstances, such as the BSE crisis) on shipments from one Member State to another. Until 1992, for instance, veterinary controls in England were applied specifically to meat for exports, while controls for the internal market were looser (and veterinarians played a minor role). From 1993, there was only a single, unified European market – and thus new procedures (and bodies) had to be introduced for England to guarantee the same level of inspections as other Member States.

A single market required making consumers confident that (at least) the same level of safety would be ensured. in order to provide appropriate *trust* for the market to function. Efforts at harmonization pre-1993 had created no permanent structure, except (in a limited way) for veterinary control (and even then, its resources were limited). While the European market was now as integrated as the US market, and European food safety legislation to a large extent harmonized (possibly more than in the US)[17], there was no equivalent to the Food and Drugs Administration (FDA) and Food Safety Inspection Service (FSIS). While the US model sees these agencies (responsible for food entering interstate commerce) coexist with state-level (or county-level) ones (for food remaining in the local market), the EC/EU situation was and is different. The single market does not distinguish between interstate and other commerce (more integration), but the principle of subsidiarity[18] means implementation should as much as possible be done at the Member State level or lower (less integration).

The BSE crisis led to the creation of a new institutional framework[19]. First "in 1997, the Food and Veterinary Office was established as a successor of the former "veterinary inspection unit" to carry out inspections to ensure "compliance with EU food safety and animal health rules" (EU 2007 p. 33). Then, in 1999, all food units of the EC merged to form a part of the Directorate-General for Health and Consumer Protection, separating food safety from agricultural production (*ibid.*). With the Food and Veterinary Office (FVO) reporting to this new DG ("SanCo"), the EU now had a new, and original, institutional setup. One "quasi-regulatory" institution with a mandate covering all the food chain– and an implementation body, not inspecting food business operators, but supervising the way Member States' "competent authorities" do so. In 2002 was adopted Regulation (EC) 178/2002 called "General Food Law" which "introduced the "farm to fork" approach (…) and the necessity for food to be traceable right back to its original source" and also "provided for the creation of the European Food Safety Authority" (EFSA) (EU 2007, p. 38), in charge of scientific risk assessment .

[17] While Member States have retained (at least in some cases) some additional requirements (which, as per ECJ jurisprudence, end up in many cases applying only to their own businesses), EU food safety law covers *all aspects of food safety*, and *all types of products* – which is a significantly higher level of integration than the US case.

[18] As well as strong objective factors such as the difficulty of creating control bodies that would have to function in all EU languages, and of achieving acceptance by the public for controls performed directly by "Brussels". Both obstacles are daunting enough, even were subsidiarity to be weakened.

[19] And, eventually, to the strict liability regime being "widened to apply to agricultural and fishery products" (Purnhagen 2014, p. 37)

The EU food safety regulatory system today – a high level of harmonization in enforcement

The core of the EU food safety system is a set of regulations adopted in 2004, known collectively as the "Hygiene Package", and regularly updated. The "Hygiene Package" replaces previous "vertical" legislation, and embodies the principles affirmed in the 2002 Food Law, and is complemented by a number of "horizontal" directives and regulations, the most important for enforcement being Regulation 882/2004/EU on Official Food and Feed Control.

These regulations incorporate key principles such as traceability of products and full liability of "Food Business Operators" (FBOs). They internalize the impossibility of "zero risk" –foreseeing the conditions in which a recall is mandated, and the ways in which it should be performed (and incentivize FBOs to proactively initiate a recall if they detect a problem). Crucially, they require of FBOs not only to comply with hygienic requirements or MRLs, but also to implement permanent self-control systems, to ensure that food is constantly safe at every stage –based on the Hazard Analysis and Critical Control Points (HACCP) approach. The "package" also formulates *risk* as an organizing principle – the basis to select regulatory instruments have to be chosen, allocate regulatory resources, and decide *enforcement responses*. This applies also to the pre-operation stage – only FBOs producing/ processing food of animal origin are subject to mandatory prior approval, others can start operating after a simple registration (notification).

Regulation 882/2004/EU on official controls defines *risk* as the fundamental criterion to organize food safety controls. It governs how national inspection bodies should work – so as to provide *confidence* that official controls are *equivalent* all over the EU's territory. It covers inspections

and enforcement in detail, risk assessment, planning, quality control, staffing levels and training, funding level and sources, methods and tools – in ways rarely found in national legislation. Point 13 of its preamble prescribes that "the frequency of official controls should be regular and proportionate to the risk, taking into account the results of the checks carried out by (…) operators under HACCP based control programmes". The Regulation mandates the use of *risk-based planning*, specifically through "multi-annual national control plans" to "identify risk-based priorities and the most effective control procedures" (Preamble, point 34). In Article 1 the aims of official controls are defined as "preventing (…) or reducing to acceptable levels risks to humans and animals" and "guaranteeing fair practices in (…) trade and protecting consumer interests" – thus, it keeps the duality of purpose (safety, and market rules), but puts risk prevention first. In Article 3, the Regulation defines the risk factors to be taken into account: "identified risks associated" with specifics of the product or operation (inherent risk), "operators' past record as regards compliance", the "reliability" of internal controls and external information "that might indicate non-compliance". Article 54 further directs that "when deciding which action to take [in case of non-compliance], the competent authority shall take account of the nature of the non-compliance and that operator's past record with regard to non-compliance" – and Article 55 also prescribes that sanctions should be "proportionate".

Thus, the Regulation seeks to ensure as much uniformity of food safety controls all over the EU, and to ground this on risk proportionality[20]. It mandates coordination at all levels, across Member States. It also regulates the capacity and functions of reference laboratories. In order to ensure that these requirements are complied with, the Regulation foresees a system of "control of the controllers". In this two-tier system[21], the Commission controls Member States' Competent Authorities. Member States also submit annual reports to the Commission. Most importantly, the FVO exercises the powers granted by the Regulation to "carry out general and specific audits in Member States" according to an annual control programme.

The system makes the FVO very powerful, through its audits of Member States, and its work on assessing candidate countries' readiness (and advising on reforms necessary for EU accession). To the extent that evidence is available, the overall performance of the system appears high – and it has supported a far greater integration of the EU market, and increase in trade volumes. Success on consumer trust and confidence is not perfect, but real, particularly considering the situation was in the 1990s. New Member States have been "brought up" from (in some cases) very problematic situations up to levels of food safety that are generally in line with the older EU Members – as evidenced by FVO audits and EFSA monitoring.

There are, however, limitations that prevent us from drawing too strong conclusions. First, there is insufficient epidemiological data to assess if the system performs better than (for instance) the US's – and in any case, there are serious attribution issues. It is unclear how strong is the link between food safety data, and improved (or assumed to be improved) controls. Second, while the inspection regime foreseen by EU Regulation 882/2004 is strongly *risk based, risk focused* (but not fully) and (to a large extent) *risk proportional*, it fails to incorporate a really comprehensive approach to *compliance.* Throughout the directive, compliance is seen through a *deterrence* angle (requirements to have dissuasive sanctions: Preamble point 41, article 55). The FVO harmonization efforts are conducted from this perspective: ensuring inspections are well targeted, and competent – but not that serious efforts are made to support FBOs to understand and comply.

Weaker integration – and recent efforts to strengthen "implementation" – in non-food products

While the early development of European regulations for food and non-food products were linked, they have taken different trajectories from the 1990s and the institutional and regulatory changes adopted in response to major "food scares" such as BSE. The framework for non-food product markets includes a General Product Safety Directive (since 1992, 2001/95/EC being current), there are also "New Approach" Directives covering specific types of products (from toys to electrical equipment) – as well as a few "Old Approach" Directives still applicable (mostly to "niche" issues). In addition, there are a number of product types that are *not* harmonized and circulate based on mutual recognition (some of them quite significant, e.g. motor vehicles). Most Directives also include a section on market surveillance, some of them quite specific (e.g. on medical devices). In addition, the variety of technical fields means that many Member States have several market surveillance authorities for different products, even though there is a trend towards consolidation. The fragmentation of the regulatory framework has made it more difficult to have a consistent enforcement approach, and European institutions have attempted to address this problem in several ways.

[20] There are exceptions to this risk-based approach, e.g. the mandatory 100% control of animals at slaughter, which dates back to much earlier phases of regulatory development, and was strengthened by the BSE crisis.

[21] Or three-tier, when national Competent Authorities themselves supervise local authorities which conduct the actual controls.

In 1990, PROSAFE (Product Safety Forum of Europe) held its first meeting. It was established by market surveillance officers and institutions from the EC/EU (and EEA). Though not affiliated with the Commission, the latter is represented at PROSAFE meetings, funds its "Joint Actions", including the development of "best practice" guidance. This work has led (under EC-funded EMARS projects) to a book called *Best Practice Techniques in Market Surveillance* - subsequently revised with an updated risk-assessment chapter. The latter reflects the RAPEX guidelines adopted by Commission Decision 2010/15/EU and includes a detailed section on risk assessment (with a web-based tool: http://ec.europa.eu/consumers/consumer-safety/rag/public/).

While having no legal strength , the PROSAFE/EMARS guidance is clear, unified and specific – and it draws on the binding RAPEX guidelines. Still, it is a far "softer" instrument than what exists for food, where FVO guidelines are binding for competent authorities. European institutions have, for years, been concerned about significant implementation gaps regarding non-food product safety legislation (in particular after the latest rounds of EU enlargement), resulting in (perceived or real) increased risks for consumers. The first response was the adoption of Regulation 765/2008 on accreditation and market surveillance, which aimed at establishing "a broad-based, legislative framework of a horizontal nature to deal with" all types of products[22], aiming at a "high level of safety". This new Regulation emphasized the importance for risk assessment to "take all relevant data into account" as well as "measures (…) taken by the economic operators" to alleviate risks (Preamble, point 29), to allow for the "destruction of products" if necessary (point 35), to have "effective, proportionate and dissuasive" penalties and increase them for repeat offenders (point 41), and to allocate Community financing for the Regulation's implementation (point 42). Several articles have direct bearing on enforcement structures and practices. Article 18 requires Member States to allocate adequate powers and resources to market surveillance bodies, to ensure they follow the proportionality principle, and they conduct periodic assessments and submit findings to the Commission. Article 19 mandates that they "shall perform appropriate checks on the characteristics of products on an adequate scale", based on "established principles of risk assessment, complaints and other information". Article 20 foresees powers to conduct recalls and other measures in cases of serious risk, and article 23 the creation of a general information support system. What the Regulation does *not,* however, foresee is a European institution for market surveillance (contrary to what is included in the same Regulation for accreditation).

[22] *Preamble*, point 4

The Commission conducted a subsequent review of the implementation of Regulation 765/2008, summarized in a report that became part of the proposed new "Product Safety and Market Surveillance Package" submitted in 2013. This report pointed out a number of shortcomings, e.g. in communication and coordination mechanisms, in procedures to monitor accidents and harm to health, leading to insufficient data for risk assessment (p. 7). It reported on the successful introduction of the new ICSMS information management system, now expanded from a few Member States to all of the EU (ICSMS allows for a comprehensive exchange of information between all market surveillance authorities of the EU, and contains all information on every product that was checked by any authority – part of it is accessible to the public). These were important achievements, but not sufficient given remaining implementation gaps. As a result, in order to introduce more coherence in product market regulations, the Commission proposed the aforementioned new 2013 "Package" (still under consideration).

In the *Communication*[23] that is part of this "Package", the need for new regulations aims at "lowering compliance costs", "reducing the administrative burden" (for authorities) "and eliminating unfair competition" – making products safer, and confidence higher (p. 3). The Commission sees the need for simplified "rules and procedures", as well as "better IT tools", stronger "external controls at the Union borders" and "harsher penalties for infringements" (*ibid.*). It notes that "enforcement needs to be stepped up" because "people still suffer harm and harmful products still pollute the environment" (p. 4) – a paragraph that is doubtly problematic. First, because it is impossible to avoid *all harm*. Second, because the links between enforcement measures and safety are indirect, and even problematic (in other words: more inspections and stricter enforcement do *not* guarantee higher compliance and improved safety[24]).

In order to increase market surveillance effectiveness, the new Regulation would apply to "harmonised and non harmonised products" (p. 5). It also "would strengthen controls at external borders" through powers to suspend "release for free circulation" in case of risk, would give market surveillance authorities "the power to charge economic operators fees where they require corrective action to be taken" – and would also strengthen the role of the unified database (ICSMS) (p. 6). It would also give the Commission more powers in case of significant risk – and foresees "enhanced cooperation between customs and market surveillance authorities" at the borders (p. 8),

[23] COM(2013) 74

[24] See Blanc 2012, Blanc et al. 2015, OECD 2014 and 2015, Tyler 2003, Hodges 2015.

greater coordination between different market surveillance authorities, common risk assessment practices, and a "multi-annual market surveillance plan" (p. 7). On the *institutional* side, however, the proposal limits itself to a "European Market Surveillance Forum" (EMSF) that would lead development of "best practices" (*ibid.*). A detailed review of the draft Regulation[25] shows that while it puts obligations on Member States (article 4: market surveillance to be "carried out in accordance with this Regulation", "report on these activities and controls to the Commission every year") and on market surveillance authorities (Article 6: "appropriate checks (...) on an adequate scale and with adequate frequency"), implementation mechanisms are decidedly weaker than for food products. It foresees that "the Commission may adopt implementing acts to establish uniform conditions" for market surveillance checks of given products and emerging risks, and that "these may (...) a temporary increase of the scale and frequency of checks" but the lack of a body empowered to exercise this role appears problematic.

Overall, the draft Regulation would harmonize and reinforce procedures relating to "products presenting a risk" (article 9), allow to charge fees when "measures" are taken (article 10), allow for "Union assessment" for products subject to harmonisation legislation (article 11), and action at the Union level in case of serious risk (article 12), extending similar strengthened powers to border controls (articles 14-16) etc. The draft also strengthens RAPEX (articles 19-20) and the ICSMS (article 21). In terms of implementation bodies, however, it is far more limited. It extends the EU "reference laboratories" approach, crucial in food safety, to non-food products (article 28), and allocates financing for "technical or scientific expertise" to the Commission (article 29), and sets up the EMSF and Commission support to it (articles 25-27). While the EMSF would "facilitate" exchange of information and "coordinate" market-surveillance programmes, as well as "provide advice and assist the Commission", it is not vested with as much power as the FVO, and the draft Regulation is less far reaching than Regulation 882/2004 for food.

Recent and proposed aim at more consistency in non-food products surveillance, in more risk-based and proportionate way, , it is not clear whether they will, indeed, be fully effective[26]. First, because the 2013 "Package" is still to be adopted. Second, because the instruments foreseen to ensure harmonization and coherence may not be sufficient, in particular because institutions are clearly weaker than on the food safety side. Third, while the "Package" mentions the need to make regulations clearer and actively support compliance, alongside its focus on deterrence, it fails to articulate a fully coherent vision of the links between regulation, compliance and safety – i.e. the integration of the different "drivers of compliance" (and of the safety drivers, which may be different) is insufficient.

Occupation Health and Safety and Environmental Protection

Environmental issues were not listed among areas of Community competence in the Rome Treaty, and Occupational Health and Safety (OHS) had only a marginal place. Until the early 1970s there was essentially no European action on these issues. Justification for European action was less direct than for product markets regulations, which were essential for the 'four freedoms'.

A first source was the Treaty's Preamble objective of "constant improvement" of living and working conditions. The Treaty's chapter on free movement of persons (incl. workers, articles 48-51) focused on abolishing discriminations, ensuring access to benefits and pensions. Foundations for OHS were in Title III (Social Policy), articles 117 ("need to promote improved working conditions and an improved standard of living for workers" including through approximation of provisions laid down by law, regulation"[27]) and 118 ("promoting close co-operation between Member States (...) relating to: (...) - labour law and working conditions (...) - prevention of occupational accident, and diseases; - occupational hygiene"[28]). In addition, articles 100 and 101 on approximation of laws allowed to "issue directives for the approximation of such provisions (...) as directly affect the establishment or functioning of the common market"[29] – in cases where differences are " distorting the conditions of competition"[30]. In short, OHS was mentioned, but not prominent – and environmental issues were absent (unsurprisingly for 1957) but could potentially "come in" under the Preamble's goals and articles 100 and 101.

European action in both fields started in the 1970s, with important similarities in methods and instruments in spite of the obvious specificities of each field.

[25] 2013/0048 (COD)

[26] It is important to note that the European institutions are *simultaneously* working on reducing the scope of non-harmonised regulatory areas, and to bring harmonisation to more products, as this makes it easier to ensure consistency (and to try and drive higher effectiveness). One of the most notable developments in this area has been the Construction Products Regulation 305/2011.

[27] Now article 151 TFEU

[28] Now article 153 TFEU

[29] Article 100, now article 115 TFEU

[30] Article 101, now article 116 TFEU

Occupational Safety and Health

Before 1974, the focus was on harmonizing workers compensation and "mapping" and researching OHS problems[31]. These appeared acute enough[32] to warrant a stronger response, first sketched out as part of the 1974 Social Action Programme. An Advisory Committee to the Commission was created including representatives from governments, trade unions and employer associations, meant to provide direct, specific advice on OHS issues. In 1975 was created the European Foundation for the Improvement of Living and Working Conditions, the "Eurofound", with a remit of policy research and recommendations in the social field. Regulation was, however, slower and limited – the first significant Directives (safety signs, protection from certain chemicals) came in 1977-78.

The First Action Programme on Safety and Health at Work(1978) opened a new phase, focusing on "dangerous substances" and "dangers and harmful effects of machines". It also led to improvements and harmonization in statistics which resulted in the Eurostat data that now allows to compare the performance of Member States (with fatal accidents the most reliable indicator).

The 1980 "Framework Directive" (80/1107/EEC) was a major step, covering "risks related to exposure to chemical, physical and biological agents at work". It foresaw the adoption of Directives on specific agents (four "Daughter Directives"), setting specific requirements, maximal acceptable values etc. It required workers' information and involvement (article 5), and active surveillance of workers' health for the more hazardous agents (articles 3 and 5).

In 1982, the first "enforcement forum" for European OHS legislation, the "Senior Labour Inspectors Committee" (SLIC), started meeting informally. Gathering senior delegates from every OHS inspectorate in the EC/EU, SLIC's aim is to improve information exchange and bring practices closer. SLIC (which became an official Committee advising the Commission in 1995) defines "common principles" and conducts assessments of the national inspection systems. While SLIC is a well established body, it is also very "lean", and has no binding powers.

Treaty changes led to stronger European involvement in OHS – as the Single European Act (SEA, 1986) strengthened article 118 of the Rome Treaty in terms of OHS objectives and of instruments available. Regulating OHS was now a "core" area of European regulation. This was followed by a new Commission Programme on OHS (1988) and a new "Framework Directive" 89/391/EEC, arguably more significant than all previous European actions in this field. It introduced "general principles of prevention" based on risk. It created obligations for employers (and, to a lesser extent, workers) –a duty to "prevent risk", and constantly adjust to evolving techniques so as to raise the safety level. It required all enterprises to conduct risk assessments and develop risk management policies. The Directive went much further than previously existing civil liability in its specifics, and in the onus it put on employers to prevent risks. A total of 19 "individual Directives" deriving from its article 16 have been adopted as of end 2015.

Since then, European regulations have expanded and often overtaken national legislation as the main source of OHS rules. EU regulations tend to precise and prescriptive, far more e.g. than UK OHS regulations (see Baldwin 1992) - though the Treaties and "Framework Directive" require attention to specifics of SMEs, it is unclear how much this is the case in practice.

In 1994 was set up the European Agency for Safety and Health at Work (EU-OSHA) with focus on research, data and information. It has produced a number of information publications and tools, in particular an interactive risk assessment online tool. As a result, there are 3 structures dealing with OHS issues within the EU (in addition to the DGs): the Eurofound, SLIC and EU-OSHA. None of them has a strong implementation mandate, e.g. the power to direct competent authorities in Member States to follow certain approaches. A succession of Action Programmes have been implemented, latest being the "Strategic Framework" 2014-2020. The first challenge it identifies is improving "implementation of existing (...) rules", and several "strategic objectives" relate to this challenge, e.g. "providing practical support to small and micro enterprises" and "improving enforcement by Member States". It is unclear, however, whether instruments and measures foreseen will succeed to "improve enforcement".

Actual OHS *outcomes* across the EU appear markedly unequal. Eurostat publishes key harmonized indicators for OHS – accidents of different levels of seriousness, and diseases. The latter, however, suffer under "time lag" problems (illness may surface decades after the fact, and reflect on the OHS system as it used to be and not as it is now) as well as reporting/detection challenges. The rate of reporting of work-related accidents is also problematic, introducing serious bias in the data. The most reliable indicator (and with no time-lag_ is the rate of *fatal work-related accidents* (which inevitably end up being

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[31] Neal and Wright (1992), pp. 3-6

[32] Neal and Wright (1992), p. 4, suggest the rate of fatal occupational accidents was close to 1 per 1,000 –40 times higher than the 2012 EU-28 average (as per Eurostat data). The figure seems largely exaggerated however, and does not appear to match historical data available elsewhere (e.g. OECD 1989, p. 138)

recorded[33]). The average standardized rate of fatal accidents for 100,000 workers in EU Member States ranged from 1.5 to 7.14 for 2008-2013, with an average of 2.44. Nor was the huge discrepancy explained by the wealth gap between "Old" and "New" Member States – the EU-15 average was 2.42 and the EU-28 was 2.56. In fact, a number of the richest, "oldest" Member States (e.g. Belgium or France) ranked way worse than average. The best performers included the UK, Netherlands, Germany, Finland and Sweden (in that order). The worst were Romania, Lithuania, Portugal, Austria and Latvia (in that order). Thus, the *effective* approximation of OHS between Member States appears lagging.

Interestingly, among the best performing countries (and for several decades already) is the UK – a country against which the European Commission brought an infringement case for failure to fully implement Directive 89/391/EEC. The UK held that its 1974 Health and Safety at Work Act, which qualified employers' health and safety duties with "as far as reasonably practicable", did *not* violate the Directive (and in fact the Act's establishment of a universal OHS mandate, and risk-based language, probably *inspired* the Directive). The EC thought otherwise and referred the case to the ECJ in 2005. In June 2007, the ECJ found against the EC and upheld the UK's position. Leaving aside the legal arguments, the EC held that the qualification amounted to "defective implementation", equating strictness of legal language with effectiveness. The "implementation challenge" thus may stem not only from weaknesses in the institutional framework, but from an inadequate model of *what implementation means* and of *what drives improvements in compliance and performance.* Equating "effective enforcement" with "strict legal language" and "availability of dissuasive penalties" is a very narrow view – and one that does not match the evidence available.

This is all the more problematic as available evidence suggests that, in terms of enforcement, *effectiveness* rarely correlates with "quantitative" indicators of deterrence. A review of OHS inspections in Britain and Germany, for instance[34], shows that, between 2006 and 2013, OHS inspections were from 4 to 7 times more frequent (*pro rated* to the enterprise population) in Germany than in Britain – whereas outcomes were essentially similar (after a long period where Britain's were far better). The possible explanations include a longer- and better-established use of risk assessment by enterprises, greater emphasis on practical guidance (and better availability of guidance documents), more systematic use of risk-based targeting for inspection visits (and better data), clearer division of roles between the different institutions involved etc.

Environmental Protection

While European environmental action was *theoretically* possible based on the Preamble's goals and articles 100-101[35], it was not before 1972 that the general concern for environmental issues led to the first Environmental Action Programme (EAP) adopted in 1973. This emphasized "comprehensive assessment of the impacts of other policies"[36] –what would later become a more systematic practice of impact assessment. The first and second EAPs combined research, sector-specific work and a strong push for quality improvements for air, water and waste. One early major directive was 75/440/EEC on surface water "intended for abstraction of drinking water", with Directive 80/778/EEC[37] then going further and defining specific parameters (and testing measures) for drinking water. Both are representative of a phase when European environmental regulation relied primarily on *performance standards* applying to the actual quality of elements of the environment: the water *ready to drink* has to meet these requirements. Because drinking water supply is highly centralized, with either state/municipal actors or closely regulated monopoly utilities, control and enforcement were made easier, and the Commission could limit itself to infringement procedures without this impairing the effective achievement of the Directives' goals.

In the 1980s, successive EAPs emphasised the links between Internal Market and environmental issues[38] and made greater use of "emission standards" (i.e. regulating the *pollution* rather than the *resulting state*). The SEA then gave stronger powers in environmental matters to European institutions. The 1990s saw again a change of approach (sector/integrated approaches, recognising the limitations of emissions- or quality-based norms[39]), as well as increasing *resistance* to European environmental regulations, from a business and economic perspective.[40] Nonetheless, significant legislation was adopted in the 1990s, in particular the Integrated pollution prevention and control Directive (IPPC - 96/61/EC later replaced by 2008/1/EC). It "applies an integrated environmental approach to (...) industrial activities" meaning that

[33] This indicator does have one limitation: because the number of cases is low, variations year-on-year can be high in percentage, and small differences in rates (or short-term changes) should not be over-interpreted.

[34] Author's own research based on official British (HSE) and German (SuGA) data, to be published 2016 or 2017, details available upon request.

[35] Complemented by article 235, which provided for a mechanism when action was "necessary to achieve the goals" of the Treaty.

[36] Hey 2006, p. 19

[37] Now superseded by 98/83/EC

[38] Hey 2006, p. 19

[39] *Ibid.*, pp. 21-23

[40] *Ibid.*, pp. 23-24

"regulators must set permit conditions (…) based on (…) the Best Available Techniques (BAT)" so as "to prevent emissions and waste production and where that is not practicable, reduce them to acceptable levels[41]". The IPPC Directive is important because of the *regulatory instruments* prescribed to enforce compliance – namely permitting, with specific conditions imposed, followed by regular monitoring (inspections). While the IPPC mechanism offers some flexibility (conditions can be tailored to each facility), it also creates a significant *ex ante* barrier (permit issuance) – and there is no requirement for Member States to review previously existing permitting requirements, and consolidate them. There is also no mechanism to ensure that methods used for monitoring and inspections are, in practice, consistent across the EU.

In the 1990s was also set up the European Environment Agency (EEA) which, like EU-OSHA or EFSA, is an agency tasked with scientific assessment and advice to the European institutions, and with information to the public and enterprises. It is *not* in charge of supervising enforcement. Thus, while the development of environmental regulation proceeded apace, no implementation structure was created – something which is particularly problematic given the changing nature of this legislation. Whereas early directives set quality objectives to be achieved by Member States, mostly concerning small numbers of easily controllable utilities (water), subsequent regulations increasingly applied to large numbers of economic actors (manufacturers of industrial products, operators of industrial or agricultural facilities etc.) – i.e. to areas where actors are numerous, and action is indirect. A superficial review of compliance levels suggests they are higher for areas of direct action governing a small number of actors (water) than for more complex and "dispersed" areas (air), which is unsurprising.

The only structure that aims at improving "implementation and enforcement" of EU environmental regulations, IMPEL (European Union Network for the Implementation and Enforcement of Environmental Law), is an informal network of national and local competent authorities for environmental enforcement, that started operating in 1992 and grew somewhat more formal over time, in a way similar to SLIC. Its core activities are, capacity building, information and cooperation. It is referenced in several official EU documents, and has been the recipient of a series of EU grants for research and guidance into environmental inspections and enforcement best practice – but it remains outside of the EU institutional system. Over time, IMPEL has produced an increasing body of publications summarizing best practices in performance assessment for environmental inspectorates, implementation of risk assessment methods, choice of appropriate types of interventions depending on issues and target groups etc.

IMPEL recommendations strongly support a risk-based and risk-proportionate approach, the need to balance enforcement actions with promoting voluntary compliance, and diversification of environmental regulators' activities beyond inspections and enforcement, to take into account the diversity of issues, compliance drivers, target audiences etc. In the 7th EAP[42], the Commission specifically refers to IMPEL's work[43] in Priority Objective 4, which aims at "maximising benefits" by "improving implementation". It notes "significant differences in implementation between Member States"[44], the "high number of infringements, complaints and petitions"[45] and foresees to "further develop inspection support capacity at Union level, drawing on existing structures"[46] and extend "binding criteria for effective Member State inspections and surveillance to the wider body of Union environment law". Instruments to "support capacity" include professional networks (IMPEL) and "peer reviews" to increase "the efficiency and effectiveness of inspections"[47]. What the EAP does *not* incorporate is a vision of the overall approach to be used to promote compliance, even though it implicitly supports IMPEL's recommendations..

Several events and processes in recent years are also relevant to review: the implementation of the REACH Regulation (EC 1907/2006), the potential for major environmental accidents illustrated e.g. by the 2010 Ajka alumina plant accident in Hungary, and the latest emissions cheating scandal involving the Volkswagen group. The adoption of REACH has led to the creation of the European Chemicals Agency (ECHA)[48], in charge of leading the evaluation process for chemicals registered under REACH (and of related scientific and information duties), and of reviewing the use of chemical substances of very high concern (SVHC). Enforcement responsibilities remain solely with national inspectorates, though ECHA does host a coordination Forum on enforcement. Thus, while REACH requires the registration and hazard assessment of over 140,000 different chemicals (to be completed by 2018), stringent approval procedures for the use of SVHCs, and information requirements for every chemical at every

41 DEFRA 2010, *Environmental Permitting guidance* – The IPPC Directive

42 See: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN

43 Point 63, page 190

44 Point 57, p. 189

45 Point 58, ibid.

46 Point 60, p. 190

47 Point 65 (iii), ibid.

48 See: http://echa.europa.eu/ - it is also involved in the implementation of other directives, but REACH is the one of most interest in our case

stage, there is no mechanism foreseen to support and verify effective compliance. The effort is entirely focused on registration and regulation.

In 2010, the massive havoc wrecked by the breaking of a tailings dam at the Ajka alumina plant reminded that massive disasters due to highly visible, long established and well understood industrial processes can still happen in the EU. While accidents *can* happen, this disaster was clearly *preventable* from a risk perspective. Given the nature of the activity, and the age of installations, this *should have* been classified as high-risk, been the subject of a high level of care by its operator and *also* of a high level of supervision by the environmental regulator (neither of which were the case). Targeted enforcement could have helped prevent risk, but did not take place.

In September 2015, a worldwide emissions testing fraud scandal broke out, affecting vehicles produced by the Volkswagen AG Group. It was detected by US regulators, there are suggestions of earlier "cover ups" linked to VW's local clout. The truth is still unknown, and occurrence of fraud (albeit massive) is not proof that a system is unfit for purpose, but this does strengthen doubts about adequacy of environmental enforcement. Reliance on "normalized" conformity assessment tests, prior approvals with no "real life" checks", and decentralized (and non-harmonized) enforcement may not be able to deliver the regulations' stated outcomes. The response here is not "more regulation" or "stricter enforcement", or assuming that all businesses fraud – but to review the existing structures that "deliver" the regulations, and see if they can be made more effective (and efficient) at their core tasks (and how). To date, the EU has mostly relied on indirect and informal coordination of enforcement, with infringement procedures as a "backup"[49] – and environmental NGOs to support monitoring and push for action. However, though NGOs can play a strong positive role[50], improving the effectiveness of environmental "regulatory delivery" appears essential.

[49] Scheuer 2006, pp. 335

[50] See Bentata and Faure 2015

The impossibility of "optimal regulation" and the complexity of compliance drivers

Shortcomings in EU regulations implementation lead to consider cross-learning between areas, but also questions of regulatory design and compliance. Understanding which of the four setups drives stronger harmonization is insufficient – we also must consider whether the enforcement approaches they promote are adequate, in order to come up with recommendations on what an "optimally effective and efficient" EU-wide regulatory enforcement architecture could be.

Enforcement is important because regulations are not self-executing (Yeung 2007), and because there are no "optimal" rules. Ogus (1994) has shown that all types of mandatory norms ("target", "performance" or "specification") have limitations – those easier to control and enforce are also least directly connected to the desired outcomes, and the "outcomes-based" ones are least connected to businesses' actions and least enforceable (pp. 166-171). Black (1997) suggests that the generalization necessary to develop rules results in problems when applying them – and that a rule's success should be measured in a strict instrumental way (achieving policy objectives). But rules are not perfectly correlated to the hazards they seek to address (Bardach and Kagan 1982, p. 71). Building on Diver (1983), Baldwin (1995, pp. 179-181) has shown that rules are always over- or under-inclusive, and that "an alternative response is to write rules that devolve discretion down to enforcers" (p. 184)[51].

Even very specific norms do not work uniformly in practice because of differences in enforcement methods. Trying to curtail discretion can lead to difficulties in fighting "creative compliance", i.e. formal compliance with requirements that "covers" undermining of the regulation's objectives (Baldwin 1995, pp. 185-189). Even "target" rules are not immune to being "gamed" – because it is impossible to "target" everything that would be meaningful (Bevan and Hood 2006). Going "beyond compliance" thus seems necessary to really achieve the purpose of public policies (see Gunningham, Kagan and Thornton 2003) A recent report by the Scientific Council to the Netherlands' Government underlined the same risk of "creative compliance", and called in response for *increased* regulatory discretion (WRR 2013).

[51] Cf. Ogus (op. cit., pp. 170-171) searching for ways to make standards - more "optimal", concluding with flexible language relying on enforcers' competence. There is no escaping discretion in any case. Even in systems (e.g .US OSHA) which try and minimize regulatory discretion (with many side-effects), discretion remains –in the hand of judges called upon to decide conflicts between regulators and businesses.

Since excessive rigidity harms the economy, freedom and the regulations' own purposes, the question *how to organize* this indispensable discretion to avoid capture, abuse, and excessive variations – and achieve optimal impact.

The links between enforcement and compliance (or "better than compliance" behaviours) are complex. A common view is purely "deterrence-based" and results in increased inspections frequency and sanctions. Decades of research show that this view is too narrow, and results in disappointing compliance levels. Rather, compliance is fostered by at least three drivers: moral values, legitimacy of authorities, and rational calculations (deterrence) – the latter appearing to be the weakest.

Moral values are among the strongest drivers of compliance – but influencing them through public policy is difficult, and long-term. Deterrence is far easier to use– but has important limitations. First, its effects are mediated by the values of the regulated subjects (see Kirchler 2007) – meaning those whose values already support compliance will experience a stronger dissuasion effect, but those whose values do not will be far less influenced (whereas these are precisely the target). Second, really strong dissuasion tends to have considerable costs – both in terms of finances and freedom (personal and economic), meaning that strong deterrence is impossible to achieve in most cases (see Tyler 2003). Finally, when efforts at dissuasion are excessively intrusive or heavy handed, they tend to negatively affect procedural justice, and actually *decrease* compliance (see Tyler 2003, Kirchler 2007, Blanc, Macrae, Ottimofiore 2015, Hodges 2015 etc.).

Indeed, the degree to which regulated subjects (citizens, businesses) find authorities and rules legitimate is one of the strongest compliance drivers – and also the most easily influenced one (strengthened, or weakened) by public authorities' actions. In turn, a strong factor influencing legitimacy is *procedural justice* – the extent to which public authorities are perceived as *fair*, not in terms of results, but of their processes. High procedural increases legitimacy of authorities and rules– and thus, compliance (see Tyler 2003). It is therefore essential to find the right enforcement balance between achieving some deterrence, and fostering procedural justice.

A simplistic deterrence model assumes purely "economically rational" decisions, and sees organisations as unitary entities, neglecting that firms comprise many individuals, and human behaviour is shaped by their "cognitive development and moral understanding", as well as social norms (Hodges 2015, pp. 3, 15-16). Crucially, decisions are more often taken on the basis of the "fast heuristic approach", which "involves impulsiveness and intuition", than using the "slower system that is capable of reasoning [and] is cautious" (*ibid.*)[52].

A last essential factor is the *ability to comply* – which itself requires both *knowledge* and *material capacity*. The first, particularly for SMEs, makes clear information and guidance crucial. The second means that complex and onerous requirements with marginal safety benefits may actually harm overall outcomes by distracting resources away from more important improvements, or by pushing businesses towards non-compliance because they see rules as excessive[53].

To sum up, we can outline four *foundations* of compliance:

- Enabling conditions: understanding of rules, financial and technical ability to comply
- Economic incentives: deterrence (probability of detection, sanctions, reputation loss), economic benefits of compliance (reputation, market positioning, productivity)
- Social drivers: group conformity (peers are compliant), group ethical values (aligned with regulatory goals, or with legal compliance as such)
- Psychological drivers: legitimacy of authorities (influenced by individual and group experience), procedural justice (or lack thereof) experienced in interactions with authorities.

An optimal system should cover all these foundations and strike the right balance to fit different categories of regulated subjects – the majority which tend to comply voluntarily if the preconditions for compliance exist (legitimacy, knowledge, "realistic" regulations), and a minority of "rational calculators" (Voermans 2014, Elffers 1997). For them, an element of deterrence is essential – and this will also ensure the majority of "voluntary compliers" that there is a "level playing field" – but this deterrence should not become so burdensome that it alienates the majority.

Conclusion

Regulation can have important benefits for public welfare – it also has costs. Being mindful of costs and benefits is essential and, as Helsloot (2012) has shown, excessive economic costs can actually translate into net *negative* results in terms of safety. Good regulatory design is important, but insufficient: real attention needs to be given to *enforcement* or *regulatory delivery*. In turn, this

[52] In addition, decisions are often taken on the basis of the "fast heuristic approach", which "involves impulsiveness and intuition" (ibid. and Tversky and Kahneman (1974), Bennear in Balleisen et al. (2015), Thaler and Sunstein (2008) pp. 19-39)

[53] See the "economic" side of the "license to operate" concept outlined by Gunningham, Kaghan and Thornton (2003).

requires to balance different compliance drivers: procedural justice, knowledge and capacity, deterrence where appropriate.

EU regulatory systems have developed differently for food, non-food products, OHS and environment. These differences appear caused more by historical circumstances and path dependency than by inherent characteristics of these different regulatory areas. The European Treaties applied directly to food and non-food from the onset, while OHS was less central, and environment absent – this resulted in different paces of development. The creation of the Single Market further strengthened rules for product markets, and successive food crises led to a high level of European harmonization of food safety enforcement. As a result, while strong rules and institutions ensure a degree of uniformity in food safety (with a sound risk-based approach), this is far less true in other areas, and there are serious concerns of implementation weakness. Ongoing European programmes and regulatory proposals all emphasize implementation, but they rely mostly on regulatory design, informal mechanisms, and a narrow vision of what drives compliance. This leaves us with three out of four areas where the setup does not appear "fit for purpose" – and one (food) where innovative approaches are insufficiently supported.

Because these are four "core" regulatory fields that do not typically require very different institutional set ups and approaches[54], and because there appear to be clear differences in effectiveness of delivery models, cross-learning between these fields could bring major benefits. The FVO offers a possible model: strong institution, clear mandate, real powers, and visible effects. Its emphasis on a risk-based deterrence model is, however, too narrow – and insufficient efforts to support SME compliance have negative effects for growth, jobs and consumer safety in many Member States. By contrast, good practices such as food hygiene ratings (Denmark, UK, now the Netherlands), hands-on guidance for SMEs (Britain's *Safer Food Better Business* and OHS guidance, Lombardy's 'good hygiene practices' manual), assured advice (Britain's *Primary Authority* scheme) are insufficiently promoted across the EU.

By contrast, IMPEL is an informal network with insufficient power to force change in competent authorities' practices – but it has a broader, more balanced view of compliance and of good enforcement approaches. It also shows the importance of using horizontal, cross-learning and not only top-down harmonization. Thus, structures and harmonization are stronger in the food safety field, with positive effects on European integration, but environment has developed a richer perspective on compliance, and an optimal model would seek to combine both.

Introducing stronger institutions and powers at the European level to achieve more harmonization of enforcement in a "top down" way may prove challenging, however, politically – and face resistance from Member States' inspectorates. Britain's *Primary Authority* may offer an innovative model to ensure more consistency, more effectiveness, a more balanced compliance approach and a better combination of "prosperity and protection", which could be replicated at the EU level. Rather than having a centralized body harmonize enforcement practices, it relies on designating local authorities as "primary authority" for a given (group of) business(es), and have them provide compliance support, and (binding) guidance to other enforcement authorities in dealing with this particular business(es). It requires of course harmonized legislation (which the EU has), and also an oversight body (the Better Regulation Delivery Office in the UK, which "vets" which authorities can become "primary" in which field, based on competence, and resolves conflicts). Replicating this at the European level would require innovative institutional and legal solutions, but may in some areas help move beyond the alternative of "strong but rigid harmonization" or "innovation but divergence".

In short, addressing the European "implementation gap" and making EU regulations more consistently, effectively and efficiently applied require a combination of steps:

- More "binding" guidance, through a central institution (like the FVO), a decentralized system (like *Primary Authority*), or a combination of both
- A comprehensive approach to compliance (and "beyond compliance"), using innovations from all Member States and spreading them, building on risk-based approaches but seeing "regulatory delivery" as going far beyond narrowly seen "enforcement".

Elements of "best practices" exist both at the European and Member States levels, and cross-learning can allow to make considerable progress. To do so will, however, require to challenge many established structures and beliefs. The first step is to remember that "more" does not always equate "better", as Britain's outstanding OHS performance, with comparatively few inspections, testifies.

[54] Cf. Mertens 2011, Blanc 2012 and OECD 2014

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2. International cooperation via networks and agencies: A tale of perceptions, informality and national cultures

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The European Union: Even rules, uneven practices

In an international governmental structure with 28 members, the implementation of joint laws is bound to be an issue. Indeed, implementation of EU legislation is a booming field of scholarly research, and increasingly is also a topic receiving careful consideration at the political level. As the European Commission stated in its Communication 'A Europe of Results: Applying Community Law' (CEC, 2007: 10), 'The timely and correct application of Community law is essential to maintain a strong foundation for the European Union and ensure that European policies have intended impacts.' Some scholars assert that we are witnessing a 'European enforcement deficit' (e.g., Jans *et al*., 2007). However, if we were honest we would admit not knowing much about the size of this deficit. We have no across-the-board evidence of how Europe's thousands of regulations, directives and decisions, in addition to the many soft-law types of agreements, are actually implemented and complied with in all of the 28 member states of the European Union. Thus, instead of an 'enforcement deficit' it would be more accurate to speak of an 'information deficit' (Versluis, 2008). We do know that implementation of EU law is by no means uniform. Case studies have affirmed that implementation of EU legislation can differ markedly between member states. Let us illustrate this with two concrete examples.

A case study on the Safety Data Sheets Directive of 5 March 1991 (91/155/EEC), which regulates safe handling of dangerous substances and preparations, demonstrates that while each of the four member states analysed (Germany, United Kingdom, Spain and the Netherlands) transposed this directive correctly, its actual application left much to be desired (see Versluis, 2007 for the case study). This case study demonstrates that only the Netherlands paid – be it marginal – attention to enforcement, and only a handful of chemical companies indicated serious efforts to comply with the obligation of providing safety data sheets. A core reason for this lack of attention at the 'street level' was that the directive was simply not considered sufficiently important. Its low salience influenced the time and attention that national inspectors devoted to it. In sum, this case study shows that a law in the books is not automatically a law in practice.

The case study on the Seveso II Directive (96/82/EEC), which regulates the handling of dangerous substances, shows a very active implementation practice (see Versluis, 2004 for the case study). This highly salient directive triggered much attention in the same four member states scrutinized above, yet the amount and type of attention differed between the four countries. This case study illustrates the enormous variety in the ways that member states may put the same EU directive into practice. While Dutch and British inspectors spent considerable time assessing the safety reports that chemical companies were required to produce to comply with this EU directive, their German and Spanish colleagues devoted much less effort to this activity. German inspectors spent between 10 and 30 days assessing a safety report, while British inspectors spent 25 to 50 days per report. The same holds true for the amount of time spent doing on-site inspections: while Dutch inspectors spent from 10 to 20 person-days per year on inspections related to this directive, their Spanish counterparts spent from 1 to 5 person-days per year. From this case study we can conclude that particularly the domestic policy tradition, alongside the level of national experience and expertise with the specific topic, influenced the inspection style of individual member states.

In sum, while an information deficit certainly remains about the state of compliance in the European Union, we can conclude that even rules do not automatically lead to even practices, and that the way all 28 member states implement EU legislation remains an important agenda topic. To address this issue, the European Union has often resorted to more centralization and horizontal coordination. Thus, there has been ever-increased involvement of the EU level in national implementation practices, as well as an increased number and variety of international cooperation initiatives.

This contribution explores the increased international cooperation by looking at one specific form: cooperation via networks and agencies. In particular, it examines two examples of such cooperation. The first is a comparative analysis of different transnational networks, and the second is an analysis of the European Railway Agency. These examples show that international cooperation between national inspectorates is only likely to work when there is interdependence, some form of informality and an eye for national cultural differences. Furthermore, the case studies illustrate the importance of perceptions. Perceptions influence implementation behaviour and also what works and does not work in international cooperation between national inspectorates.

Implementation problems in the EU: Increased international cooperation as the answer

The European Commission set the tone with its 2001 White Paper on European Governance. That paper states that one way to better tackle implementation problems is to resort to European agencies, as such agencies would

'improve the way rules are applied and enforced across the Union' (CEC, 2001: 24). Indeed, we have seen a proliferation of EU agencies in all sorts of policy sectors since the 1990s. But explicit references to implementation to justify in one way or another why a new agency is set up are more recent, dating only from the 2000s. The European Maritime Safety Agency, for example, owes its very existence to implementation problems. The agency was established in the aftermath of the *Erika* (1999) and *Prestige* (2002) oil tanker accidents, with the explicit expectation that the agency would result in better implementation of EU maritime safety rules. And this trend has not yet ended. In response to the financial crisis, the European Securities and Market Authority was established in 2012 to supervise domestic regulators and safeguard the stability of the European financial system. The idea appears to be gaining ground that implementation – while in principle a responsibility of the member states (TFEU, Article 4) – will benefit from more direct EU-level involvement; and more explicitly, that EU agencies will induce better compliance with EU law at the member-state level. The rationale underlying this expectation is a belief that agencies – possessing (independent) expertise and an apolitical stance – will produce high-quality evaluations and better results.

Today there are more than 40 EU agencies. Keading and Versluis (2014) categorized the different 'implementation roles' that these agencies have. They found that nine of these EU agencies – mostly related to DG MOVE and DG MARKT – are invested with a variety of tasks related to ensuring that rules are implemented and enforced effectively at the national level. These agencies' competences to influence implementation at the national level vary enormously. They range from capacity building (e.g., providing training or technical assistance), to explicatory (explaining rules in published guidelines and reports or in practical workshops and conferences), to indirect enforcement actions in member states (such as peer reviewing, state visits and inspections). The more recently set up financial sector agencies have the farthest-reaching competences, directly influencing national implementation activities. They can bindingly settle disputes between member states, or prohibit certain activities or products (e.g., the European Securities and Markets Authority has such authority).

In sum, international cooperation between national inspectorates is on the rise. EU regulatory agencies have strong ties with their national counterparts, and influence the daily work of national inspection agencies. The same applies to the increasing number of both formal and informal networks set up to contribute to better implementation of EU law. What does all this international cooperation between national inspectors via networks and agencies teach us? How and when does it seem to work? What value do domestic inspectors attach to this international cooperation? The sections below describe two case studies conducted following the same premises. By focusing on the perceptions of national inspectors, they analyse how and when international cooperation in European networks and agencies is considered to be of added value.

International cooperation via networks: Informality is the trick

This first case study is based on research by Polak (2015; see also Polak & Versluis, 2016) on the effectiveness of international networks in improving domestic compliance with EU legislation. The core question was how effective do national inspectors consider participation in an international network to be for improving implementation of EU legislation within their own member state. The research focused on participation of Dutch, Polish and Portuguese inspectors in four international networks. The findings indicate that while interdependence may first and for all motivate international cooperation, it is the perception of a network as being informal that is the determining factor for it to be considered worthwhile in delivering the benefits that networks might produce. Informality unleashes opportunities for mutual learning to occur, for mutual trust to flourish and for resource sharing and conflict resolution to actually take place. On what basis was this conclusion reached?

The EU increasingly relies on 'networked governance' as an independent mode of steering. In it, networks are seen as supplements to the executive position of the European Commission in implementation of EU measures (Hofmann *et al*., 2011). Why would national officials participate in international networks? We know little about the value that participants in these networks actually attach to the cooperation and whether they consider the networks to indeed bring about the abovementioned benefits. If the participating actors do not consider international networks useful for their own work 'back home', we might ask whether such networks ever will make a difference. While participants' perceptions do not necessarily reflect their actual behaviour, perceptions are likely to influence behaviour by serving as 'cognitive and normative frames for action' (Egeberg & Trondal, 2011: 874). Our analysis was based on 28 interviews with participants in four networks related to three EU directives. The Consumer Safety Network and Prosafe are, respectively, a formal and an informal network associated with the General Product Safety Directive (2001/95/EC). IMPEL is an informal network associated with, among others, the Directive on

Integrated Pollution Prevention and Control (2008/1/EC). Finally the European SAFA Steering Group is a semi-formal network associated with the Directive on Safety Assessment of Foreign Aircraft (SAFA; 2004/36/EC). The commonality between these four networks is that all bring together national officials involved in implementation of EU directives.

The first conclusion that can be drawn based on this comparative case study, is that interdependence is a key factor motivating international cooperation. Supporting the conclusions by Boetzelaer and Princen (2012), our case study demonstrates that interdependence is an important functional argument for cooperation. As an inspector involved in Prosafe indicated, 'Product safety is a topic on which you cannot think in national terms only. I spoke with a business operator who said, "So what if my product is not admitted to the Antwerp port. I'll take it to Hamburg and import it to Europe from there." I answered, "Then I'll inform my colleagues in Hamburg that this product is headed to them." My conversation partner wasn't happy about that. …It doesn't work to think nationally. We are in an internal European market, so we have to cooperate – otherwise products will enter our market even though we've just sent them back because they are unsafe.' While interdependence often triggers international cooperation, it is not sufficient for explaining the high value that national inspectors attach to such cooperation.

As a second conclusion, national inspectors identified a number of virtues of international cooperation. Yet they attached different value to these virtues. Among the virtues mentioned were mutual learning, mutual trust, resource sharing and conflict resolution. While all of the officials interviewed spoke highly of mutual learning, there were marked differences between the officials from the different member states. Portuguese and Polish officials were more positive about the added value of cooperation in international networks, as they saw it as stimulating learning. According to a Portuguese official involved in product safety, 'Cooperation is particularly important because it makes it possible to see how other member states work. Together we find solutions to issues. We help each other, and we learn with each other. We have to learn from each other.' Dutch officials didn't stress learning as particularly important for themselves. These inspectors, instead, positioned themselves as 'teachers'. Why would Dutch officials then participate in international networks, if as they indicated, they take less away from the cooperation? Here we come to the second virtue identified: mutual trust. There can be no positive effect of international cooperation unless the participants involved open up. International cooperation might not necessarily stimulate learning for the Netherlands, but it does expand mutual trust, according to a Dutch inspector: 'Often, the first thought is, why should we implement this here if other countries don't do it? Cooperation is used to hold a mirror to our own performance. We may think we are doing well, but is this actually the case? And are they [Eastern-European countries] actually so bad over there? There is a lot of rabble-rousing. Images and noises come up very quickly. Sometimes they are the truth, but no one checks whether it is indeed the case. Because of cooperation, you see that things are done the same in other countries. IMPEL contributes to strengthen mutual trust.' As a third virtue of international cooperation, interviewees mentioned resource sharing. Here again we found a cross-country divide. Portuguese and Polish officials underlined the rather mundane benefit that participation in networks brought them: it reduced the financial burden of implementation. Particularly in the field of product safety, the costly testing of whether products are safe can be shared among the members of the network. The last virtue of international cooperation identified by the actors interviewed was conflict resolution. Particularly in policy domains where risk assessments play a role – in our cases, product safety and air safety – differences between member states may have a direct effect on individual agencies' ability to implement EU law effectively. Cooperation may prevent differences from having this effect – and conflicts from getting out of hand – by facilitating the resolution of differences. For example, there is always some subjectivity involved in interpreting the results of risk assessments, and talking to each other and jointly analysing assessment results helps inspectors come to a common understanding, thus facilitating the day-to-day implementation work of each and every inspectorate.

As a last conclusion, this comparative case study illustrates the importance of informality. Officials unequivocally referred to informality as the key to making international cooperation work – and to formality as the surest way to stifle meaningful cooperation. What, then, are the benefits of informality? The answer was succinctly expressed by a Portuguese official: 'Informality is why you have so much input from the participants.' Informality stimulates openness about the problems authorities struggle with – and the benefit of openness, in turn, is that it allows cooperation to function as an effective learning, trust-building and problem-solving instrument. In Prosafe this works as follows: 'The solution to problems is found only if the reason for the problems is explained. If the reason is not explained, we cannot find a solution that suits the problem. And there can only be trust when the information that comes in is honest. In Prosafe, we talk freely.' The way this process plays out is particularly evident in the field of product safety. Two networks are active this area. The formal Consumer Safety Network and the informal network Prosafe. All of our interviewees, including those

from the European Commission, agreed that the formal network had not achieved the same level of effects as the informal network. According to one Commission respondent, 'When government officials come to Brussels to attend, they do so as representatives of the member states. The formal character of meetings hardly fosters cooperation at a practical level. It can even act as a brake on cooperation. Prosafe works better, because it is informal.' The environmental network IMPEL started experiencing problems the moment Commission officials began to formally participate. The network lost its effectiveness – member states were no longer really open – which was then a reason for the Commission to quit its involvement in the network.
There is one complication to informality as a crucial factor in making international cooperation in networks work: it is *perceived* informality that seems to do the trick. Thus, officials' perception of cooperation as being informal determines their behaviour in networks. Legal informality – i.e., the lack of codification in EU legislation – seems to be an absolute precondition in this regard; but the same does not apply to material informality – i.e., the complete lack of involvement in the network of the European Commission or other official EU actors. This is illustrated by the case of the European SAFA Steering Group for air safety. This is a legally informal, but materially formal, platform of cooperation. It is not codified in EU legislation, but it is chaired by a member of the European Commission and attended by officials from the European Aviation Safety Agency (EASA). Despite the formal set-up of the meetings, officials nonetheless perceive them as informal events. According to one interviewee, 'The European Commission acts as the chair of those meetings. So it is the EC representative who runs the show. But in 99% of the cases, the EC representative is very low profile, and it is a kind of a formal thing: they open the meeting and thank all the participants, close the meeting and so on. But I don't feel watched by the EC, by no means. I am pretty sure that neither I nor any of my colleagues have ever felt constrained, say, because the EC representative is there. On the contrary. It is a technical discussion. The EC representative is not a techie… not an engineer or a pilot. So we can discuss freely between us… the [EC representative] doesn't understand our language anyway, and that's very good.' In this same vein, alongside perceived informality location also matters. Brussels is not conducive to cooperation, it seems: 'Whenever these things take place in Brussels, it is too stiff. It is too strict, too formal, too Commission-centred. And whenever Prosafe meetings take place… [at] different locations, everything changes. We had a Commission representative at one of our project meetings, and that meeting had the same level of great cooperation because it was not in Brussels. It was in Warsaw, and everybody felt safe.' In sum, it is not informality *stricto sensu*, but the *perception* of cooperation as informal that smoothens cooperation; and it is not necessarily the actual absence of the Commission or other EU officials, but rather the absence of the Commission as guardian of the treaties that facilitates the perception of informality. Commission officials can participate in networks, as long as they make sure not to disrupt the informality of the meetings; it helps too if Commission officials open up about their own problems, as some of the interviewees indicated.

International cooperation in the European Railway Agency: Differences in national perceptions matter

After discussing the importance of perceived informality in making cooperation in international networks a success, we now turn to an example of cooperation through an EU agency: the European Railway Agency (ERA; see Versluis & Tarr, 2013 for this case study). What can we learn from this case study on the role of an EU agency in implementation practices at the member-state level? Several scholars have analysed the impact of EU agencies on member states' compliance behaviour (e.g., Groenleer *et al*., 2010; Gulbrandsen, 2011; Versluis, 2012), but the case study on the ERA highlights differences in actors' perceptions of the agency's impact on domestic compliance. The expectation that agencies can improve implementation is not new. Dehousse (1997: 254) argued that agencies can ensure that 'actors in charge of implementation of Community policy behave in a similar manner'. In particular, Dehousse expects agencies to have an impact via the promotion of 'horizontal cross-fertilization among national administrations' (Dehousse, 1997: 255). Majone (1997: 272) also addressed the importance of agencies in facilitating 'the development of behavioral standards and working practices that create shared expectations'. Based on 19 interviews with Commission officials, ERA staff and inspectors from six member states, we conclude that the theoretical expectations outlined above are not necessarily justified.

The ERA was set up in 2004 (Regulation 2004/881/EC) to reinforce safety and interoperability and therefore help to create an integrated railway area. It participates in three types of activities with potential impact on compliance at the member-state level: issuing recommendation and opinions; networking and dissemination of information; and monitoring. ERA cooperates with two types of national authorities: national safety authorities (NSAs), which monitor safety regulations and supervise railway safety, and investigating bodies (IBs), which lead investigations of serious incidents such as accidents. ERA organizes network meetings and workshops involving all

European NSAs and IBs. In addition, it issues guidelines and best practices reports. The ERA activities with the greatest likelihood of directly influencing member-state activities are its national visits and its transposition checks. Based on the interviews with the different types of partners, we can conclude that different groups have different perceptions of the ERA's role and impact.

We start with the ERA officials themselves, who emphasized the ERA's role in providing a neutral forum for meeting and exchanging ideas. This links to conclusions drawn earlier on the importance of informality. While not using the term informality, an ERA official observed a similar effect: 'We're a partner and not the police, and therefore we can bring people together in a neutral place where all the actors meet and facilitate consensus. We may even suggest solutions.' The ERA could provide the Commission with a lot of information about problems at the member-state level. Based on, for example, the transposition checks that the ERA does, the Commission could potentially initiate infringement procedures. ERA officials, however, downplay this possibility, arguing that it would undermine the agency's position. The ERA's position is a powerful one, as it sits in the middle of a triangle between the Commission, the sector and national authorities. Several ERA officials indicated this as a valuable position that generates trust: 'The member states are afraid of the Commission because the Commission can do nasty things to them, and they all know they are not complying. We come from the sector and meet with people at the working parties all day every day. So people tell us things they don't tell the Commission.'

There are no uniform perceptions among member-state representatives about how useful the ERA is in advancing implementation of EU railway legislation. Rather, a sharp divide can be observed between the group of member states that scores highly on regulatory capacity and performance (the Netherlands, Germany and United Kingdom) and some of the member states that score lower (e.g., Italy, Poland and Hungary). Respondents from all six member states considered the network meetings to be useful, but they differed in their final evaluations. Italian, Polish and Hungarian inspectors stressed learning a lot from participation in the ERA meetings, and that these lessons were very beneficial to national implementation practices. Dutch, German and particularly British inspectors were less positive. As illustrated by this quote from a British inspector: 'I probably invest between 5 and 7 per cent of my working hours supporting ERA. Not supporting me, but supporting ERA. That's a lot of time. And they are supposed to be supporting me, and not the other way around.' This is illustrative of the viewpoints of member states that don't consider themselves as profiting from cooperation via the European agency. In sum, the ERA's perceived role and impact on national implementation practices differs diametrically between countries.

The European Commission, finally, has very specific ideas about the role that the ERA should take up, at least in the future. The Commission officials interviewed foresaw a much stronger role for the agency, with more competences in monitoring domestic implementation. These interviewees realized that not all member states, or even ERA staff, shared that vision, but they nonetheless indicated that the ERA would 'play a bigger role in the future in the railway sector than is the case today.... ERA's competences are going to increase gradually towards inspections.... We cannot exclude that there will be hot debates, even during the preparatory phase of the new legislation. The national authorities will have to get accustomed to a new regime.'

This case study points to opposition by powerful and resourceful member states to a strong EU agency with hierarchical means, while less powerful and resourceful member states expressed support for such a strong agency. In the first category of countries, the ERA has relatively low impact because existing regulatory traditions are strong and the agency seems to have little to add by way of knowledge or resources. For this category of countries, an increase of ERA competences would in fact likely interfere with existing standards and practices. While respondents from these countries seemed willing to cooperate – and were generally positive about the idea of cooperation via the European agency – they suggested that the ERA offered little added value for their own regulatory tradition. The second group of countries, those with less regulatory capacity and lower performance – seemed to perceive cooperation via the ERA as an opportunity for mutual learning, and wished the agency would do more.

Dehousse (1997: 254) argued that agencies can only be expected to have an impact on domestic compliance 'if they agree on the definition of a given problem, and on the response it calls for'. The ERA case illustrates that this is perhaps more difficult to achieve than might at first be expected. European agencies have to live with the realities of 28 domestic implementation practices, and thus potentially 28 different views on the primary problems and relevant responses. Trying to reach agreement on the definition of a given problem, and on the appropriate response, might be a sheer impossibility. After all, the problems – and thus the required responses – will never be the same for all member states. Perhaps we must start realizing that the added value of EU agencies in improving domestic implementation is not to be found in stimulating common behavioural standards and working practices. Rather, the heterogeneous realities of the 28 EU member states call for a differential approach by EU agencies and the Commission alike.

Successful international cooperation: A tale of perceptions, informality and national cultures

Both case studies drawn on here illustrate the importance of taking perceptions seriously, particularly perceptions of the street-level actors responsible for implementing EU legislation 'on the ground'. As stated above, perceptions are not always reflected in actual behaviour, but they do serve as frameworks for action. The case studies suggest that cooperation can produce mutual learning, mutual trust, shared resources and conflict resolution, as long as participants perceive the cooperation as informal. Only in an informal setting are national officials likely to open up and share knowledge, experiences and problems. And such candid sharing is necessary to bring about the abovementioned benefits. In addition, the case studies demonstrate that perceptions of the usefulness of an EU agency or network in stimulating effective national implementation differ widely between member states. What works to make country A compliant in situation Z, will not necessarily work for country B. Domestic contexts vary; and reasons for lagging, incomplete or incorrect implementation of legislation vary with circumstances. Compliance problems always stem from a combination of underlying reasons, be they intentional (i.e., noncompliance due to opposition to regulations or unwillingness) or unintentional (i.e., noncompliance because of ambiguity about the rules, a lack of expertise or other capacity limitations). This will obviously impact what inspectorates have to do to resolve problematic cases. We have long understood that 'sticky' domestic and sectoral traditions matter (see, e.g., Almond & Verba, 1963). What works in the Polish aviation sector will not necessarily be equally successful in the British agricultural sector or the Greek financial market sector. It might even be counter-productive.

International cooperation between national inspection bodies is most likely to be successful in areas where there is some form of interdependence and where the environment is one of mutual trust and informality. Even if these conditions are met, cooperation will be effective and add value only if national circumstances and cultures are considered and taken seriously. We need to be aware that harmonization and streamlining of national inspection approaches can never be fully realized; and we should question whether this is actually a goal worth working towards. It is clear that the Commission is thinking about addressing compliance problems along the lines of further harmonization. In its recent Communication 'Better Regulation for Better Results: An EU agenda', it argues that '[i]n many cases, one set of EU rules replaces a patchwork of 28 different national rules, so making life easier for citizens and businesses' (CEC, 2015: 3). But in fact reality is a patchwork. We know from the case studies drawn on here – and the many more case studies out there – that even rules do not always automatically lead to even practices. It would be more helpful if the Commission – and EU agencies – would simply accept and try to work with the patchwork, and accommodate national differences.

The case studies explored in this contribution demonstrate that reasons for noncompliance will never be the same across the European Union. Thus, the approaches taken by inspectorates to address noncompliance should never be exactly the same. Rather than investing in expanding harmonization and streamlining the working practices of national inspectorates, it would be wiser to put money into further European-level investigation of tailor-made responses to individual instances of noncompliance and to share the results internationally. Such investigation would require the Commission to assess not only where and how tailor-made responses would benefit implementation, but also whether such responses could be implemented within the limits of the EU treaties (e.g., regarding the principle of equality of member states before the treaties). It would also require member states to play their – constructive – part in making cooperation work better, for example, by indicating what they need and how they could contribute to making cooperation more effective. Making cooperation work better is, indeed, a shared responsibility.

In addition, EU-level harmonization should always address higher principles of inspections, never the low-level details, which should be left to the member states. This was nicely expressed by a British railway inspector: 'Their [ERA] belief is that one solution will fix everything. But this will never work. They should go to the different member states and find out what the specific problems are. ERA is looking for common methods of work. And this is where the problem stands. You will never, ever, ever, literally have common methods of work. For me, you have to go one level higher. What are the principles of independent accident investigation that must be achieved, no matter which way you work.' Such an approach at a more abstract level – an approach that, moreover, is sensitive to the perceptions of national implementing actors, to the patchwork of cultures and enforcement styles in the EU, and to the nature of compliance problems – may not only be more effective in ensuring implementation; it may also increase the acceptability of EU action in the domain of implementation among those that are indispensable for making EU rules work in practice.

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3. Cross-border cooperation between inspectorates: From challenge to strategy

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Introduction: Cooperation as a challenge[55]

Many societal problems extend beyond the level of the nation state. They manifest throughout Europe or even on a global scale. Environmental pollution, for example, has no regard for national borders. Since the establishment of the European internal market, food safety and other health risks have spread across the continent at a staggering pace, while workers may now move from one country to another, though often facing highly variable employment conditions. Technological developments, such as the Internet and digitalization, are playing an important role too in the internationalization of trade and finance – with all the attendant potential negative consequences, as demonstrated by the recent global financial crisis and the ease with which dangerous products ordered online can enter the European market.

To get a grip on cross-border trade and transactions – both physical and digital – a complex machinery of laws and regulations has been established over the past decades, particularly at the European level. The underlying assumption is that agreement on basic rules will help minimize risks, increase product quality and safety, and enhance the functioning of markets.

Yet, these rules, as we know all too well from the national context, are of little merit without means to ensure compliance. Therefore, at the national level a motley collection of oversight authorities and inspection services has been established, ranging from market regulators to environmental and labour law inspectorates.[56] These national oversight authorities and inspectorates were originally also responsible for supervising compliance with European regulations. They were the ones who ensured that regulations agreed in Brussels were also implemented in and by the member states – at least on paper.

In practice, it has turned out to be rather difficult to ensure that the same rules are actually implemented in the same way in and by all the EU member states. National oversight authorities and inspectorates frequently face two major challenges in their role as "extended arms of Brussels" – as they may increasingly be perceived. First, they may lack the required capacity (in terms of knowledge, information, experience, and resources) to oversee compliance with European rules. Second, even if they do have adequate amounts of the right kinds of capacities, there may be a lack of political and public backing for enforcement of European regulations within EU member states. For both these reasons, national oversight activities and structures vary widely, in their nature as well as their magnitude.

Such differences are by no means always problematic. Indeed, they might even be advisable, for example, if "local" circumstances demand a particular approach or if national-level ownership is needed to ensure compliance. In other cases, however, more uniformity in oversight is needed. To protect workers and consumers throughout Europe, it is not enough simply to have European and national regulations on the books; coordination and monitoring of their enforcement is also needed. Moreover, to secure a level playing field for businesses, a measure of alignment or even cooperation is needed between inspectorates across national borders.

Establishing such coordination and cooperation is easier said than done, especially in regulatory domains in which there are frequent disagreements. Nonetheless, in virtually all policy domains, including those in which Europe is just beginning to get involved, like education and healthcare, some alignment is already appearing among inspectorates in the ways they conduct oversight. In domains where European cooperation has a longer history, extensive partnerships between inspectorates may be observed, and even a degree of centralization at the European level via European networks or EU agencies. The question, then, is not so much whether national inspectorates will cooperate, but rather when they will do so, why and how precisely. That question, or rather, these questions are the central topic of this contribution.[57]

We argue that while cooperation might appear to be the only sensible way forward, it is not necessarily logical, and it certainly is not always simple or even recommendable. More cooperation between national inspectorates is not always better. When deciding whether more cooperation is needed or desirable, the nature and scope of the problems being addressed and the societal outcomes being pursued must form the starting point. The kinds of capacities to be drawn on and the types of benefits expected from cross-border cooperation are further considerations. Finally, there is the question of what support will be needed for cooperation, both at the national level and to maintain cooperation across borders.

[55] We thank Eva Berkhuijsen and Martijn van der Steen for their helpful comments on an earlier version of this contribution.

[56] In the following, we refer to both inspection and oversight, because these tasks or functions in practice flow into one another to some extent. Our main focus is the national inspection service that is active in monitoring compliance with safety and quality regulations; we concentrate less on issues of market regulation.

[57] To answer these questions, we rely on academic literature, previous scientific research on implementation, enforcement, oversight and compliance in the EU, and personal communication with Dutch and foreign inspectors.

Cooperation between inspectorates, then, constitutes a challenge, but it also offers a strategy for attaining compliance with European regulations in the domains of safety and quality. Cooperation as a strategy requires not only the right mindset among the inspectors and inspectorates seeking to work together, but also the right skillset – and it is precisely on this latter point that many gains remain to be made.

Section 2 sets out some reasons, both functional and institutional, why inspectorates might work together. Section 3 then examines the forms such cooperation may take, from informal and ad hoc to more formally structured arrangements. Throughout sections 2 and 3, we seek to identify and better understand some of the differences between countries and between industries and economic and social sectors. Section 4 closes this contribution by presenting a number of conclusions, as well as possible next steps in discussions on oversight of European regulations and internationalization of national inspectorates.

What reasons for cooperation could there be?

Cooperation takes time and energy, and success is by no means guaranteed. There are many potential barriers and constraints: from differences in language and identity, to the simple fact of distance, as well as possible losses of organizational autonomy. So why would inspectorates cooperatewith other inspectorates at all, especially across national borders?

Undoubtedly, inspectorates are not always in a position to choose whether or not to cooperate with foreign counterparts; they sometimes must, for official or practical reasons. Pressure to cooperate may be applied from different directions. The European Commission, for example, in its capacity as guardian of the EU treaties, may intervene directly in the way national oversight systems are organized. Sometimes this intervention concerns cooperation between oversight authorities, including (or especially) in the implementation of European directives. Special interest groups may also apply pressure. As such, collectives of businesses or citizens may perceive cross-border cooperation between inspectorates as a solution to problems they are experiencing (including an overly cumbersome regulatory burden).

In most cases, aside from external pressure, it is ultimately (as yet) up to the inspectorates themselves to decide whether to cooperate with other inspectorates, within or even beyond the European level. National inspectorates may have a range of reasons for doing so. We look at these, drawing an analytical distinction between functional considerations and institutional motives (see Figure 1 for an overview).

Functional considerations

Broadly speaking, there are several functional reasons for inspectorates to work together. Mutual learning is the first. Together inspectorates can be smarter, because cooperation increases the availability of knowledge, information, and opportunities. Second is efficiency, as it may be more economical to conduct oversight together. A third reason is effectiveness. Working together, inspectorates are better able to achieve their oversight objectives. We take a closer look at these three functional reasons below, illustrating them with a few examples.

Learning The most common reason for cooperation is to learn from others' experiences and bring together knowledge and information. Indeed, availability of knowledge and information varies widely between inspectorates. Smaller inspectorates often have particular difficulty in acquiring the right expertise and information. For some inspectorates, such as those in the most recently acceded EU member states, this problem may be compounded by short institutional track records and lack of experience. Moreover, inspectorates in much of Europe are under pressure to downsize, which may deprive them of expertise they have built up over years. Knowledge transfer and sharing of information and experience may offer a solution. Ultimately, such exchanges can lead to mutual learning, convergence of oversight practices, and a more level playing field across Europe in the conduct of oversight.

One of the best-known cooperative frameworks for promoting learning among national inspectorates is the EU network for Implementation and Enforcement of Environmental Law (IMPEL).[58] A primary reason for establishing IMPEL in 1992 was to stimulate uniform implementation of EU legislation and regulations in the area of environmental policy. The Food Law Enforcement Practitioners (FLEP) network is another group of oversight authorities set up in the early 1990s to facilitate informal information exchange and promote learning and cooperation, this time focused on food safety regulation. Among FLEP's aims are to foster mutual trust and develop practical solutions to bottlenecks encountered in implementing EU regulations.[59] From 1990 to 2010, the network met regularly to discuss various oversight issues. In 2014, it began to work more closely with the Heads of European Food Safety Agencies network, in addition to resuming meetings of the FLEP as a network.

58 For more information about IMPEL, see http://impel.eu/. See also Martens (2006).

59 For more information on FLEP, see http://www.flep.org/

The International Liaison Group of Government Railway Inspectorates (ILGGRI) is an informal network, in this case bringing together railway oversight authorities. Since 1997, it has provided a forum for sharing knowledge and experience on safety and interoperability, among other things.[60] Unlike IMPEL and FLEP, ILGGRI operates mainly as a platform to enable national inspectorates to keep in contact with one another, rather than as a vehicle for promoting uniform implementation or harmonization of oversight. That latter purpose is served by the European Railway Agency, a more formally structured and relatively independent EU agency set up in 2004.[61]

The Standing International Conference of Inspectorates (SICI) and the European Partnership for Supervisory Organisations in Health Services and Social Care (EPSO) likewise function as platforms. SICI is a formal cooperative structure that now involves some 32 education inspectorates in Europe and has a relatively long, some 20-year history. Within SICI, inspectorates exchange information, foster professionalization of education inspectors, and carry out joint inspection and evaluation projects.[62]

Since the mid-1990s, EPSO similarly has stimulated exchanges of knowledge and information, both formal and informal, in addition to promoting cooperation in monitoring the quality of healthcare.[63] Nonetheless, oversight in healthcare remains primarily nationally organized, and the EPSO network has kept its distance from attempts to organize cross-border oversight.[64] That said, the growing mobility of doctors throughout the European Union is stimulating some national inspectorates to set up information-sharing mechanisms. The idea is to draw up and maintain "blacklists" of medical specialists banned from exercising their profession due to malpractice in one country, to prevent them from migrating and continuing to practice in another country.

Efficiency Working together often brings efficiency gains. Cooperation may deliver scale advantages, both for the inspectorates and for the industry or enterprise supervised. For instance, if an inspectorate adopts the findings of a cooperating inspectorate, it does not have to do all inspections itself, leading to cost savings. As such, national inspectorates might join forces in a European network or a European oversight agency. Sharing scarce resources and jointly conducting enforcement activities may even enable national oversight bodies to be reduced in size – though cooperation also has costs, so-called transaction costs, which are not always recovered in the short term. Enterprises supervised might also gain efficiency benefits from cooperation. After all, if they no longer needed to be inspected by 28 (or more) different regulatory authorities, their regulatory burden could be considerably reduced.

Some of these benefits are observed among the inspectorates participating in the EU Offshore Oil and Gas Authorities Group (EUOAG). They exchange experiences and expertise related to, for example, the safety of offshore drilling platforms.[65] The cooperating inspectorates learn from one another, and their cooperation produces efficiency gains. For example, a mobile drilling platform certified in one member state could ideally be used in another member state without further inspection barriers. After all, if standards are the same, relying on another partner's certification should not pose a problem, and no extra expenditures would need to be made to have a platform re-inspected.[66] Though this rationale makes sense from an efficiency perspective, as we will see later, the situation becomes considerably more complex when accountability enters the equation.

The Food and Veterinary Office of the European Union (FVO) organizes audits and inspections in the member states, in the areas of food safety and animal health, among others. The aim of these audits and inspections is to ensure adequate implementation and compliance with EU legislation and regulations. Though these controls concern national oversight systems rather than individual businesses, this meta-oversight role, in theory, could also produce cost savings for the supervised industry, as well as for the member states, for example, by preventing inconsistencies in the way European regulations are applied.[67]

Whereas the efficiency argument was not the primary reason for establishing EUOAG and FVO, efficiency considerations have played a key role in the creation, under EU law, of a number of decentralized EU agencies. Thus, the European Medicines Agency (EMA), the European Aviation Safety Agency (EASA), and the European Chemicals Agency (ECHA) in many cases operate as central authorities for, respectively, authorization of new medicines, certification of airplane parts (among them parts for the Airbus 380, which is the first airplane to

60 For more information on ILGGRI, see http://www.ilggri.org/

61 For more information on ERA, see http://www.era.europa.eu/. On EU agencies, see, for instance, Groenleer (2009; 2011), Groenleer et al. (2010), and Busuioc et al. (2012).

62 For more information on SICI, see http://www.sici-inspectorates.eu/

63 For more information on EPSO, see http://www.epsonet.eu/

64 Personal communication with Dutch health care inspector

65 For more information on EUOAG, see http://euoag.jrc.ec.europa.eu/

66 Personal communication with Dutch mines inspector

67 For more information on FVO, see http://ec.europa.eu/food/food_veterinary_office/index_en.htm. See also Lezaun & Groenleer (2006).

be fully certified by Europe), and assessment of chemical substances.[68]

EASA and the European Maritime Safety Agency (EMSA), similar to FVO, conduct inspections in the EU member states. Or, to be more precise, of the member states and the way that national inspectorates enforce European regulations. When individual businesses are inspected, it is almost always done in close cooperation with a national inspectorate, in teams made up of both national experts and EASA or EMSA officials. In fact, research has shown that, rather than replacing national oversight bodies, EU agencies like EASA and EMSA are (as yet) more accurately considered complementary to the national inspectorates – which begs the question of whether any real efficiency gains are ultimately made. Nonetheless, these agencies do have considerable added value in stimulating mutual learning processes, though in this regard they are little different from the European networks.[69]

Effectiveness Even though EU agencies are being given ever-broader inspection mandates and competences, effective approaches to addressing cross-border problems nonetheless begin with coordination and cooperation between countries and national inspectorates. To oversee, for example, foreign-based businesses operating (temporarily) within national borders and to prevent such businesses from evading regulations, national inspectorates need to share information, bilaterally, with foreign counterparts, or multilaterally, via the networks in which they are organized. Inspection services are thus dependent on one another.[70] Without information, there is no way for them to guarantee minimum standards of safety or quality within their own national borders.

Dependencies between national inspectorates will likely continue to increase over time, particularly in view of the constant growth of cross-border trade and transactions, especially in industries and sectors where oversight issues are intrinsically transboundary in nature. Furthermore, as interactions between inspectorates expand in the context of European networks and EU agencies, their cooperation will inevitably give rise to new European rules for dealing with the risks associated with cross-border trade and transactions. Indeed, studies suggest that interactions tend to become more institutionalized over time and gradually start to encompass a wider spectrum of activities.[71] From the perspective of one or a few member states, mutual dependencies can thus be an important driver for even broader cooperation, towards, what can be called, an ever closer implementation and enforcement Union. We provide a few examples below.

Countries have worked together in the Euro Contrôle Route (ECR) network since the early 1990s. This network was established by the Benelux countries to harmonize oversight of cross-border road transport, its ultimate aim being better road safety. Since its inception, the network has carried out joint "check weeks" focused on a specific theme, foreign traineeships for inspectors, and information exchange, among other activities. The network has grown from three members to now encompass fourteen countries, with five additional countries holding observer status.[72] It represents an important step toward joint action on commonly perceived problems, as well as a shared understanding of the need for partnership to tackle the issues. The situation is somewhat different in our next two examples.

The first regards oversight of international animal transport. This is an area in which inspection intensities have differed markedly between EU member states. Some countries inspect on a routine basis, while others inspect only sporadically. Businesses know this and may instruct their lorry drivers to detour through another country to avoid likely inspections. This adversely affects both animal welfare and the functioning of the internal market. With cooperation, for example, in the framework of the Heads of European Food Safety Agencies network, attempts are being made to end these kinds of undesirable outcomes. This has turned out to be rather difficult, however, because ending abuses requires countries to demonstrate a willingness not only to exchange knowledge, ideas, and best practices, but also to adjust their oversight practices. This is something they are not always prepared to do.[73]

Another example is monitoring the safety of products in line with the applicable European directives. Machines, for example, have to be approved before they can be used in Europe. Oversight of the approval process is done according to the "initiating country" principle. That means it is up to the inspection service of the country that considers a machine to be unsafe to call its manufacturer to account, regardless of whether the machine was actually produced in that country. Implementation of this principle has turned out to be far from uniform, despite establishment of a so-called "Administrative Cooperation" (ADCO) working group of member state representatives to discuss concerns and issues.[74]

[68] For more information on EMA, EASA and ECHA, see http://www.ema.europa.eu/ema/; https://easa.europa.eu/; http://echa.europa.eu/nl/. See also Pierre & Peters (2009) and Groenleer et al. (2010)

[69] Groenleer et al. (2010)

[70] Van Boetzelaer & Princen (2012)

[71] Thatcher & Coen (2008), Groenleer (2011), Levi-Faur (2011)

[72] For more information on ECR, see http://www.euro-controle-route.eu/

[73] Personal communication with Dutch food safety inspector

[74] Personal communication with Dutch labour inspector

Indeed, differences between national oversight organizations are still considerable, even just considering national regulators. The Netherlands, for example, has six oversight authorities on markets, while in Germany there are some 80, and the United Kingdom has more than 200. This diversity and the large numbers of agencies involved make alignment difficult to start with. The step towards cooperation then becomes a particularly complex affair.

While a number of national inspectorates have actively sought cooperation with foreign counterparts, most inspectorates have done so only to a very limited extent or in an extremely selective way. This variation is explained, apart from the differences between national oversight systems, by diverse factors, among them the economic importance of a supervised industry or sector within a country, geographic location, perceived risks, capacity to work together (human, financial and material), and relationships with other (national) regulations. The priority given to cooperation will be a result of these different factors, though the national regulatory culture and oversight philosophy, alongside other experiences with cooperation at the national level (which we return to in the conclusion), also play a role.

Institutional motives

Beyond functional considerations, inspectorates may have institutional motives for cooperating across borders.[75] First, oversight authorities may be stronger together; that is, they might cooperate to maintain their influence, or to further expand it. Cooperation could give them greater clout, for example, vis-a-vis policy bodies within their own country. Second, cooperation may generate legitimacy and build reputations. We phrase this as "garnering support". A third and final motive for cooperation, though more a concern of political leaders and policymakers than of the inspectorates themselves, is avoidance of responsibility in the event that something does go wrong, often termed "blame avoidance" in the literature. Thus, cooperation may offer a way to shift or avoid blame.[76] These three motives are elaborated briefly below, again illustrated with a few examples.

Maintaining or expanding influence A first institutional reason for cooperation is national inspectorates' desire to maintain or even expand their influence, first, on European legislative processes and, second, on national implementation processes. At the front-end of a policy process, inspectorates might "upload" information, for example, providing comments and inputs on Commission proposals for laws and regulations. This might be done formally in an advisory role, such as in the case of IMPEL or one of the different ADCOs associated with implementation of specific directives, or informally, such as in the case of EPSO.

At the back-end of a policy process, after "downloading" the rules, national inspectorates are responsible for enforcement. In this role, they might bring in specific expertise that policy bodies lack, to ensure that the regulations established are ultimately also enforceable. Cooperation may strengthen their position, allowing them to play a more central role in the processes of crafting regulation and ensuring feasible oversight, internationally but also at the national level.[77]

Garnering support Cooperation often reflects positively on inspectorates. Policy bodies may perceive inspectorates that seek contact with foreign counterparts as being outwardly oriented and willing to learn from others. Cooperating across borders may therefore foster support for the inspectorates' work in key national arenas. Cooperation can strengthen inspectorates' international reputation as well, while also raising their stature in the eyes of those supervised.

While inspectorates often seek to learn from foreign colleagues, cooperating may furthermore provide them opportunities to actively showcase oversight practices developed nationally (or bilaterally). By spotlighting certain practices via cross-border cooperation, wider support for the practices could be generated throughout Europe. This may have long-term benefits: the better the institutional "fit" between what is already happening at the national level and the practices that are considered desirable in Europe, the smaller the potential adjustment costs of making any changes necessary to stay in step with advancing Europeanization.

Avoiding blame Inspectorates conduct oversight to minimize social or economic risks, for example, by ensuring that products and services comply with quality and safety criteria. This does not mean that nothing ever goes wrong, though politicians might like to suggest otherwise. If things do go wrong, politicians often hasten to point to the inspectorate as to blame. The (simplistic and somewhat opportunistic) conclusion frequently drawn is that the oversight system failed and therefore needs to be reorganized. For example, the recent financial crisis brought to light serious gaps in regulation at the European level. These allowed banks and countries to take enor-

[75] These institutional motives are difficult to disentangle from functional considerations as they are often closely related. For researchers, moreover, institutional motives are not easy to unmask as inspectorates have an incentive to camouflage their intentions. See also Groenleer et al. (2014)

[76] Hood (2010)

[77] Egeberg (Ed.) (2006)

mous risks, to the detriment of the entire European Union and spurring a wave of new supranational, European-level regulation.[78]

If oversight is organized at the European level, blame can be simply shifted to a – in citizens' eyes – relatively anonymous and rather abstract European network or European agency, like EFSA, which has the thankless and almost impossible task of preventing food safety emergencies such as the BSE crisis and the dioxin scandal.[79] More generally, cooperation within networks or agencies at the European level can allow difficult decisions to be made without national actors having to bear the full brunt of any (negative) consequences. This may be convenient, for example, on regulatory issues that elicit resistance in society, such as the question of whether genetically modified food should be allowed into the European market.

Nonetheless, if something does goes wrong – say, there is an incident involving the earlier-mentioned mobile drilling platform (or a food scandal or a train accident) – politicians and, particularly, citizens are still apt to point first to the national inspection service. Or at least, this is what is assumed by inspectorates, including the inspection service in charge of the offshore oil and gas industry.[80] The national inspectorate may itself be confident that its colleague inspectorates (or the private certification bodies that they have inspected) have done adequate inspections and issued bona fide certifications, but the political risk is too great to sail blindly on trust.

In the end, it is national inspectorates that are held responsible for implementing EU legislation and regulations and ensuring compliance with them.[81] This, despite the fact that in some cases they may no longer carry out the requisite tasks themselves or even possess all the competences needed to effectively fulfil the mandate because these have been shifted to the EU level.

What types of cooperation can be distinguished?

Once national inspectorates decide to cooperate, much depends on the arrangements they choose for doing so. Cooperation may be structured in a variety of ways, though these are certainly not all heavy-handed arrangements. We describe here four "ideal types"[82] of cooperation between inspectorates: intergovernmental European cooperation outside the EU framework; informal and formal European/EU networks, including ADCOs; independent European agencies; and supranational cooperation under the auspices of the European Commission (see Figure 2 for an overview).

The distinctions drawn, however, are mainly for analytical purposes. In practice, numerous additional "types" may be identified. Moreover, forms of cooperation in oversight develop continually over time, often independent of the underlying issue or problem addressed. In general, cooperation has been found to expand over time to include an ever-wider scope of activities. Interactions between cooperating parties also tend to take on a more structured character over time. They become more formalized, as well as including greater numbers of participants. Finally, the decisions made within cooperative structures tend to become more binding over time.[83]

Intergovernmental European cooperation outside the EU framework

Cooperation does not necessarily start in one of the most intensive forms. It often begins with informal contacts between one or a few staff members of different inspectorates, for example, following a (chance) meeting at a conference. Or, inspectors may find they need certain information or expertise, which prompts them to consult on an ad hoc basis with counterparts in other member states.

Taking cooperation a step further, more systematic mechanisms for exchanging data might be established between two or more national inspectorates, often in response to a concrete problem and with a clear objective in mind. Such exchanges could be accomplished through consultations or reports, but also via a dedicated (ICT) system set up especially for the purpose. While this kind of cooperation may not necessarily be part of the EU framework, it may have a link with the European Union, for example, using EU administrative systems.

The Polish labour law inspectorate and the Dutch social affairs and employment inspectorate, for example, signed a cooperation agreement to address labour market abuses, a topic that both are keenly interested in. The inspectorates exchange data on sham arrangements, unscrupulous employment agencies, and businesses that have violated labour laws.[84] They do this via IMI, the Internal Market Information System, a computer database set up by the European Commission for sharing informa-

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78 Groenleer et al. (2014)

79 Lezaun & Groenleer (2006), Boin et al. (2014)

80 Personal communication with Dutch mines inspector

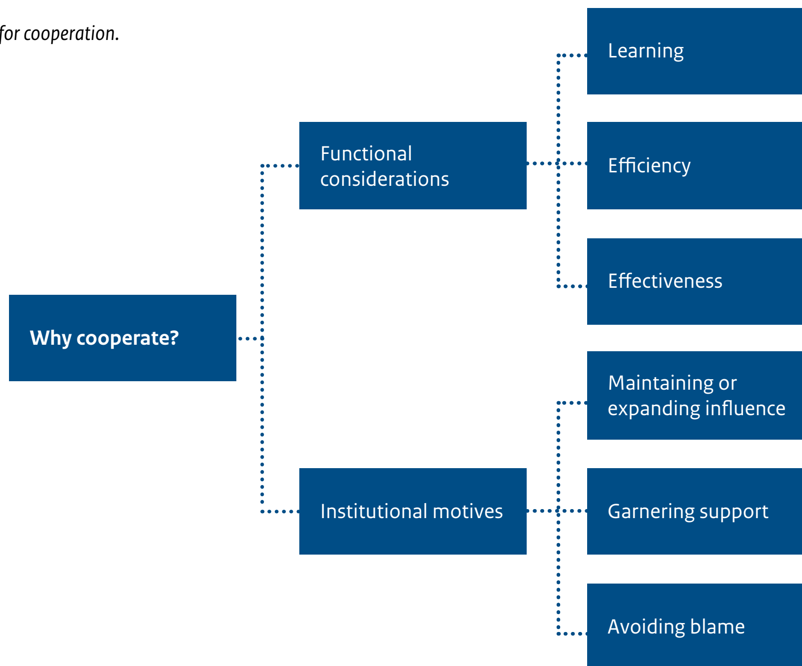
81 Personal communication with Dutch transportation inspector

82 These are hypothetical or abstract types, not perfect or optimal types, in the sense that they are formed from the characteristics of the phenomenon of cooperation, but they do not correspond to all of the characteristics of any one particular case of cooperation.

83 Thatcher & Coen (2008), Groenleer (2011), Levi-Faur (2011)

84 Personal communication with Dutch labour inspector. See also the press release (in Dutch): https://www.rijksoverheid.nl/actueel/nieuws/2013/12/18/poolse-arbeidsinspectie-en-inspectie-szw-sluiten-samenwerkingsovereenkomst

Figure 1. Reasons for cooperation.



tion between the authorities implementing internal market legislation.[85]

Various European cooperative arrangements among inspectorates have been founded on an intergovernmental basis, established through, for instance, administrative agreements or memorandums of understanding (MoUs). These are often set up by a select group of European countries, though non-EU countries may also be involved, such as Norway or Switzerland. Typically, administrative support is provided by a secretariat based in one of the participating countries. The costs of such cooperative arrangements are usually shared among the participants.

Examples of these are the above-mentioned International Liaison Group of Government Railway Inspectorates (ILGGRI), the European Forum of Food Law Enforcement Practitioners (FLEP), and the European Partnership for Supervisory Organisations in Health Services and Social Care (EPSO). These intergovernmental networks exchange knowledge and experience on subjects of mutual interest, they discuss relevant subjects and developments in their field and coordinate further thinking. Sometimes they may also provide inputs to European agencies; for example, ILGGRI contributes information on railway matters to the European Railway Agency (ERA). Or they may make use of EU agency facilities; for example, the European Maritime Safety Agency (EMSA) hosts a database of inspected ships for the Paris MoU on Port State Control.[86]

Another example is Euro Contrôle Route, the earlier-mentioned network for road transport inspections established by the Benelux countries.[87] Within the network, participants seek to align their road transport inspection activities, in order to increase their effectiveness. Though the agreements reached are not binding, they reflect a gradual merging of enforcement actions through mutual consultation, cooperation, and joint initiatives.

Informal and formal European networks, including the ADCOs

European networks of national inspectorates have been created in many policy fields.[88] The ways these networks are organized vary widely. Some networks are informal and dominated by the member states, while others are more formalized and under the strong influence of the European Commission or are coordinated by an EU agency.[89]

Initially, IMPEL operated as an informal network of European environmental inspectorates, but it has since been formalized, acquiring an independent legal status

[85] For more information on IMI, see http://ec.europa.eu/internal_market/imi-net/index_en.htm

[86] For more information on the Paris MoU, see https://www.parismou.org/

[87] For more information on ECR, see http://www.euro-controle-route.eu/site/

[88] See, for an overview, Dutch Board of Inspectorates (2009).

[89] Coen & Thatcher (2008), Börzel & Heard-Lauréote (2009), Börzel (2011), Groenleer (2011)

and official recognition via an MoU with the European Commission. At present, in addition to facilitating exchanges of information, knowledge, and experience, the network organizes training courses, workshops, and exchange programs; drafts technical guidelines; establishes minimum criteria for inspections; and organizes joint or coordinated inspections. Inspectorates and their inspectors work together on specific cases, which the inspectors involved consider to be one of the major reasons for IMPEL's success.[90]

In addition to informal networks, a range of more formalized European networks has been established in recent decades. This establishment, in practice, has often come down to the formalization of existing informal cooperative arrangements via European legislation. In addition to these, a number of European working groups have been set up to implement EU directives related to the internal market. These are the so-called "ADCOs" (Administrative Cooperation Groups), in which representatives of both national inspectorates and the European Commission are active. For example, in the framework of the Radio and Telecommunications Terminal Equipment Directive (R&TTE), the ADCO for R&TTE serves as a forum for cooperation and information exchange between national market oversight authorities.[91]

Formal networks serve various objectives.[92] One of the most important of these is coordinating implementation of European legislation and regulations. National authorities for consumer protection have worked together in the Consumer Protection Cooperation (CPC) network since 2007. The aim of this formal network is to bring a quick and effective halt to commercial practices that violate European consumer law,[93] particularly in situations where customers and businesses are based in different EU member states. Member state representatives meet three to four times each year in the CPC Committee, which serves as a platform for discussing, for example, the development of common approaches to oversight through means such as common standards and guidelines. This committee also discusses "enforcement action plans," including coordinated annual Internet sweeps.[94]

Formal networks can additionally provide national inspectorates a platform for reaching agreement on how EU legislation and regulations will be implemented, therefore promoting harmonization of operational processes. They may also offer early opportunities to identify bottlenecks in implementation of European rules or to request clarifications from the Commission if European rules are unclear. Furthermore, they can facilitate identification of best practices and the conduct of peer reviews, such as in the IMPEL Review Initiative and PROSAFE Joint Actions.[95] PROSAFE, the Product Safety Forum of Europe, promotes cooperation among European market surveillance authorities. In addition to providing training and improving communication between member states, it also coordinates product-specific market surveillance activities for greater oversight efficiency and provides opportunities for more in-depth study of best practices.

Best practices and peer reviews are seldom binding, but they may nonetheless significantly impact policy, both in the member states and especially at the European level. The Commission's involvement in formal networks has cultivated close linkages with representatives of national inspectorates. This also provides inspectorates a channel for submitting recommendations for adapting regulations; and the Commission may request advice from inspectorates based on their practical expertise. This is observed, for example, in the Senior Labour Inspectors' Committee (SLIC)[96] and the ECHA's Enforcement Forum.[97] SLIC helps the Commission monitor enforcement of occupational health and safety legislation; in the ECHA's Enforcement Forum national inspectorates advise on regulations for safe use of chemical substances.

A major advantage of European networks is the bottom-up character of the cooperation, which promotes acceptance among national inspectorates. Member states and their national inspectorates are responsible for implementing oversight within their own national borders.[98] This is, at the same time, an Achilles heel of cooperation via networks, regardless of whether they are informal or formally structured.[99] Because network cooperation is often voluntary and decisions are not always binding, national authorities are still free to

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[90] Personal communication with Dutch and Belgian environment inspectors

[91] For more information on the R&TTE, see http://ec.europa.eu/growth/sectors/electrical-engineering/rtte-directive/index_en.htm

[92] Lavrijssen & Hancher (2009)

[93] For more information on the CPC network, see http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/consumer_protection_cooperation_network/index_en.htm

[94] Personal communication with Dutch consumer protection enforcer

[95] For more information on the IMPEL Review Initiative and PROSAFE Joint Actions, see http://www.impel.eu/projects/impel-review-initiative-iri-2015-programme/; http://www.prosafe.org/

[96] For more information on SLIC, see http://ec.europa.eu/social/main.jsp?catId=148&intPageId=685

[97] For more information on ECHA's Enforcement Forum, see http://echa.europa.eu/nl/about-us/who-we-are/enforcement-forum

[98] Eberlein & Grande (2005)

[99] Kelemen & Tarrant (2011)

organize their implementation of EU legislation and regulations as they see fit, with all the attendant potential consequences for cross-border inconsistencies. If difficulties do arise, the European Commission usually has few qualms in proposing stricter requirements for national oversight or even farther-reaching Europeanization of oversight, for example, through EU agencies.[100]

European Union agencies

The term "agency" is a source of considerable confusion, because the word is used for different kinds of entities within the European Union. The agencies referred to here are autonomous entities with an independent legal status under European public law. They are usually established by means of a regulation.[101] At present, there are more than 30 such agencies, all active in various policy areas and with a variety of tasks and mandates. Most agencies are not based in Brussels, but operate out of other EU member states. In total, they employ more than 5,000 staff and have aggregate annual expenditures of more than one billion euros.

Most agencies have a limited mandate, though a few have broader competences. As such, they might make decisions in individual cases, such as on authorization of medicines or food products, or they may be responsible for carrying out oversight, for example, in the aviation or maritime industries. EMSA, the earlier-mentioned agency for maritime safety, seeks to ensure uniform conduct of inspections and use of the same inspection criteria and reporting procedures by inspectors across the European Union. It seeks to achieve these goals through workshops and other means.[102]

Given the influence of the existing national authorities, EU agencies are frequently organized as "network" organizations, to complement rather than replace member state authorities.[103] Through the networks that they coordinate and, at the same time, are a member of, the agencies are well positioned to contribute to increasing stakeholder involvement and enhancing information exchange and the sharing of good practices.

Initial experiences of EU agencies suggest that their greatest added value lies in stimulating mutual learning processes between national authorities and in serving as platforms for discussion and debate between European and national stakeholders.[104] In this sense, EU agencies' contribution differs little from that of European networks of national authorities.[105] But the role of agencies does appear to be growing, not necessarily centralizing, but federalizing tasks. For example, decisions made by EASA, the agency for aviation safety, can be binding.[106] And, not unimportant, EASA coordinates joint inspections.

Supranational cooperation under the auspices of the Commission

No single European agencies have, as yet, been established to swallow up national authorities.[107] The most intensive form of cooperation is the central conduct of inspections at the EU level. Cooperation within the Food and Veterinary Office (FVO) comes closest to this. In this supranational arrangement, oversight authorities from all EU member states have joined forces under the auspices of the Commission to undertake joint "meta" inspection activities.[108]

Nonetheless, it would be an exaggeration to label the FVO a European inspection agency. National inspectorates still exist and remain in charge of the foremost inspection tasks within the member states. But in conducting their work, they are more bound to uniform rules and procedures. Indeed, FVO inspections are often additional to the inspections already scheduled and carried out by national authorities. They are therefore frequently perceived as an extra regulatory burden, by both the businesses supervised and the national inspectorates.[109]

Even if member state authorities were eventually absorbed within a single European-level agency, it is still unlikely that national inspectorates would entirely disappear. An EU agency is unlikely to possess the necessary knowledge of the local context, to say nothing of language divides, which may also constitute major barriers. It is more likely that national authorities will continue to exist, but develop, for example, into regional offices or centres of excellence in a particular field. In the areas of food safety and aviation safety, for example, some national inspectorates can already be observed moving towards this focus on a more limited scope of specialized tasks, mindful that other tasks are already being performed through supranational cooperation, with the close involvement of the Commission, and sometimes even under its authority.

[100] Pierre & Peters (2009), Groenleer (2011)

[101] Groenleer (2009)

[102] Groenleer et al. (2010)

[103] Curtin & Egeberg (2008), Groenleer (2009), Busuioc et al. (2011), Busuioc et al. (Eds.) (2012)

[104] Zito (2009), Groenleer et al. (2010), Sabel & Zeitlin (Eds.) (2010)

[105] Schout (2012)

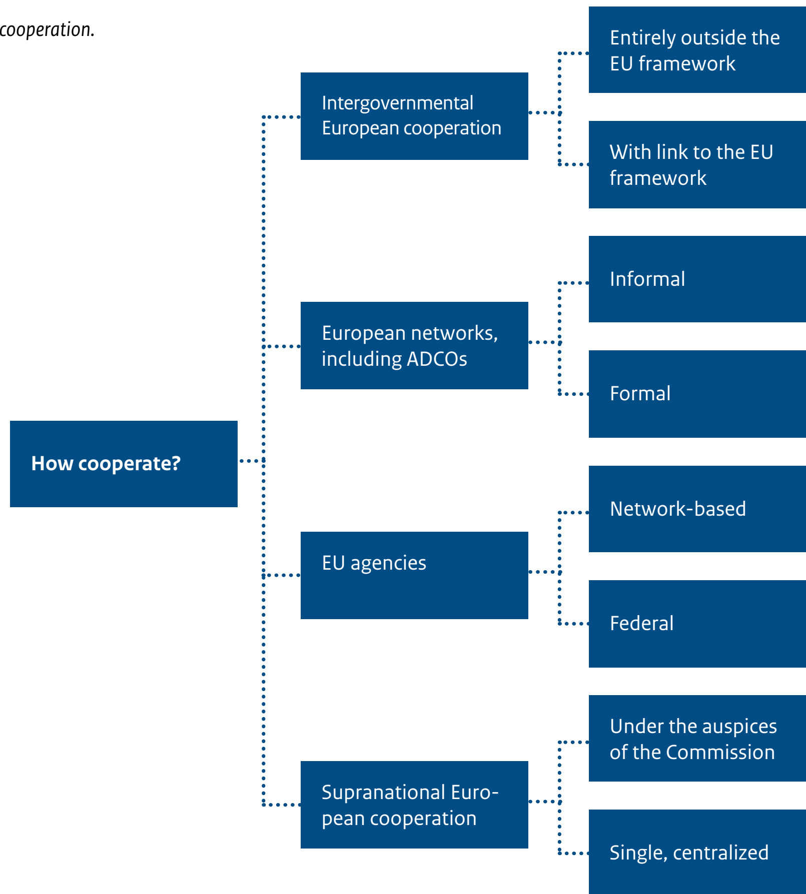
[106] Groenleer et al. (2010)

[107] Thatcher & Coen (2008)

[108] For more information on the FVO, see http://ec.europa.eu/food/food_veterinary_office/index_en.htm

[109] Personal communication with Dutch food safety inspector

Figure 2. Forms of cooperation.



Conclusion: Cooperation as a strategy

This contribution sought to answer the questions posed in the introduction: when do national inspectorates cooperate, why do they do so, and how precisely. We found that cooperation is certainly not always logical, simple or even recommendable. The nature and scope of the problems addressed and the societal outcomes pursued must form the starting point for determining if cooperation is warranted. Is cross-border cooperation necessary and desirable given the problem to be addressed? How much and what kind of cooperation should be sought to achieve the desired social effects? These are, in essence, questions about the appropriate level and extent of coordination and cooperation. Indeed, these are fundamental issues in the functioning of the European Union, not only with respect to decision-making but also with regard to implementation and enforcement of legislation and regulations.

Cooperation, then, constitutes both a challenge and a strategy. Cooperation confronts national inspectorates with major dilemmas, for example, regarding how and where to invest time and energy in the short term, to improve effectiveness and efficiency in the long term. Moreover, cooperation involves risks, for example, because working together might eventually undermine national autonomy in determining how oversight of European regulations should be conducted. To attain compliance with European regulations in the field of safety and quality, national inspectorates have nonetheless risked the step towards more intensive cooperation with counterparts in other countries. Though inspectorates sometimes have no choice in the matter, functional considerations and institutional motives have tended to play a role in decisions to cooperate. Inspectorates often make a deliberate choice to work together, though the forms cooperation can take vary widely.

Cooperation as a strategy requires not only the right mindset among the inspectors and inspectorates seeking to work together, it demands the right skillset as well. It is precisely on this latter point that many gains remain to be made. Inspectors tend to be mainly content-driven. They derive their motivation from, and are experts in, improving safety and quality in a particular industry or economic or social sector. For strategic cooperation within Europe, however, process management skills are needed, such as aptitude in bringing together different interests and preferences, ability to forge coalitions, capacity to

influence an agenda, and skill in lobbying European policymakers and in “uploading” information and knowledge. This calls for education and training of inspectors, both nationally and in cooperative arrangements among countries, beyond a singular focus on the topic of inspection.

In some countries, cooperation between national inspectorates is already common, for example, aimed at reducing regulatory burdens. Moreover, joint training of staff and common methodologies have been developed on overarching themes associated with inspection. The culture of cooperation that seems to be emerging from activities such as these may be an important explanatory factor for the outward orientation of inspectorates, and their willingness to join in cooperation with counterparts abroad. For that matter, the skills required for cooperation will already be better developed within countries with close national cooperation arrangements among inspectorates compared to countries lacking in such a culture of cooperation.

Cooperation across organizational boundaries, starting with other inspectorates within the country and then expanding to the European or international stage, can therefore be viewed as a next step in the professionalization of oversight systems and the individuals that are part of such systems, particularly inspectors. It allows inspectorates to increase their capacity (not only in terms of knowledge, information, experiences, and resources, but also in terms of skills) to oversee compliance with European rules, and may help to boost political and public support for enforcement of European rules within their territories. Ultimately, cross-border cooperation between inspectorates can contribute to the reduction of unnecessary and undesirable differences between national inspectorates and their practices, and, therefore, to the improvement of the societal outcomes of regulatory oversight.

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4. Regulatory oversight (monitoring, compliance, enforcement) as a function of the state: The case of the Netherlands

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Introduction: The position of regulatory oversight in the state

Every country has its own system of government and its own principles that underlie the design of state structures. Nonetheless, in all countries governments perform many of the same functions. Policy is developed, laws are crafted, laws are implemented and laws are enforced. The particular way these functions is fulfilled, however, is unique in each of the EU member states, meaning that we often have to look hard to distinguish where corresponding functions are found. This is made even more difficult because different functions are often brought together within a single organization, and these organizations are unique not only to the country, but also to the particular economic or social sector they serve. For example, things might be organized differently for industry than for education. The difficulty I touch upon here is particularly evident in regulatory oversight. Its organization varies, not only from country to country, but also from sector to sector. It is difficult to distinguish any single pattern, which means that it is not easy to pinpoint appropriate partners and points of contact between countries. It therefore seems appropriate to explain for the Netherlands how the regulatory oversight system has developed in recent years and what the current status of the system is.

In the Netherlands we can state that the function of regulatory oversight is performed by a separate government organization in many social and economic sectors, and also that these government oversight organizations are often horizontally linked to one another. As such, there are – by way of example – specific oversight organizations for the different modes of transportation (rail, road, aviation and shipping), and these are then also incorporated together within one organization, which also includes other regulatory domains (the Human Environment and Transport Inspectorate). The Netherlands, moreover, has two distinct types of organizations for regulatory oversight called, respectively, 'inspectorates' and 'authorities'. The inspectorates represent the older and thus more classic pattern of regulation, while the authorities are newer types of regulatory organizations, established in line with more recent policies geared towards supporting market mechanisms (often in the context of the European Union).

In the Netherlands there is growing appreciation for the craftsmanship that is required to adequately implement regulatory oversight. Overseeing compliance with the law is increasingly understood as a highly professional endeavour, which requires both knowledge of the regulated domain and expertise about the conduct of oversight itself. Specialist studies have therefore been established for regulatory inspectors. Academic research is also being done on the topic, and an academic-professional community has formed. Broadly speaking, we can state that the Netherlands, with regard to the substance of its regulatory oversight, is most at home with the International Best Practice Principles, as developed by the OECD in 2013.

Regulatory oversight requires a particular art of leadership and management. Interactions with society, too, in line with the need for oversight organizations to maintain greater openness and communication within the public arena, make particular demands of regulatory organizations that differ from those pertaining to the civil service apparatuses that directly support the political work of government. Even though regulatory organizations are bound up with politics, special significance is attached to their autonomous professional status and the relative independence necessary to maintain it. Oversight organizations' degree of independence in relation to the politically accountable minister differs in the Netherlands between the traditional inspectorates, which are positioned closer to the minister, and the newer regulatory agencies, which as 'authorities' have been accorded greater independence by law. Despite a movement towards a more autonomous oversight system, it nonetheless remains part of the executive branch of government.

Regulatory oversight is, depending on the domain it is exercised in, also linked to the judicial system. In the past it was customary for the judiciary to impose any sanctions resulting from noncompliance. This, however, resulted in much inefficiency and even dismissal of many cases. In the Netherlands, moreover, the judicial system has been overburdened for many years, meaning that less serious offenses have received little attention. To solve the problem, the relationship between the regulatory system and the criminal justice system was reformed. Over the past ten years 'administrative sanctions' or penalties were thus added to Dutch regulators' toolkit. This means that oversight authorities can now impose an immediate sanction on regulated enterprises that are found to be in infringement. Of course, major offenses are still deferred to the judicial apparatus.

A key characteristic of all public regulatory bodies in the Netherlands is their explicit focus on the interests of the citizenry. While in the past there was often ambiguity about the 'motive' for oversight, today its priority is undisputedly to protect citizens and public values. However, this explicit focus has raised certain expectations within society, and these are not always consonant with the actual positioning of the regulatory system as part of the executive branch of government.

Background of the development of regulatory oversight in the Netherlands

In the latter half of the 1990s, regulatory oversight was a subject of intense political scrutiny in the Netherlands. This increased interest was a result of a number of developments. Of course, one of these was the general shift in views about the rightful role of government in society. Generally speaking, changing attitudes towards government's role led, first, to a more primary role of social actors in society's development and, second, to a reduction of direct government involvement – at least in a number of domains. In the political rhetoric of the times, this was often referred to as 'more autonomy' for civil society actors, which however was to be accompanied by 'more accountability'. In the form in which this ideology was expressed, regulators were ascribed key tasks, especially initially. Conceptualizations of this were not always sharply defined, however, certainly not in any consistent way.

Providing a precise definition of the nature of government activities has proven difficult to do. In the approach that I take in this essay, the notion of the 'regulatory state' serves as backdrop. I believe the policy of the Netherlands government since 1990 can best be categorized as such, especially during the period in which policymaking on regulatory oversight was being particularly emphasized. Of course, all sorts of other drivers of change have also influenced the regulatory system. The developments encapsulated in the New Public Management (NPM) have been especially pivotal in influencing how regulators work. Below I look at a number of triggers that provoked a new and 'different' way of thinking about regulatory oversight.

The enforcement deficit

> *Laws exist to be complied with. In many cases, this doesn't happen automatically. Compliance then has to be 'helped along' by the active intervention of, among others, regulators. This is often difficult, taxing and stressful. It is often tempting then to refrain from enforcement, thus 'turning a blind eye' to an infringement.*

The 1990s brought greater awareness of the need to more effectively enforce laws and regulations. During that period, the concept of the 'enforcement deficit' was emerged, which provided an empirical measure for failure to comply with statutory regulations. Within Dutch society, this represented a trend break. The Netherlands had been characterized by a high density of regulations, but also by a strongly developed 'culture of tolerance' and a certain permissiveness towards violations of the law. While civil disobedience was recognized as disobedience, it was also thought to be a bona fide aspect of the social system and therefore a necessary part of life. Graffiti, for example, was acknowledged as vandalism but nonetheless considered worthy of respect because of the aesthetic values it could be associated with. The Netherlands' soft drugs policy offers probably the best illustration of the Dutch culture of tolerance. This tolerance, however, meant that the real significance of laws and regulations was often ambiguous, and there was ample space for selective application of rules. Enforcement organs, too, often turned a blind eye to violations and were flexible in the face of infringements. This, all together, resulted in a relaxed attitude towards rules. Violations and failures to comply were often noted, but remained without repercussions.

Towards the start of the twenty-first century, the idea that there was too much regulation rapidly gained prominence – initially provoking a wave of noncompliance with the regulations on the books. Later this evolved into a selective approach in applying the tool of regulation. However, at this point, when regulations were established, adequate compliance with them was also insisted upon. Ensuring this was a task delegated, in particular, to agencies mandated to monitor compliance and to do so in such a way as to promote rule compliance. This demanded a very significant culture shift among enforcement organizations. For example, while many inspectorates had hitherto emphasized mainly advisory services and assistance, they were now required to sing a very different tune.

Reviews were carried out and adjustments made within, for example, the inspection organizations, to establish modi operandi more in keeping with the new way of thinking. To accommodate the desire for more effective compliance, new forms of sanctions were also designed. One of these was the administrative enforcement provisions introduced to lighten the load on the judiciary system and also to bring about greater efficiency in the imposition of penalties. The Public Prosecutor opted for more selective application of criminal law, subsequent to an administratively elaborated intervention policy. Intervention pyramids and proportional sanctions were also introduced within Dutch regulatory organs. The policy focused on ensuring compliance was stimulated nationwide at the local government level, where enforcement activities were mandated to be carried out. Although numerous features of these developments were unique to the Netherlands, the developments overall transpired in step with a larger global trend towards more effective government action. In the maintenance of law and order, for example, concepts like 'zero tolerance' were being introduced. These developments formed, certainly in part, the backdrop against which regulatory enforcement policy in the Netherlands was elaborated.

Regulatory policy consistent with political and social spirit of the times

> *There is a gap between policy and society. Many policymakers don't know what is going on in society. They just swim along with the tide, reacting to whatever is the 'topic of the day' within the political establishment. There is a need for more 'feedback' from 'reality' and a broader basis than just the impressions formed during the latest 'working visit' or an incidental reprimand.*

Inspectorates, and enforcement services more generally, can be viewed as front-line organizations. They are in direct contact with society and with the way that public tasks are supposed to be and can be implemented. They are the ones confronted with new circumstances and phenomena, and they are often the ones asked to ensure that new practices are brought into alignment with the law. Within society, there is an growing urge towards individuality and variety, and these same attributes are also demanded of regulatory enforcement, which is increasingly expected to be tailored to individual situations and circumstances. Yet, particularly against the backdrop of the earlier-mentioned expectation of strict compliance, this tends to be a source of friction within the enforcement services.

Alongside the greater emphasis on the enforcement task of regulators as inspectors, greater accent has also been placed on the feedback role that regulators can play. Inspectorates typically become very knowledgeable about emerging developments in their field of activity and thus also within society. They can emit early-warning signals to the responsible government officials and policy organs. This is not a new role for inspectorates, but it is a role that has received new impetus in the current social context in which policy and government administration are frequently accused of having lost touch with the real concerns of society and citizens. Of course, this role also implies that within the inspection organizations, mechanisms and techniques have to be developed for providing this feedback efficiently and professionally. Not every experience, or every reprimand, or every conflict will be worth sharing. Inspection organizations have to approach this task with acumen and discrimination. In this regard, inspectorates have opted for reporting techniques such quarterly reviews for policy organs and annual reports that provide glimpses of emerging developments in their field of activity.

In their communications with the national political establishment, too – and this means, as a rule, with ministries – new configurations have been developed that make it possible for inspection organizations to be involved in policymaking while maintaining respect for the regulator's independent authority. The implementability and enforceability of new laws are also assessed, and the inspectorates play a role in this too. To perform the feedback role adequately, the inspectorates have developed new means of communication that, in principle, address a wide spectrum of social actors. The media, especially, as well as the political establishment, especially elected representatives, are especially important audiences for this function of oversight.

Recognizable achievements and accountability

> *How good is this hospital, this school, this university, and so on. Citizens have discovered that things aren't equally good everywhere, and they want to know where the differences lie. This has generated considerable interest in 'transparency', which has then taken the form of 'rankings', 'comparison tables' and 'overviews'. Regulators possess a great deal of information about the institutions under their supervision. Citizens, with the aid of the media, want to 'get hold of' that knowledge.*

Government has to demonstrate performance. Publicly financed organizations have to demonstrate 'value for money' to tax-payers. Public tasks have to be carried out efficiently. Unlike 'market organizations' there are no standard indicators for measuring the performance and effectiveness of organizations in the public domain. Or, better said: thinking in those terms wasn't habitual prior to the 1990s. Performance was often measured by 'input' magnitudes. The more money went in, the more and the better the output was considered to be. Exactly how that conversion worked was left to the institution. Its processes for achieving its objectives were a black box. Even whether the objectives had really been achieved was no simple matter to determine. It was therefore frequently a subject of dispute. Regulatory inspectors were clearly implicated in calls for more exacting standards for determining the effectiveness of organizations in the public domain. The Healthcare Inspectorate (IGZ), for example, was expected to know how effective and efficient hospitals were; the Inspectorate of Education had to know the same thing about schools. The focus of the inspectorates in these domains thus shifted during this period to a more output-oriented approach, also seeking to use inspection findings, where possible, to help improve the effectiveness with which those outputs were obtained. The scope of regulation also evolved to include assessments of the 'quality' of an institution. Methodologically, however, this is no easy task. Moreover, and it widens the scope of emphasis, as society is not only interested in the regulator's particular findings on outputs and effectiveness, but also wants to know how the regulator arrived at its conclusions. This requires a rigorous methodological approach, as well as a high degree communicative proficiency. After all, an inspector must not only form an opinion about the quality of, say, a school, but it must also be able to explain the basis of that opinion to the people to whom that opinion is important.

In most fields, this has in recent years led to operational definitions of quality. These sometimes take the form of output indicators or index statistics, but may also be communicated in more extensive analyses of the institutions supervised according to indicators and criteria that are set in advance. With this approach, quality management systems have been brought more into the equation. They too have become a subject of regulatory assessment. Inspectorates thus are no longer exclusively concerned with questions of 'compliance', but also seek to provide answers to questions of 'performance'. Within regulatory oversight as a profession, this places a premium on expertise about empirical-analytical tools for carrying out performance measurements and comparisons.

The developments referred to here have, furthermore, been greatly stimulated by the media's interest in knowledge and information about public institutions. Newspapers regularly request performance data, invoking the Freedom of Information Act if necessary, and judges have generally been sympathetic to these appeals. The media adore comparative data, especially those that can be presented in the form of rankings. 'Ranking' therefore, too, has become a 'tool' for bringing about a particular dynamic in demand-driven systems. In an administrative approach to ensuring compliance, these data can be used for 'naming and shaming' and applied deliberately as a public corrective mechanism. The media play an essential part in this.

The Netherlands Scientific Council for Government Policy (WRR, 2004, 2013) has proposed consideration of a different type of regulatory oversight system, one that places much greater emphasis on 'learning', instead of concentrating exclusively on accountability, referring to this latter as a 'reflexive role'. The WRR has gone on to suggest that a national organization like an inspectorate could act in a simulative capacity by compiling and spreading 'good' examples, in any case, providing rational arguments for the various solutions developed by institutions and enterprises. The WRR contribution questions the function of regulatory oversight, challenging regulators to make explicit choices, because 'accountability', 'learning', 'monitoring' and 'sanctioning' are not always fully compatible with one another. The 'repressive' aspect of oversight, for example, is often at odds with its 'simulative' element.

An interesting aspect in this regard is that the inspectorates themselves are, of course, also 'public organizations' and the arguments that they consider applicable to others can also be considered to apply to themselves. Regulators have to be accountable too, and therefore also need their own indicators of performance.

Failing oversight

> *Where was the regulator? This question is asked every time a serious incident or irregularity occurs. Obviously it is a good question – and one that has to be answered – but another question that could be posed is whether expectations of the regulatory system are unrealistically high and unachievable in practice.*

Incidents and disasters place the spotlight on responsibilities. They raise questions about the adequacy of rules, as well as about the way the rules are applied. Similarly, when citizens' immediate interests are damaged and an oversight function of the state may be culpable, regulatory agencies are understandably interrogated about how they operate. Regulators always come off badly when unwelcome incidents occur despite their efforts. They are looked to for explanations of why they couldn't prevent the incident. At the same time they have to communicate clearly how they work. How do they make their selections? How do they conduct inspections? What do oversight agencies do when they encounter improper abnormalities, and what options for intervention do they have?

Occurrence of serious incidents in a variety of domains has put regulatory oversight policy at the top of the political agenda. But there are no simple answers to questions of how regulatory oversight is best organized for it to function in a way that is socially acceptable. Current evaluations of whether the regulatory system failed, for example, in the case of the financial sector, address these kinds of questions. Indeed, oversight systems have never been as fundamentally scrutinized as in the aftermath of this mega-crisis. An important aspect here is that the regular oversight authority was part of the system it was supposed to be supervising. Yet, as a 'participant' in a system, it is difficult to observe from an objective vantage what is really going on and to ask critical questions. Maintaining an independent and provocative stance requires procedures and approaches that transport the regulator into 'another environment' and in doing so expand its perspective.

Publication of an annual report about the 'state of the system' can help draw attention to the broad outlines of emerging developments and 'unusual incidents'. Regulation aims to have a preventive effect. If crises do break out despite this, scrutiny of regulatory systems is entirely appropriate. Thus, every incident provides, in turn, impetus for the further development of the oversight system.

The advent of new regulators

Within the political establishment of the Netherlands, interest in market regulation spiked in the 1990s, in step with similar trends throughout the entire Western world.

These were particularly influenced by European developments in the context of the European Union. Various theorists have given this development a name: many speak of the rise of the 'regulatory state'. In a regulatory state, lawmakers ensure that certain tasks are performed, but leave execution of those tasks, in principle, to 'others'. The state doesn't do things itself, and furthermore, it seeks to limit its involvement in the performance of tasks to the very minimum possible. Furthermore, there is more emphasis on the functioning of markets. After all, if market mechanisms are being proposed because the market is thought to perform better, on balance, as a regulator, then citizens must be assured that those markets really do function adequately. Markets may work well, but their functioning can also be hindered by participants within the market, for example, by forming cartels. Optimizing market mechanisms therefore became the main policy objective of government, which resulted in new and more intensive forms of oversight. In the Dutch context, these oversight responsibilities were vested in new organizations, or were delegated to existing organizations that had been revamped for the purpose. These regulators were designated 'authorities'. Thus, the Netherlands Authority of the Financial Markets was created, the Netherlands Competition Authority (NMa), the Netherlands Independent Post and Communications Authority (OPTA), et cetera, which were then later merged into a single authority called the Authority for Consumers and Markets (ACM).

These new, or revamped, regulators were given a large degree of autonomy in preforming their tasks. Their establishment as independent administrative bodies was considered the most appropriate legal structure, as this would ensure unambiguous political accountability at the system level, while preventing the political establishment from intervening in individual cases. While most of these new oversight authorities were focused on markets and market parties, an authority was also created for a sector such as, for example, healthcare – which functions partially as a market: the Netherlands Healthcare Authority (NZa). These new regulators, organized completely differently from the more traditional inspectorates, have contributed to a repositioning of the regulatory system as a whole and the way oversight is performed. One thing they do have in common with the inspectorates is that the regulatory activities they conduct are recognized and accepted across society. This has resulted in greater emphasis placed on the professionality and integrity with which oversight tasks are conducted. Because the new organizations do not bear the burden of a past they have been able to evolve more quickly than the inspectorates, many of which have a more than venerable history.

Regulatory policy for state oversight organs

Whereas regulatory policy had fallen mainly under the authority of those responsible for sectoral policy, after the turn of the century the topic of 'regulatory oversight' became part and parcel of a new way of thinking about different types of governance systems and different mechanisms for exercising the influence of the state. Of course, regulation continued to exhibit features of the policy fields supervised and the institutions within them, but beyond that, regulation was approached from a more general perspective as well. This led to new adjustments in the way the oversight system was organized. The most important of these are examined below.

Strengthened position with increased scale

Regulatory oversight was a function of the executive branch of government and included among the responsibilities of a minister. Within the different ministries, rather than being predominantly generically organized, regulatory oversight was incorporated within a directorate-general. As such, for example, the Shipping Inspectorate was part of the Directorate-General for Freight Transport, under the Ministry of Transport and Public Works, and the Director-General for Freight Transport was the civil servant responsible for the regulatory oversight function. The conduct of oversight activities was based in a separate organizational entity, which furthermore enjoyed a degree of autonomy in performance of its tasks. Within the ministry, hierarchical channels were strictly adhered to, and regulatory officials could approach the minister in no other way than via the channel of the director-general.

The first period of increased emphasis on regulatory oversight was marked by organizational changes that targeted oversight tasks and resulted in consolidation of oversight functions at the ministerial level. This increase in scale, which however, did not lead to creation of a single regulatory organization in all of the ministries, led almost automatically to an upgrade of the status of oversight. Leadership of an inspection organization was now recognized as having the same level of authority as a director-general, meaning that within the organizational structure of the ministries the function of regulatory oversight became equivalent to a policy function. Within the structure of the ministries this was a step towards processes geared more towards 'checks and balances', which provided a more authoritative basis for advising the minister for a particular policy area.

The inspectorates, similarly, were better positioned to autonomously influence policy. Drawing on their expertise and assessments, they could now address the minister

directly and thus operate in an ‘agenda-setting’ mode. The notion of autonomy played a central role in this new positioning. Beyond the function that the inspectorates fulfilled within the ministries, they increasingly also had a public role to play. The news and reports they issued about what they encountered fed political and public debate. Moreover, in the years before and after the turn of the century, the Dutch House of Representatives (*Tweede Kamer*) was one of the most insistent on giving the inspectorates greater autonomy, to better ensure that the news and reports they issued conveyed a realistic picture of what the inspectorates wanted to say – and had not been coloured by the lens or pen of ministries and ministers. It was not considered appropriate for an inspection service to report exclusively to a minister in areas where social actors were also implicated. As they too were recognized as carrying an important burden of responsibility, accountability could not be considered to lie wholly and explicitly with the ministry. Regulatory oversight was, in this sense, ‘socialized’ by the changes in the system’s governance. Regulation became a part of the network of society with connections to all relevant parties.

Regarding the relationship between the inspectorates as organizations and the ministries, no uniform picture has (yet) emerged. Generally speaking, the inspectorates perform their tasks under the direct authority of a minister. The built-in guarantees to provide oversight agencies sufficient professional autonomy remained varied, from legal provisions (such as, e.g., for oversight of education) to a complete absence of any specific provisions in certain cases. A development common to all was the substantial upgrade in the status of regulatory oversight at the end of the recent turn of the century, across all policymaking areas and in the functioning of social sectors. Within the ministries they are now treated with difference.

Cooperation between inspectorates

Considering the way the regulatory system developed, the step towards the inspectorates entering into dialogue with one another seems a rather natural one. Thus, an institutionalized form of cooperation was created between inspectorates, later named the Inspectorate Council. This has provided increasing levels of coordination and guidance to the inspectorates in their operations (resulting in greater uniformity of oversight) and also produced comparisons based on benchmarks, thus promoting ‘good practices’. This cooperation was initially motivated by a desire to share knowledge and therefore feed learning processes; though the regulated sectors and industries were also proponents of greater organizational cooperation and alignment among regulators, to stimulate more rationalized oversight regimes. Motivated particularly by that cooperation, interactions between regulators began to centre increasingly on standards of professionality in regulatory work. Discussions have taken place on methodological aspects of the work, and common approaches have been elaborated, for example, for risk-based oversight.

More than previously was the case, inspectorates must now provide precise justifications for the way they go about their business and the choices they make in a particular period. Inspection – oversight – capacity is always limited. Because the areas supervised are always many times larger, regulatory authorities have to be rationally selective in their engagement. The methodological question is then how do they justify that selectivity. In any case, the risk-based approach scores highly in current practice. There is much less consensus and clarity on the exact risks that should be defined and how those risks should be ‘weighed’.

Cooperation between regulators would then suggest that a conference, such as the one we are holding now, might be organized on such a topic by the regulators, in this case the inspectorates.

The political context

As noted, in the lead-up to the turn of the century, the Dutch political establishment demonstrated considerable interest in market-based mechanisms for regulation and, by extension, in a diminished role of the central government. Added later was a wholesale pursuit of decentralization in all areas of government administration. Furthermore, there was considerable interest in ‘alternative’ forms of governance, particularly focusing on rearranging administrative burdens. All these developments were obviously influenced by developments in the European Union, in which the Dutch were more apt to lead the way than to be followers. These developments have not changed track in any essential way in recent years. However, much has been learned on the topic self-regulation since the financial crisis and from other crises, and these lessons have brought about a more cautious approach resulting, particularly, in a stronger role for regulatory oversight. In the areas of combating crime, maintaining public order, preventing terrorism and, in fact, across the entire sphere of the judiciary, the significance of central government’s presence has only increased. Enforcement and compliance, prevention and sanctioning have become high priorities.

Rationalization and deregulation

Successive governments in the Netherlands have implemented political programmes in which the theme of reducing the cost burden imposed by regulation on society

is a prominent policy goal. 'More effect, less burden!' is a slogan often used to express this policy. This maxim has direct relevance for regulators, because together they are the ones responsible not only for the rules but also for the way compliance with the rules is ensured. They thus represent a major share of the cost burden of regulation on society.

Oversight bodies were initially driven mainly by the desire to stay out of the way of economic development. They were thus sympathetic to the private sector and furthermore mindful of the sense gradually pervading all social sectors that the regulatory and inspection burden was overly cumbersome. Calls for simplification of rules and reduced inspections were widely heard. In domains where oversight had to be conducted, it was expected to be efficiently organized and, in any case, the 'silos' separating the various regulatory domains were to be broken down. The end-product of this operation was to be establishment of a single leading regulator for each social sector, with the authority to direct the others in carrying out their activities. Formation of the Inspection Council mentioned earlier as a 'compulsory form' of cooperation between oversight authorities was the result.

Next to these tangible changes, there was also a shift in rhetoric. In line with current social and economic developments, demands grew for stricter regulation than in previous years, and of course these directly affected the regulatory system. In addition to regulatory activities carried out by the state itself, interest has increased in linkages between private oversight agencies and regulatory oversight in the public domain. Though numerous questions can be raised about such 'co-regulation', we are nonetheless seeing more and more of it. To some extent, it is unavoidable because government regulators can no longer assemble all of the required areas of expertise within their own organizations, due to scarcity but also because of the high costs involved. International cooperation via private organizations that carry out oversight tasks under market conditions are perhaps a natural evolution, and in fact, they are already common in various domains (e.g., in traffic and transportation). But this evolution calls for even greater scrutiny of public legitimation and links with public regulators.

Decentralization

As indicated, movement towards more competences for local levels of government administration and increased autonomy of civic organizations are basic principles underlying policies. The provincial and municipal government levels, rather than the central level, have therefore become increasingly responsible for implementation of national legislation. A question that has then also arisen is whether regulatory oversight tasks will also be decentralized. In fact, most local government administrators take this as a given. In situations where individual municipalities are found to lack sufficient organizational strength and expertise to implement and enforce complex laws, the preferred response is to solve the problem mainly with cooperation at the municipality level or with cooperation between municipalities and the provincial government, rather than by maintaining a national regulator. Maintenance of a national regulator is feared would provide an instrument for central government interference, via that regulator, and such a scenario has been rejected. Evolution towards administratively stronger local governments is institutionally bound up with the dual division of responsibilities introduced at the municipal level in 2002. Municipal governments are formally controlled by their municipal council. It is therefore considered inadvisable for 'others' to also maintain lines of oversight on the municipalities.

For civic organizations the situation is slightly different. In the Dutch administrative context, civic organizations are not organically linked to local government, but have an autonomous position in society owing to national legislation and national funding allocation mechanisms. From the start of this century, however, an evolution strongly hinged on the notion of 'governance' has been under way, evident particularly in the Dutch public housing sector and among institutions in the education and healthcare sectors. Consistent with this notion, policymakers have sought to support and strengthen 'implementing organizations' and to avoid any impression of implementers being 'subordinate' to a central authority in executing their tasks.

Although national regulations are being implemented, these are designed in such a way that accountability for implementation lies explicitly with the institution concerned. Implementing bodies are accountable, insofar as possible, to their local environment. In this regard, we can speak of 'horizontal accountability', with the notion of 'stakeholder' used to identify those that are implicated. The institutions are governed by an executive committee, often designated as an executive board or council and composed of full-time directors. The institution then falls under the authority of a Supervisory Board. That board is staffed by 'wise and experienced' members of society. Nonetheless, the position of national oversight in relation to institutions in the social sectors remains a regular topic of public debate. Conceptually it is not yet well established.

Quantity

Politically the desire to engineer a shift towards 'less oversight' or a 'different position of oversight' has been expressed in imposition of hefty quotas or quantitative targets for the national oversight organs linked to the ministries. This accent on quantitative targets has stimulated increased cooperation among the inspectorates for efficiency purposes. It has also deepened thinking about what oversight intensity is needed or desirable and led to at least token acceptance of risk-based regulatory oversight

policy. This has become a generic operational strategy among the cooperating inspectorates. The way it has been implemented varies widely between the different inspectorates, and it is still far from being substantial in all. The political establishment itself has not yet settled on a consistent policy line regarding intensity of regulatory oversight. It has, however, formulated a maximal provision: enterprises may not be visited more than once a year. In short, the legal basis for determining a reasonable intensity of inspections is still under development; and various approaches are still competing for primacy or rise to the surface when 'political convenience' dictates. It is up to the regulator to establish convincing justification for this and to carefully communicate that within the political and public arenas.

Oversight by inspectorates, especially in domains lacking a relatively 'straightforward' enforcement element, can be done convincingly only if the expertise of the regulator is not called into question. Much of the regulatory work carried out by the inspectorates is a continual process of 'evaluation and weighing of evidence'. Staff members, the inspectors charged to do this work, have to know their business. Yet, the contraction of oversight systems and the merging of oversight tasks has placed that expertise under pressure. Oversight of the healthcare system has to be done by people who 'know' healthcare, and the same holds true for the nuclear safety authority and the Inspectorate of Education – to name just a few. But it also applies to those in leadership positions within regulatory organizations: If they want to be valuable discussion partners for sector representatives, ministries and members of government, they have to 'know' the issues they're talking about. It is this in-depth knowledge that gives an inspection organization its added value. Of course, everything in moderation, and here again, a degree of judiciousness is called for, because a too single-minded and narrow view is not conducive to a vibrant oversight system.

Oversight effectiveness and methodology

Next to discussions about location, organization and position, there is, of course, also the issue of the impact of the work done by the inspectorates. That impact can be encapsulated by the answer to the question: does any good come out of it? In other words, are things better because an inspection agency is involved. These are not questions that can be straightforwardly answered. The effectiveness of regulatory systems is in fact a topic generating considerable scepticism. It is therefore important for the inspectorates to realize that they are part of the system they supervise. They are marked, in part, by some of the same characteristics. Society has shown itself to be sympathetic to an inspection agency that clearly articulates and monitors a particular standard and takes action consistent with it. But there is little sympathy for an inspection agency that establishes that things have gone wrong but then doesn't (or is unable to) take action. It is not a signal of strength for an inspectorate to conclude that things have gone wrong year after year, because it then becomes apparent that they have inadequate capacity to intervene effectively with the parties concerned. It's especially bad news for inspectorates if 'others' produce documents showing that things aren't as they should be, and the inspection agency itself had not noticed.

Relatively little evidence-based knowledge is available on what designs and procedures could help inspectorates become more effective organizations. Similarly very little theory has been developed about the job of inspecting. The inspectorates themselves, moreover, have not been very proactive when it comes to demonstrating their own effectiveness. For a long time they took themselves for granted: 'We are here, so we must be doing okay!' Some research on oversight performance has since emerged, but much of it tries to make too big a leap. For example, researchers have sought to demonstrate that oversight of the educational system has brought about measurable improvements in the quality of education. Others set out to prove that the quality of healthcare provision has been positively influenced by the work of the Healthcare Inspectorate. Such questions, in my view, are 'too large'; instead, questions of effectiveness have to be formulated at a more intermediate level.

Researchers in the Netherlands have picked up on US studies that approach oversight as a 'problem-solver'. Thus, regulatory inspectors are challenged to identify what problems they aim to solve within a specified period of time, and to demonstrate that the problem was indeed solved. This is then considered an indicator of effectiveness.

Furthermore, among the cooperating inspectorates, it would be worthwhile to conduct critical assessments of the procedures of the cooperating partners and the end-results obtained. Cooperation among regulators across Europe could offer especially valuable prospects for learning, and in fact, a number of sectors already boast of experience in cooperative arrangements at the cross-European level. In the fields of, for example, environmental law enforcement, healthcare and education, voluntary modes of cooperation now exist between the EU member states. Various other regulators come together within the institutions of the European Union, including in the EU agencies that have been set up for many social sectors.

Common areas for development

Certainly when compared with the situation that existed around the mid-1990s, the classic state regulators have changed in many important aspects. They have evolved

from rather nonbinding, bureaucratic government organs with a low social profile, into more recognizable state institutions with more rationalized and finely tuned procedures. Cooperation and knowledge transfer are now the order of the day. Changes in governance, especially the stronger accent placed on decentralization and privatization, have affected the whole of Dutch society. Regulatory oversight organs, including the inspectorates, have been particularly implicated in this policy vision. According to the conventional wisdom, risks associated with the burgeoning autonomy in society can be obviated by a proactively operating regulatory system, which then also functions as a safety net. This vision brought about a revival of the classic regulatory organization, while also upgrading the status of regulatory oversight organizations. Moreover, it has led to a new type of regulators, expected to focus less on the centrally positioned minister and more on the accountable organizations and institutions.

Immense criticism of the regulatory burden, particularly from the private sector, among other factors, led soon after the turn of the century, in about 2002, to a view of regulators as primarily an encumbrance, impeding and hindering innovation. Regulators thus became the personification of the onerous regulatory burden, in part due to the very improvements they had made in their own procedures, which had raised the profile of regulation and made it more tangible and felt, and therefore also more of a perceived encumbrance. This evolution was strongly reflected in politics, resulting in a more constrained approach among the inspectorates – certainly in quantitative terms, but also with regard to the autonomy with which they conducted their work, and the public role fulfilled by the leaders of these organizations. The overall impression is therefore that they have adopted a more defensive posture.

The emphasis today lies mainly on cooperation, on implementation effectiveness and on reports issued by inspectorates documenting their accomplishments in these regards. With respect to social impact and social action, much less is apparent. The inspectorates seem to be receding back into the background, becoming more a part of the state bureaucracy – their own logos and letterheads are disappearing – and less the autonomous government entities in the social sectors in which oversight must carry out its functions.

Forms of oversight are vital to maintain strong performance among organizations and enterprises in our society. Self-regulation is an option, but repeated scandals involving corruption, dishonesty, fraud and negligence also show that to keep organizations 'in line', effective regulatory systems will continue to be a necessity. In addition, regulation provides feedback, and that is needed in any system. Such feedback does not have to come 'from the government', but it is important to consider what other form such feedback might take, and also be assured of impact because it is backed by sufficient knowledge and authority. This is no simple task. Within the dynamics of European developments, several issues can be raised that are of particular concern to the Netherlands:

1. European regulation in particular rightly assigns an important role to private certification and accreditation organizations (the so-called 'notified bodies'). Much of the oversight conducted in market sectors is based on a mixture of state regulation and private standard-monitoring institutions. However, these organizations' relationships with national regulatory authorities are far from clear, which undermines transparency and the sense of accountability. Concerns have also frequently been raised about whether the work of certification organizations is performed in a sufficiently unbiased manner, and whether it isn't important for this work to be done in a more transparent manner. Cases in point are problems that have emerged with breast implants, automotive emissions tests and the admission of new rolling stock (the Dutch Fyra project). In-depth dialogue on these topic is under way in the Netherlands (see the contribution of Haiko van der Voort).

2. Regulatory professionals in virtually all social and economic sectors have come to understand that decisions on inspection intensities have to be based on an analysis of risk, in line with the desire to reduce the burden imposed by regulatory oversight. This approach thus differs from the more legalistic-administrative attitude which sets requirements of a certain number of inspections within a certain time interval. Deepening knowledge about these two approaches could be an important area of interaction among the member states of the European Union. Moreover, to maintain a level playing field, greater coordination is needed on the forms and amounts of sanctions (penalties) for noncompliance. Sanctions imposed on individuals and enterprises under supervision should furthermore be made known back and forth across the European Union and must then be respected. This requires openness about any measures instituted.

3. The Netherlands acknowledges the individual responsibility of the member states for compliance and enforcement, but nonetheless considers professional interaction and exchange within the European Union to be of major importance. Professional development and the facilities that provide it should have a strong international component, to establish professional-level cooperation between countries, more than in the past. Participation back and forth in one another's training activities would provide a very natural way to raise professionalization to a higher (international) standard.

5. Transnational cooperation over the public-private divide: The challenges of co-regulation

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The dynamics of transnational cooperation between public and private regulators and enforcers

The activities of many organizations cross national borders, as transport and trade go from one country to another. Yet each country has its own regulatory culture and tradition, and countries' regulation and enforcement systems are all different. As a result, business processes now operate on a different – usually larger – scale than inspections. This poses at least two problems. First, national inspection authorities may possess insufficient countervailing power in the face of international businesses (Bartley, 2003; Marx, 2008; Van Waarden, 2009). Second, businesses incur considerable unnecessary costs in complying with different, perhaps contradicting, national regulations.

Cooperation among national inspectorates is a logical answer to this, although cooperation among inspectorates is more difficult than may appear, as demonstrated by Groenleer and Kartner in this volume. The current contribution adopts a broader view on cooperation, as it also takes private regulating bodies into account. Many organizations impose norms on others and also carry out inspections or audits to verify compliance. These entail not only regulators and inspectors in the public sector. Private organizations also regulate and enforce, as expressed by the concept 'self-regulation'. At both the national and international levels numerous self-regulation programmes have been organized by companies, trade organizations and nongovernmental organizations (NGOs). There is an entire industry dedicated to standardization, including organizations like the International Organization for Standardization (ISO), accreditation bodies, certification authorities and private inspection bodies.

The very existence of these private regulatory bodies implies opportunities for solving the two problems mentioned in the opening of this contribution. Indeed, private international standards and inspection activities facilitate public regulation and enforcement in some cases. Moreover, they sometimes act on the same, international scale as large companies. They may also have capacities that public regulators lack, such as information-gathering abilities, knowledge of private norms and greater access to human resources (Gunningham & Grabosky, 1998: 52; Ogus, 2004; Garcia Martinez et al., 2013). These are in fact some of the reasons why cooperation with private regulators has the potential to improve public regulation and oversight.

This contribution looks at some of the complexities of cooperation between public and private regulators, from now on called 'co-regulation'. Co-regulation implies that regulation and inspection activities are carried out by multiple different regulatory authorities, each with its own operational logic and history (Schiff Berman, 2007). Public regulators, broadly stated, apply a legal-hierarchical logic, while private regulators apply the logic of the market. When public and private regulators cooperate, these logics inevitably collide, and that collision introduces a degree of dynamism to co-regulation in practice.

The aim of this contribution is to advance understanding of these dynamics and to draw lessons from such cooperation for public inspectorates. First, a typology is sought of co-regulatory efforts, settling on two major types (section 2). For each type, particular characteristics of the dynamics of co-regulation are described drawing on national and international case studies (sections 3 and 4). The final section exploits knowledge about these dynamics to address the issue of cooperation among national inspectorates.

Our intention is not to advocate or refute the value of co-regulation. Rather, we will take co-regulation as a given, and examine how it works out in practice. The analyses is based on the literature and policy documents on transnational co-regulation, as well as empirical findings from the Netherlands. The empirical findings are derived from three case studies on co-regulation involving a desk study and 63 interviews with public and private regulators and enforcers.[110]

Who is responsible? Two types of co-regulation

Co-regulation can be conceived of as a continuum from public regulation to self-regulation (Bartle & Vass, 2005; Van der Heijden, 2009: 65; Senden et al., 2015). A degree of coordination is involved in typical regulation and inspection activities, which generally involve a 'director' (a norm or a standard), a 'detector' (an indicator or information) and an 'effector' (an instrument for enforcement; Hood et al., 2001). As such, co-regulation may entail harmonization of standards, exchange of information and coordination on sanctioning. The essence of co-regulation is that different regulators care about each other's activities and anticipate on them.

Many different types of co-regulation may exist. They are, in fact, too numerous to analyse in this contribution. Moreover, the key issues raised by co-regulation do not relate to the various types. They centre, implicitly or explicitly, on who is responsible for the consequences of noncompliance. Much of the literature centres on failed or

[110] The casestudies are made for my dissertation (Van der Voort, 2013)

imperfect forms of co-regulation (e.g. Dorbeck-Jung, 2010; Van der Voort, 2015). Many critics take the government's perspective and express scepticism about the ability of private parties to regulate themselves. The government is often seen as bearing ultimate responsibility for any regulatory activities aimed at ensuring compliance with laws and, more broadly, to safeguard public values (Dorbeck-Jung, 2010). If traditional regulatory tasks are delegated to private parties, a relationship of mutual dependencies is created between public and private parties. Public regulators become partly dependent on private regulators' performance of regulatory tasks. Adequate performance, however, is not always guaranteed: many self-regulating companies, trade organizations and certifiers lack motivation or capacity to be sufficiently rigorous (Gunningham & Rees, 1997; Hutter, 2006; Potosky & Prakash, 2009).
With this in mind it would seem more sensible to base our typology of co-regulation on responsibilities for regulatory activities. Van der Heijden (2009: 58–73) distinguishes responsibilities for developing the regulatory oversight framework and responsibilities for the execution of regulatory tasks. This distinction suggests the following rough typology of transnational co-regulation:

- *Private parties executing oversight activities within a public regulatory framework*. This type is in line with EU policy, considering their definition. Co-regulation is defined by the EU as, 'a mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)' [111]. This suggests that private parties may execute tasks that are predefined within a legislative framework set by national or supra-national government. They operate within a framework that they cannot influence. Their only influence is discretionary freedom in interpreting the tasks they are given.

- *Public and private parties both regulating and executing oversight side by side*. This second type suggests private parties setting a regulatory framework themselves, alongside governments. Public and private regimes are separate and independent entities. Co-regulation then emerges when these regimes begin to recognize each other and operate with consideration of the other's existence. This mutual recognition may be explicit, and formulated in public-private arrangements – again regarding standard-setting, information exchange and intervention – though respecting one another's independence.[112]

Both types of co-regulation imply considerable input from public and from private regulators, and they also imply a dynamic of colliding operational logics. The sections below explore dynamics of co-regulation for each of these types.

Private parties executing oversight within a public regulatory framework

The basic model

When private parties execute oversight within a public regulatory framework the tasks of the public and private regulators and enforcers are predefined. Defining the conditions under which regulatory activities are carried out is entirely the responsibility of the government. In this sense, this mode of cooperation is purely hierarchical: government is superior to the private regulators, and the latter's tasks are confined to execution. Government determines the level of discretionary freedom of self-regulatory institutions, and this freedom may well differ per arrangement. The roles of public and private inspectorates may also be defined in the framework, which promotes uniformity. In an international setting, coordination between public inspectorates, too, is centrally defined with predetermined roles. The framework represents the larger system which sets out how public regulators and inspectorates are to relate to private regulators. A well-known model the Community formulating essential requirements of products or processes in its legislation and assigning private standard-setting bodies (European Committee for Standardisation (CEN) and European Committee for Electrotechnical Standardisation (CENELEC)) to develop and adopt operational standards. There are, however, other versions of this model.

In the EU the model of private parties executing oversight within a public regulatory framework is common. Indeed, the very definition of co-regulation takes this as its starting point. It presupposes the prior involvement of a legislative authority that identifies the objectives that should be secured by private actors. Co-regulation is viewed as an implementation mechanism (Verbruggen, 2015).

A number of experiences with this model have been documented at the national level, as evidenced by our first case description.

[111] European Commission, 2014, 2014 Revision of the European Commission Impact Assessment Guidelines - Public Consultation Document, p.37-38; first mentioned in the Interinstitutional Agreement on Better Law-Making (2003) OJ C-321/01

[112] In theory it is possible that public parties de facto execute oversight within a private regulatory framework (Scott, 2002). This category may also be found empirically, but it will not be considered in this contribution.

Case 1. Oversight in the Dutch poultry sector: A confrontation between public and private regulation
Institution of a predefined framework is an attractive option for governments to mitigate the potential risks posed by private regulation. Having responsibilities already explicitly stipulated on paper facilitates accountability. This premise led former Dutch Ministry of Agriculture to draw up a policy framework entitled Supervision of Controls (TOC, *Toezicht op Controle* in Dutch) in 2005. The framework described a system wherein certifying bodies could take over some public inspection tasks and set out the conditions under which this would be allowed. The framework was applied in a voluntary certifying system in the Netherlands' poultry sector. During the negotiations between government and industry on the system to be implemented, public regulators demanded that the private partners provide extra quality guarantees. First, certifiers were to conduct extra, unannounced inspection visits. Second, a penalty in the form of a fine was to be added to the certifiers' sanctioning toolbox. A third, more widely supported demand was that producers were to obtain accreditation for a product certification system (NEN EN 45011). The extra guarantees evoked much resistance. Neither poultry farmers nor certifiers were eager to go along with the fine. The controversy deepened when the fine was declared incompatible with the product certification system. The Dutch Accreditation Council, upon consulting the European Cooperation for Accreditation (EA), called the fine 'unacceptable' for NEN EN 45011 accreditation. As a consequence, the sector faced two mismatched standards, both backed by regulators. While government backed the TOC system, the Dutch Accreditation Council advocated NEN EN 45011. The industry eventually opted for compliance with the latter, as that accreditation was vital for its export position, unlike the TOC.

The extra, unannounced inspections were controversial too. The costs of these visits were to be distributed over the members of the voluntary system, as an expression of the industry taking responsibility for its own quality control. A first controversial point here was how the European regulations should be interpreted. What did 'unannounced' exactly mean? Did it just mean not being programmed in the regular inspection rounds, or would a call the day before also be forbidden? Government resisted any room for discretion in this regard, while the self-regulating industry demanded more freedom for manoeuvre. The government demanded the stricter interpretation, whereupon the controversy shifted to the required number of inspections. Industry wanted the percentage low, to minimize cost and burden, while government wanted a higher percentage, to provide stronger guarantees and accountability. The controversies eventually resulted in noncompliance and distrust, compromising the TOC's effectiveness (Van der Voort, 2013: 79–116).

This case demonstrates the types of confrontation and issues that arise in regulatory systems involving varies types of agencies. Government wanted to be invulnerable to accountability issues, and undertook to protect itself by defining a strict framework and demanding extra guarantees. Participants in the voluntary system, however, would bear the costs, and they feared for their competitiveness, especially in relation to non-participants. Moreover, demands made by government sometimes proved incompatible with those of the standardization industry, which compelled the industry to make difficult choices. Industry considered its position towards international trade partners more important than its position towards regulators operating on a national scale.

Case 2. Medical devices: More government as a reflexive response to incidents
The model of public regulating frameworks is common at the European level. A well-known system for enabling international trade while still respecting national jurisdictions is the CE (*Conformité Européenne*) marking of products. Under the system products are allowed to be traded within the entire European Union if they are approved by an inspection organization assigned by an EU national government (**90/385/EEC**). The assigned inspectors are usually private actors and are called 'notified bodies'. Notified bodies are designated, monitored and audited by the relevant member states via the national competent authorities, usually ministries, national agencies or inspectorates.

Trade in medical devices is regulated this way, in accordance with three EC Directives (90/385/EEC, 93/42/EEC and 98/79/EC). Though products with a CE marking can circulate freely throughout the EU, there are conditions. According to the regulations, responsibility for gaining approval lies with the manufacturer. They have to prove that their product meets predefined 'essential requirements'. Furthermore, they must, depending on the risks of the device, have their product inspected by a notified body. The notified body writes a conformity assessment. Member states must allow products with a CE mark into their market, unless they can prove that the product fails to comply with the essential demands in the pertinent directives.

Many medical devices are traded within the European Union. Once in a while problems arise, which often imply direct health risks to users. This was the case for the breast implants produced by Silimed. When faulty products are determined, critics typically respond by addressing individual regulators or inspecting bodies, though notified

bodies may be targeted as well. The professionality of notified bodies may be questioned. For instance, the *British Medical Journal* (2012: 345, e7126) published a list of eight notified bodies that would 'likely [be] more interested in repeat business than patient safety'.

A second type of response concerns the system. Media and politicians may raise concerns about the autonomy of the notified bodies. After all, these institutions are selected and paid by manufacturers to conduct their analyses of product safety. Wouldn't there be ample incentive for notified bodies to be lenient to manufacturers? It is difficult for government to brush aside this critique. In 2014, EU authorities considered strengthening controls on medical devices, looking particularly at the role played by the notified bodies, in the context of the foreseen adoption of two new EU regulations on medical devices (2012/0266 (COD) and 2012/0267 (COD)). The following measures were considered, among others:

- extra requirements for notified bodies, for instance, regarding the qualifications of their personnel;
- institutional changes among the notified bodies, for instance, creating a limited elite group of notified bodies for high-risk products;
- reinforcement of public regulation and oversight by establishing an extra assessment committee for medical devices and carrying out extra market surveillance.

These kinds of measures mark a departure from the premise of the manufacturers' responsibility, and a shift towards a greater public grip on manufacturers and the notified bodies. They also imply a tightening of the conditions under which private regulators operate and possibly a loss of their potential capacities.

Case 3. Admittance of the Fyra trains in the Netherlands and Belgium: Interpretation of the inspector's role

The Netherlands and Belgium developed a high-speed rail line called the Fyra to provide rapid service between Amsterdam and Antwerp. The trains to be used were being manufactured by AnsaldoBreda. The trains were completed and admitted to the Dutch and Belgian infrastructure as being in compliance with the pertinent EU regulations (Directives 2007/58/EC, 2007/59/EC, 2008/57/EC and Regulation 13712007). The procedure went as follows:

- The manufacturer was deemed responsible for producing the required quality of trains and thereto was to implement a quality management system.
- The manufacturer was deemed responsible for complying with EU regulations, as published in the Technical Specifications for Interoperability (TSI), and with national regulations, the latter mainly regarding national infrastructure.
- The manufacturer was to hire a notified body to audit its quality management systems and compliance with regulations.
- The national public inspectorates were to check compliance with EU regulations. This was to involve assessments of the plausibility of all documents submitted by the manufacturer and the notified body as well as confirmation that all necessary procedures were followed.

Yet, just five months after admittance of the Fyra trains, they had to be removed from the railway network due to a number of technical failures and insufficient assurance of the manufacturer's ability to solve them.

In the Netherlands the situation was a serious blow, as the state's financial investment in the trains was considerable. To understand how the procedures could have failed, the Dutch parliament held an official inquiry, which is its greatest control instrument. The inquiry included in-depth research on the admittance procedures and hearings under oath. The investigators described their resulting impressions 'appalling'. They criticized the process, and particularly the way the Dutch Human Environment and Transport Inspectorate interpreted its role and the admittance system itself.

In short, the system was said to place inordinate emphasis on paperwork, and the inspectorate department responsible for admittance was said to have conducted too few on-site inspections. Within the inspectorate, various views circulated on whether they were even allowed to carry out physical inspections of the trains. The Belgian inspection service, DVIS, exhibited less constraint in doing so. The Dutch inspectors who were interviewed claimed that they were operating in the spirit of the European regulations by taking trust as their starting point, by being transparent, and by sticking to the roles they had agreed upon with the notified bodies. The Dutch Human Environment and Transport Inspectorate considered its role to be a process one. Yet sticking to this role was eventually at odds with responding to alarming signals about possible deficiencies in the trains. Eventually, the parliamentary inquiry committee concluded that those signals should not have been ignored.

This case suggests that differing expectations may exist of national inspectorates within the European regulatory system. The Dutch Human Environment and Transport Inspectorate claimed to be complying with European regulations overseeing procedures. The parliamentary inquiry commission – which is a political body – expected a more classic inspector. It criticized the Dutch inspection service for placing too much trust in the notified bodies, focusing too much on process audits and a too limited

interpretation of their mandate (Tweede Kamer, vergaderjaar 2015–2016, 33 678, nr. 11: 292–296).

The dynamics of co-regulation in public regulatory frameworks

Several observations on dynamics can be made based on experiences with this form of co-regulation. First, co-regulation is a zero-sum game. Ideal co-regulation for the one is a burden for the other. Conflicts of interest regarding standards are especially apt to arise between public regulators and the self-regulating industry. Public regulators want guarantees of compliance with laws and regulations, even when inspections are done by private bodies. Transaction costs incurred by industry to provide these extra guarantees are often framed as the industry 'taking responsibility'. Self-regulating industries need transaction costs to be low, to retain their competitive position, in relation to both international competitors and competitors that have not joined the self-regulatory initiative.

Second, differences between national public inspectorates remain, even if international regulatory frameworks are very detailed. Arguably, the more detailed the frameworks become, the more room for interpretation they offer. The medical device case pointed to different perceptions of the quality of the notified bodies. The Fyra case is indicative of differences across public and private regulators and inspectorates regarding their interpretation of their own roles and positions.

Third, a centralistic reflex is common following incidents. Political bodies seem at unease with innovative roles for public inspectorates. Can they accept the consequences of manufacturers' responsibility? And, can they continue to do so after incidents as well? In the immediate aftermath of incidents, politicians typically demonstrate little understanding of the new roles of inspectorates. Instead, we invariably see governments pulling responsibilities back into the public sphere, including extra public checks. This means that the accent of end-responsibility continuously shifts from government to industry and back again – and the roles of public inspectorates with it.

Public and private parties both regulating and executing oversight side by side

The model

Our second variation of co-regulation is when public and private parties both regulate and execute oversight side by side. In this model public and private regulators are independent entities. Both carry out regulatory activities based on their own standards. They have no hierarchical relationship. Insofar as they coordinate their activities, they do so based on mutual adjustments. The dynamics of this type of co-regulation are introduced below based on two cases.

Case 1. Dutch coach travel: Co-regulatory experiments and the problem of crossing borders

The Dutch coach travel trade organization established a regulation scheme to improve the quality and image of coach travel operators. It's aim was to create a visible quality mark based on management system norms (ISO 170210) , and to display that hallmark on company buses. The hallmark was to signify a level of safety. However, the Dutch Accreditation Body asserted that a certificate based on management systems represented the quality level of the organization, and not of a bus. A sticker on a bus would suggest otherwise. The problem was solved by using management system certification as just one input among others to determine whether the hallmark should be granted. This evolved into a self-regulatory system encompassing a board, commissions and networks of public and private regulators. The industry didn't mind having government inspectors involved, as they provided a 'reality check', alongside the industry's own management audits. Public inspectorates, in turn, demonstrated interest in the hallmark, even considering giving it a role in their own risk analyses. The former Dutch Inspectorate of Transport and Waterworks suggested that a differentiated inspection system might be used, with a lighter regime for operators shown to have an adequate management system. Public inspectorates like the Dutch department of motor vehicles (Rijksdienst voor het Wegverkeer) and the Inspectorate of Transport and Waterworks have since signed bilateral agreements with the trade organization to exchange information.

The regime will harness important synergies between public and private enforcement. Public and private inspection methods in this case appear to complement each other. Coach travel operators, for example, didn't fear public inspections because of the potential fines involved. Indeed, the fines were not excessive. Information on infringements encountered by public inspectorates is forwarded to the private regulators, and these latter may elect to withdraw a hallmark. This is viewed as a much more serious penalty. A synergy is thus achieved between the sanctioning instruments. However, the relationship with surrounding countries appeared difficult. Travel coaches regularly cross borders, and in such cases operators must comply with regulatory regimes of different countries. Both inspectorates and trade organization feared that foreign regulators would consider the Dutch co-regulatory regime too light and therefore single out Dutch coaches for inspections (Van der Voort, 2013: 129–143)

This case shows that a co-regulatory regime is easily complicated by the inclusion of multiple regulators. Agreements, covenants and networks emerge that must be fit into regimes such as ISO 17021, while fulfilling the expectations of foreign inspectorates. This wouldn't be a problem if expected synergies outweighed potential transaction costs. However, interaction between regulators easily results in unique, even experimental regimes. For a sector that must also work with foreign regimes, any experimental element tends to be a drawback rather than an advantage.

Case 2. NGO-driven self-regulation: Unstructured and intended governmental stimulus

Mutual adjustment is especially relevant in the international context. However, governments have struggled to muster sufficient countervailing power to call out global companies on standards issues (Marx, 2008; Van Waarden, 2009; Bartley, 2011). NGOs may be better placed to do so. Many global NGOs have actively built global regimes based on their ideals. Well-known examples are the Forest Stewardship Council (FSC) for timber, the Marine Stewardship Council (MSC) for fisheries and Fair Trade for food. All formulate norms and may also impose sanctions, for example, withdrawal of their hallmarks or 'naming and shaming'. Regarding sustainability issues, these NGOs have stepped into the vacuum left by governments.

Do public and private regulators act independently? Sometimes they do. Are they *de facto* independent from each other? No. This case description centres on the relationship between national governments, supranational governments and NGO-driven regulatory regimes based on the literature. The description will show that governments play an important role in stimulating these NGO efforts. Moreover, their stimulus role is not restricted to joint supranational efforts.

The case for uniformity. Governments working together have often played an important priming role for NGO-driven regulatory regimes. In 2005, the Food and Agriculture Organization of the United Nations (FAO) published standards for eco-labelling for fisheries. This intergovernmental action was intended as a contribution towards a joint position on quality standards and certification. Such a joint position, it was thought, could then evolve into an authoritative standard. In the FAO fisheries case, this goal was achieved and FAO-initiated standards became the reference point for fisheries and certifiers. Gulbrandsen (2014) called this mechanism 'coercive isomorphism' (after DiMaggio & Powell, 1991). An unintended consequence was that MSC became the 'golden standard', because it was the only initiative that could comply relatively easily to the FAO standards, and it used them in its marketing efforts.

A different example of priming for private regulatory initiatives was described by Hallström and Boström (2010: 74). They observed that some of their interviewees from MSC saw the EU as a potential competitor, because discussions were under way within the EU on erecting its own labelling system. Whether or not this perception is correct, it did incentivize MSC to remain stringent on fisheries.

Both examples suggest that cooperation between national governments can act as a catalyst for global self-regulation initiatives, even if there is no intention to do so.

National governments are hardly able to set authoritative international standards. However, they can play stimulating roles. First, they may operate as clients of hallmarked goods. Gulbrandsen (2014) found that procurement policies and public comparisons enabled benchmarking. Governments developing policies to buy hallmarked products was a signal to other clients that the government took the hallmark system seriously. Governments thus provide legitimacy to self-regulation initiatives. This in turn provides incentives to these initiatives to interact with national governments as clients.

Besides as clients, national governments may serve as data providers for self-regulatory institutions (Gulbrandsen, 2014). MSC auditors, for instance, need reliable data about the fish stock in various areas. Note here that data from government seems to be viewed as reliable and unprejudiced – or in any case, as the best there is. Senden et al. (2015) call these often implicit forms of incentivizing self-regulation 'tacitly-supported self-regulation'. They give the example of government posing a "threat of shifting towards a public regulation". The examples as mentioned here, however, indicate that the array of possible incentives is much wider than that.

National governments may act individually as clients and data providers. However, the legitimacy effect of their involvement may be larger if governments act collectively. In such a case, governments can have a very real influence on a market, as a limited number of initiatives receive visibility as compliant with public procurement policies. This requires coordination at a supranational level regarding preferences and criteria that governments would like to set. This will be a political process to which inspectorates may contribute as experts.

The need for uniformity? Successful interaction between governments and self-regulation initiatives, of course, depends not only on the uniformity of government involvement. Indeed, some diversity among governments is not problematic in itself. Initiatives like MSC, FSC and Fair Trade tend to adapt to local circumstances and

regimes. They also have a relatively flexible governance structure, which enables them to respond to ever-changing economic, ecologic and social forces (Taylor, 2005). MSC has a more hierarchical structure, but has built in flexibility by keeping its number of principles low (Gale & Howard, 2004; Hallström & Boström, 2010: 64–66). Fair Trade has diversified its labels and contracts tailored to the countries in which it is active (Taylor, 2005).

This responsiveness implies that national regimes are important. Cashore, Auld and Newsom (2003) found that FSC membership of suppliers strongly depended on local conditions. Is forestry well organized? Is sustainability of forestry seen as a political problem? If not, either the number of memberships remained relatively low, or membership was motivated by economic calculation. National governments can influence such factors.
These observations cast doubt on the suggestion that 'the more cooperation the better'. Self-regulation initiatives may cope quite well with a diversity of national regimes, and national governments may not always need foreign governments to stimulate self-regulation. This mitigates the price of diversity.

The price of uniformity. Uniformity comes at a price, as demonstrated by the global problems experienced in some self-regulatory initiatives. A first issue is democracy. Global self-regulation may have difficulty representing vulnerable values and individuals (Bernstein & Cashore, 2007; Dingwerth, 2008; Marx & Cuypers, 2010). Although economic, ecological and social values are incorporated in their governance, MSC and FSC are often criticized for being too acquiescent to large corporations (Hallström & Boström, 2010: 35). A different global issue concerns implicit trade barriers. Large companies may more easily comply with standards, for example, regarding management systems. Therefore, strict environmental regulations may give them an added advantage over smaller scale, often poorer companies. A possible consequence is a growing divide between rich and poor and between North and South (Marx & Cuijpers, 2010). Like democracy, public values are also at issue, and for solutions one might easily resort to (global) governments. Summarizing, the price of uniformity is this: the more explicitly and uniformly governments reinforce global self-regulatory efforts, the more they also confirm, and even reinforce, its problems.

The dynamics of co-regulation by mutual adjustment
Four observations on dynamics can be made based on our cases of this form of co-regulation. First, national governments support global market mechanisms for private regulation. National governments have acted as clients for hallmarked products and in doing so have legitimized the global, private hallmark systems underlying them. Moreover, government purchasing decisions may stimulate – sometimes globally – suppliers to get hallmarked. As such, national governments support market mechanisms without supranational policies.

Second, private regulators are responsive to national regimes. Mutual adjustment as a principle for co-regulation causes both public and private regulators to be responsive. The Dutch coach travel industry initiated co-regulation, the public inspectorates joined in. FSC and MSC differentiated their regimes per country. MSC is operating in anticipation of a possible EU role as competitor. This implies that co-regulatory initiatives emerge in a sequence of actions and reactions, and take the form of regimes that could hardly have been imagined beforehand.

Third, experiments at the national level are seldom exportable. The Dutch coach travel regime was difficult to imagine beforehand. However, such a regime may be framed as experimental afterwards, and experiments are not always considered acceptable internationally. Indeed, there is no common framework for acceptability, as is the case in the other type of co-regulation. Each country assesses for itself the reliability of private regulation and builds its own regime around it. As Senden et al. (2015) pointed out, the regulatory traditions and legal cultures within the EU vary, as does the reliance on self-and co-regulation.

Fourth, serendipity is important. In supranational reality, independent co-existence of public and private regulation is an illusion. Public and private regulators influence each other, if only by their very existence. The priming role of FAO and MSC's anticipation of possible competition from the European Union are indicative of governments' role in incentivizing self-regulatory efforts, even unintended.

Cooperation between public regulators

What lessons can be drawn from these dynamics for cooperation among public regulators? This contribution began with the claim that cooperation between national public regulators is a logical response to a globalizing world that includes private regulators on a global scale. Cooperation by definition leads to more uniformity. However, the cases indicate that more uniformity should not be a goal in itself. Our cases of co-regulation demonstrate some important limits of uniform public regimes.

First, operational variety is inevitable. At the European level 'co-regulation' is officially interpreted as private parties executing oversight within a public regulatory

framework. This type of co-regulation assumes some central coordination within a predetermined hierarchy. Roles of public regulators may be similarly defined, as in the approval process for medical devices and admittance of the Fyra trains. Such a framework would make national public regulators more uniform. However, it already to some extent exists, and even within a well-elaborated framework, differences between public regulators and inspectorates will remain. Room for interpretation will inevitably provide some discretionary freedom, and interpretation will also influence the roles public regulators play and the extent that they stick to these roles, as shown in the Fyra case.

Second, uniformity may result in too much public centralism. In the aftermath of incidents, central regulators no longer entirely trust private regulators. Central coordination within a framework thus seems to result in central reflexes following incidents, inducing more central rules on private regulators and the industry regulated. This may compromise the very notion of manufacturer's responsibility. Centralism may also compromise the very capacities that give private regulators their advantage.

Third, uniformity may undermine the responsiveness of both public and private regulators. An alternative form of co-regulation is public and private parties both regulating and executing oversight side by side. Public and private regulators do not have a hierarchical relationship here. Instead, their interaction in regulatory activities begins rather organically. At a transnational level, public regulators have found themselves interacting with private regulators acting on a global scale. Public regulators here – both national and supranational – have proven essential in advancing the effectiveness of private regulators, even if they have not intended to influence them. By introducing greater uniformity in their procurement policies and standards, cooperating regulators may play an important priming role for NGO-driven private regulation schemes. Nonetheless, uniformity has its limits. The more explicitly and uniformly that governments seek to reinforce global self-regulatory efforts, the more they also confirm, and even reinforce, its problems. Moreover, variety among national regimes – including public regulators – does a good job in stimulating self-regulatory efforts. National governments are relatively powerful as clients of privately regulated products and they can help shape regimes wherein suppliers decide to join self-regulatory initiatives. Private regulators, for their part, have proven to be quite adaptive in coping with different national regimes.

Fourth, uniformity may reduce tolerance for national experiments. At the national level, public and private regulators in co-regulation initiatives have sought arrangements that suit each other's interests and values. This has proven difficult however. Co-regulation appears to be a zero-sum game between public and private regulators, and arrangements resulting from this game can easily grow rather complicated and – intentionally or not – relatively experimental. Internationalization is problematic for these arrangements in two ways. First, although the arrangements may produce a national regime, the regulated industry operates in a global market. This suggests that it will face trade-offs between export position and the values of the national regime, as evidenced by the Dutch poultry sector. Second, and related to the first, even if an arrangement works within a national context it may not be accepted by foreign regulators, as anticipated in the Dutch coach travel case. Because co-regulation inevitably becomes an experiment at the national level, a major question for transnational cooperation is whether room to experiment is desirable. Involvement of public inspectorates is crucial to gauge the transnational tolerance for national experiments.

These observations imply that there is no such thing as independent co-existence of national public regulators. Such independence is a myth. Public regulators may be linked by central coordination through a framework, by the processes and products they regulate, including international trade and transport, and by private regulators that operate on a global scale and turn governments into clients.

A second myth is the independent co-existence of public and private regimes. They influence each other, if only by their very existence. This suggests that policy discussions about private regulators should not revolve around the question of *whether* to interact with them, but rather *how*. The final section below gives some ideas for answering this how-to question.

In between the models: Meta-roles of governments

The two models represent extremes. The relationship between public and private regulators may not be merely vertical (model 1) or horizontal (model 2). The cases and literature show that governments use their special abilities to facilitate interaction between public and private regulators. In doing so, they fulfil a meta-role. This means they do not participate in the game of regulation and inspection themselves, but rather influence the rules of this game. Several such meta-roles are conceivable.

A first meta-role is priming function, as found in the MSC case. Setting quality standards may enable self-regulatory initiatives to develop and market themselves as compliant.

Priming can be done without reference to self-regulation. Second, governments can refer to private regulation more directly. The European Union did this with its 'Principles for Better Self- and Co-Regulation'[113]. These deal with procedural issues (like openness, monitoring and resolving disagreements) and the motives of self-regulatory organizations (like good faith and legal compliance). Although the principles explicitly target self-regulation, there is no reference to any particular self-regulatory initiative.

Third, governments can facilitate establishment of regulatory regimes by specific industries or NGOs, to enlarge the regulatory playing field. The European advertising industry has regulated itself by means of a code of conduct and a self-regulating organization carrying out policing tasks. To develop its regime, the industry held consultations with consumer and public health bodies under the auspices of the European Commission's Directorate General for Health and Consumer Protection. Among other features, the model applied calls for involvement of non-industry stakeholders in the process.

Fourth, governments can exert hierarchical pressure on specific industries to regulate themselves. Prakash (2000) found that after the Bhopal gas tragedy in 1984 strong legal pressure was exerted on companies to join self-regulatory regimes. This pressure became an important incentive for the chemical industry to found the Responsible Care Programme. This variant is often called 'enforced self-regulation'.

Fifth, hierarchical incentive can also be provided indirectly. In the Netherlands, the government has held clients of temporary employment agencies liable for fines imposed due to the agencies' infringements of labour laws. This has motivated the employment agency industry to develop a register of reliable agencies (i.e., agencies that have been demonstrated to pose little risk of liability to their clients). In this case, the government used its hierarchical position to establish liabilities, but left room for the industry to regulate itself and organize its own regime.
Finally, governments can frame self-regulation entirely within their own regimes. This is a meta-role. Private regulators cannot develop their own regime entirely, but execute tasks within a public regime in the public domain.

These meta roles taken together provide a starting point for deliberations on how public regulators might relate to private regulators in specific circumstances.

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[113] European Commission, "Principles for Better Self- and Co-Regulation", 11 February 2013

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Conclusion: organize inspections around problems

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The variety of cross-border cooperation of inspections

The joint conclusion of the papers in this volume is that cooperation should not be treated as a value unto itself; it is instead a method for organizing government around *problems*. It is a technique for providing better answers to a specific set of questions, in a format that mirrors the predominant characteristics of the issue under examination. Cooperation is not a generic value, but requires a specific mandate – it is tailor made.

There are good reasons to dedicate more time, energy, and capacity to enhanced cross-border cooperation. Close to home, cross-border cooperation is an effective means of realigning national and sectored silos of government with the demands and challenges of societal issues. More importantly, a variety of cross-border issues demand cross-border cooperation for inspections. The most impactful means of cooperation and the resulting added value depend on the issue at stake. Cross-border cooperation is *issue-oriented*. What exactly should be build depends entirely on what is asked.

There is a range of issues that demand for more intensified cooperation. Many cross-border issues in the EU are covered by the internal market regulation, e.g. by a European directive with which all stakeholders need to comply. The single market implies equal treatment and equal conditions in all member-states, and that is as much a matter of regulation as it is of inspection. In the context of the single market, cross-border cooperation begs the question of how to close the circle of regulation via arrangements for transnational cooperation on inspections, in order to enforce a jointly regulated practice.

However, the range of issues that might benefit from increased transnational cooperation is not limited to the realm of the single market. There are, in fact, many issues on member-states' plates that do *not* fall within the bounds of the internal market. In these instances, in which there is no EU-level regulation, there still exists the possibility that transnational cooperation *could be of benefit*. For example, national inspectorates have the capacity to learn from one another by exchanging experiences and by developing new professional repertoires together. This is not an issue of cross-border regulation, but instead a qualitative debate about the routines of inspectors, which in turn contributes to the improvement of the profession across borders.

Moreover, health policy, social policy, and education policy are typically issues that remain firmly under national rule, but still possess certain cross-border elements. The question for these issues is how to foster cooperation between inspectorates from individual countries to enforce regulation that is not (yet) joint, in order to develop a shared practice.

In the introduction to this essay, we called this variety of reasons for cooperation the *demand* for cross-border cooperation; i.e., what is the purpose of cooperation? The essays that followed show that there exists variety on the side of *supply* as well, and allow us to sharpen these categories into a spectrum of cross-border cooperation.

The requisite variety of cross-border inspection: where to go depends on where you start

In complexity-science, there is the law of requisite variety; to deal with a complex system that yields significant variety, the repertoire should be at least as varied as the system. A standardized and limited repertoire will in time be insufficient to deal with the new and more complex options that the system will grow to generate.

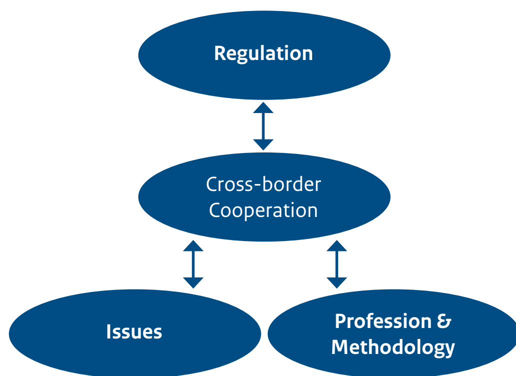
This volume has pointed out the variety of issues and arguments for and against cooperation. The main point of the book is that transnational cooperation can add value to inspections, but the amount of value added is entirely dependent on the ability to design appropriate forms of cooperation for the specific issue at hand. Cooperation is not a general category or a "one size fits all" solution, but is instead a highly specific, contextual, and dynamic concept. The type of cooperation that works for one issue in one context will not be effective for another issue in another context. The conversation of transnational cooperation needs to reflect that diversity, in order to be able to produce the appropriate answers to specific questions.

In this volume, we have mentioned several categories for thinking about transnational cooperation (see figure 2 on page 72): (1) the single market and/or joint regulation, (2) joint issues, (3) joint professional interests and/or methodologies. Each type of transnational cooperation has to take these aspects into account. However, the three also lead towards individually unique paths to follow when considering and designing transnational cooperation. If the single market is the primary concern, transnational cooperation will look different than when professional development is the purpose of cooperation. Outside the single market many issues remain that can benefit from transnational cooperation, even though they are hardly the subjects of joint regulation. That calls for different types of cooperation. When designing cross-border

cooperation, the first question should be where the cooperation comes from and where it should go to: is it a matter of joint regulation, of joint issues, or does the demand come from an urgency to collaborate on the professional level. From this crucial first question a different range of options and next steps opens.

Because of this variety in the root-cause of cross-border cooperation the spectrum of options for cooperation should not be portrayed as ranging from 'heavy to light', 'deep to shallow', or 'large to small'. These are not the relevant categories. The real debate is whether or not suggested options for transnational cooperation can achieve the intended purpose motivating cooperation in the first place. Such consideration is more a matter of *appropriateness* and of *goodness-of-fit* than of objective categories differentiating between half and whole, or small and large types of cooperation. The route towards better transnational cooperation should start with conversation and debate about the *specific demand*, in order to find appropriate options within the wide variety available. There is no universal law or direction for transnational cooperation; where to go depends on where you start. Defining the start – the purpose and context for cooperation - is the most important step in designing transnational cooperation.

Figure 2: where to go depends on where you start.



Design-options: formality, institutionalization, harmonization, direction of dynamics

The papers in this volume point at four factors for design that need to be taken into account very seriously. There are options and choices with regards to the desired level of formality of the cooperation, the level of institutionalization, the level of harmonization that is intended, and the direction of the dynamics towards and within the cooperation.

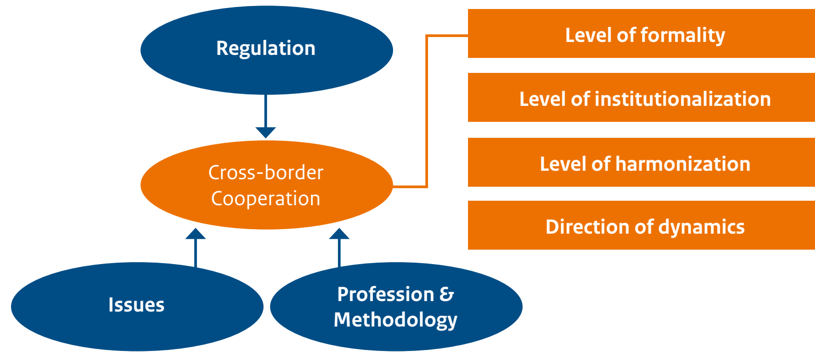
Level of formality: when cooperation is based on binding agreements, legal requirements, or is otherwise imbedded in structures that exceed individual agents' ability to opt-out of the arrangements, we speak of a high level formality. Informal cooperation is based on agreed and shared understandings that are not binding from a legal perspective, which actors can put aside if they want to.

Level of institutionalization: highly institutionalized cooperation occurs when cooperation is not merely the 'act' of working together – a verb – but when cooperation is solidified into an organization's structure – a noun. Cooperation can be something organizations do together, from within their own organization, on issues or problems they define; but cooperation can also be *the* organization itself, e.g. a European Agency to monitor and enforce a certain regulation across different countries. A lower level of institutionalization is a practical understanding of individual inspectorates and how to deal with colleagues from other countries, in addition to how to work effectively together on joint issues, from within individual and national organizations.

Level of harmonization: a high level of harmonization signifies that cooperation is not about *working together*, but about *doing the same*; use similar protocols, make the same risk-assessments, allocate similar capacity, reach the same targets, work by similar norms, apply similar standards. Harmonization can be helpful for cooperation, but is not a necessity for it. Inspection can use different protocols, but still synchronize between practices, accept a given workflow, or acknowledge another's approach. This approach runs the risk of neglecting local context and an issue's unique characteristics under the pressure of an overly detailed level of harmonization.

Direction of dynamics: cooperation can be an input or an objective, but also an outcome of a process. Highly harmonized and institutionalized cooperation can evolve and grow out of initially informal, open, and 'unintended' networks of practical exchange. Cooperation can grow from the bottom-up, but can also be defined from the top-down. Cooperation can be a directive from executive management, or a 'given' that follows new legislation; it can also be an outcome of an evolving process, initiated by individual professions, that spreads across the network of organizations and 'de facto' results in highly harmonized working practices and professional standards.
These options can be used to design different forms of cooperation, depending on the particular issues, regulation, or context at hand (see figure 3).

Figure 3: design-options to build cross-border cooperation that fits the purpose and the conditions for the cooperation.



We will illustrate the use of the design-options in four short examples.

Maximized formality, maximized institutionalization, maximized harmonization: *uniform EU inspectorate or agency*: to overcome national differences in regulation routines and cultures, and to enhance more harmonization and uniformity in the EU, one uniform inspectorate which operates on the whole of the EU level can be established (see essay by Blanc for examples of this). This one strong agency acts on behalf of all the member states and enforces European legislation and directives. The role of the EU is to regulate, to harmonize legislation and to stimulate common behavioral standards and working practices.

Strong-formality, minimal institutionalization, strong harmonization: *close cooperation of individual inspectorates*: a joint effort to tackle a common issue can also be found from intensified cooperation between individual inspections in each country. The original inspectorates remain, but they work together on a more structured basis – either on the basis of a formal agreement, or from an informal but strong want for cooperation. In order to do so, they actively synchronize protocols and harmonize shared good principles of regulation. The role of the EU can be to coordinate the cooperation, to connect the different inspectorates to one another, and to feed the process of harmonization via, for example, best practices and joint-expert sessions.

Informal, minimal institutionalization, *bottom-up harmonization*: harmonization can be implemented top-down, but it can also evolve from the bottom-up. E.g. when colleagues from different inspections from various countries exchange personal, practical experiences, and tested methodologies. Professional groups usually tend to vigorously resist harmonization if they perceive it as an ‘external’ intrusion into their professional work. However, professional groups also tend to be strong in developing shared internal codes and protocols for their work. From within the profession, in a bottom-up process, it’s possible to achieve a high level of harmonization. This is often accomplished via cross-county *networks* rather than through tight institutional cooperation. It can grow easily from an informal agreement on ‘shared problems and joint challenges’, and sometimes consolidates into sets of formal rules or procedures for practice that possibly include, for example, codes of conduct, reports on best practices and principles of regulation, methodology for risk-based inspection, exchanges of expertise for analyzing big data, and cooperation on ‘new topics’ such as internet trade – for which all countries are currently developing new repertoire.

Strong-formality, minimal institutionalization, minimal harmonization: *agreement of national difference*: this stands as the ‘odd man out’ on the spectrum of cooperation, in that it formalizes countries’ ‘right’ to local differences and represents an agreement to disagree on general standards, norms, and protocols. Individual inspectorates work on similar issues, but do so in their own way. However, this does not diminish the fact that from these local practices, encounters with cross-border issues and other countries’ practices will occur. Therefore, it is important that even from an individualistic and country-driven arrangement, there remains some level of agreement in terms of interaction and communication about cross-border issues. The EU plays a facilitating role: if national inspectorates don’t know how to operate on a specific issue, they can consult the EU for advice on what would be the best way to handle it.

A design-process for cross-border cooperation: from possible, to plausible and preferable options

First: long-list of possible options

Taking *issues*, *regulation*, and the *profession & methodology*, and the four factors for the design of cross-border cooperation, opens up a broad spectrum of design-options. There is an almost endless variety in the possible forms to work together across borders – each with its own advantages and disadvantages. It is helpful to take that extent of the spectrum into account and look at all of the *possible options* simply because it guards against institutional path-dependency, against lock-in into existing repertoires, and against the simple replication of similar models from dissimilar sectors or problems. This draws up a long-list of possible options for cross-border cooperation.

Then: reality check: a short-list of plausible options

Then, from the long-list of possible options it is necessary to channel towards a short-list of *plausible options*, which refers to a reality check of options. Many options are theoretically possible, but face pragmatic, political, or institutional problems. Even if there is a joint problem, it may be practically impossible to harmonize; e.g. when institutions hardly know each other and are organized entirely differently in various countries. Moreover, some options face practical problems of execution and coordination; a single joint agency is only plausible if it can operate effectively in the local areas and local cultures of different countries. If local difference matters greatly, it can be difficult to work from an entirely centralized agency; it is a possible institutional option, but the pragmatic plausibility is weak. Note that plausibility is not a 'hard' and 'objective' category, nor is it a general normative label. Instead, it is a situational, specific, and probably subjective estimate of the practical merit of an option. For some cases a centralized option is not plausible, for others it will be a superior option. Drawing up the short-list of plausible options requires a high-quality strategic debate that takes into account both the supply and demand side of cross-country cooperation of inspections.

After that: factor in political preference and analytical arguments: preferable options

From the short-list of possible options, countries can make a choice for one or several *preferable* options. This is a process that involves analytical arguments *and* political preferences. All of the plausible options have some merit, but their strengths – and weaknesses – usually vary. Moreover, the choice for preferable options involves preferences and values outside the direct sphere of inspections; national political color, national interests, institutional history, recent developments in a field, media attention for the issue are all possibly important factors that weigh into the choice of preferable options for cross-border inspection. Taking this step requires the capacity to combine the analytical arguments for defining superior arrangements *and* an assessment of the political space for cross-country cooperation – which is not unlimited for most countries, and will be very tight for some countries.

Finally: see cooperation as a continuous adaptive process: deliberate design, fit for purpose, but also continuous learning and able to adapt if necessary

The essays also stress that cross-country cooperation is not an institutional 'end-game'. The cooperation is not complete once it is designed and implemented. Cross-border inspection involves institutional choices that have major consequences for all countries, inspections, and professionals involved. However, these decisions are not *final* decisions for a definitive form. Cooperation always involves institutional learning, institutional tinkering, continuous development, and adaptation to changing external circumstances, internal experiences, and trends and developments in for instance new technologies. The choice for *one* option for cross-border cooperation is important and requires a careful process and professional attention; however, cross-border cooperation also requires continuous adaptation. Cooperation is a process of deliberate design, but also of continuous learning.

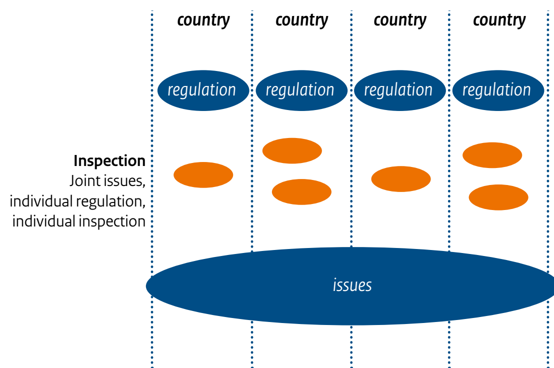
The framework in practice: a first range of plausible options for cross-border cooperation

The essays discuss a wide variety of possible modes for the cross-border cooperation of inspectorates. Several core concepts are key to discussing these different modes; if we want to see cross-border cooperation as an issue-based enterprise, we need concept to analyze the issue more precisely, look at the most important characteristics of the environment, and take into account the range of institutional options. Figure 4 depicts these core concepts. First, there are different countries involved in cross-border inspection. Second, cooperation is never conducted 'in general,' but always involves concrete issues. Cooperation in terms of transnational cooperation is typically focused on an issue shared by all of the countries involved. Third, there is regulation involved; regulation is related to a certain issue and to a certain country. For some issues, regulation is already organized at a supra-national level and applies across countries. For other issues, national or even local regulation leads the way. In between supra-

national and locally led cooperation, there exist many more forms as well. Fourth, there is a range of inspections involved in each of the various countries. The institutional structure of inspections is different throughout the various member states.

These four dimensions are a starting point for a strategic discussion about a transnational inspection. Is there a joint issue? Is the issue shared across all countries, or by just a selected few? Is the issue transnational, or is it an issue that manifests nationally, but in all of the countries? Is there joint-regulation already in place, or is national regulation dominant for the issue? Are there similar or already connected inspectorates involved? Answering these questions will help to sharpen the debate about transnational cooperation.

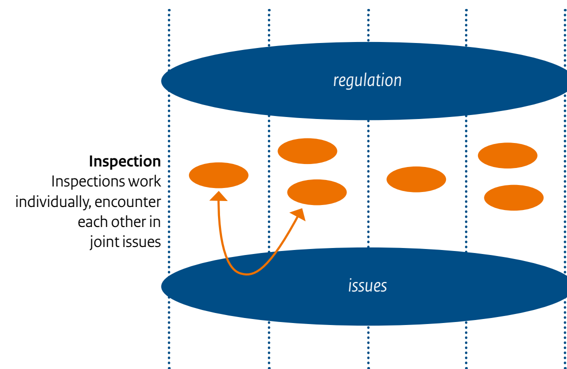
Figure 4: core-concepts for transnational cooperation.



Cross-border cooperation is a choice, but the cross-border encounters remain nonetheless

The discussion about transnational cooperation emerges from a practical problem (*see figure* 5). Inspections can choose not to work together, or only marginally, but for many problems the cross-country encounter of inspection regimes will remain nonetheless. Even when inspections do not work together, they still face similar issues, work from joint regulation, and thus inevitably encounter each other in their daily work practice. For example, products certified in 'Country A' enter the market of 'Country B'; a product for which a certificate was issued in 'Country C' cannot be checked again in 'Country D'. By choosing cooperation in any given circumstances, countries elect for a more deliberate and managed encounter in an effort to improve the quality of regulation and compliance, and to reduce the hazards of non-compliance. Cooperation does not *create* the encounter; it attempts to standardize that encounter's procedures in a proactive way. This important when engaging in a debate about cross-country cooperation; apart from the decision to cooperate, there can already be an intense encounter of countries' individual inspection regimes.

Figure 5: cooperation to manage otherwise 'ad hoc' practical encounters.



A range of joint answers for a joint issue: one agency, one framework, or a coordinating agency

The most coherent solution for a joint issue is to instigate joint regulation, and enforce that via a joint inspection or agency (see figure 6); a form that Blanc analyses in his essay in more detail and we already have instances of in Europe. Such an agency involves a formalized, centralized, and harmonized format for transnational cooperation on inspections. However, the actual 'act' of inspection is still carried out at the local level, since that is where the most inspections occur. Local branches of the joint centralized agency replace the national inspections on that matter. They are the local working units of the centralized unit that is responsible for the inspection.
Figures 7 and 8 are deviations of the model of a joint regime for regulation of problems. Figure 4 represents a *joint framework*, which countries can use in instances when they work on a particular joint-issue for which there is joint regulation. The joint framework allows national inspections to remain intact, but establishes harmonized protocols, standards, norms, codes, and methods. National inspectorates remain national and can still use their local knowledge, but the joint framework helps guide actions in a more concerted and coherent way.

Figure 6: a joint inspection, for joint regulation and joint issues, which works through local branches that substitute for national inspectorates on that issue.

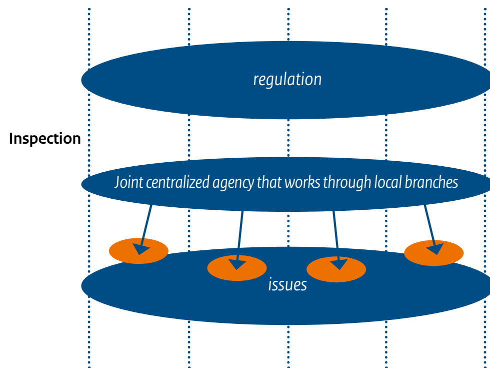


Figure 7: a joint framework for national inspections to work on joint regulation and joint issues.

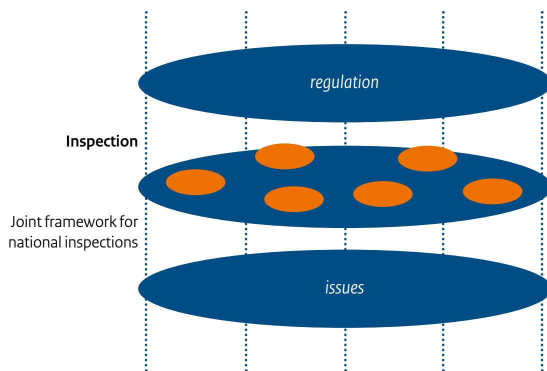
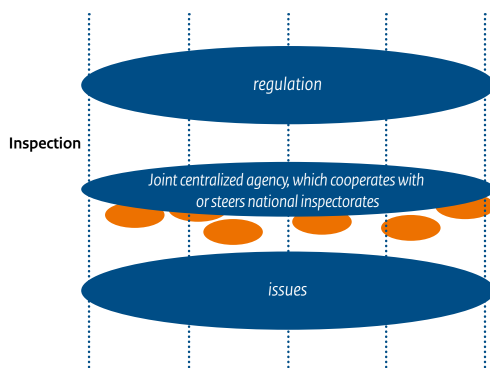


Figure 5 (on page 75) represents an attempt to reap the benefits from local knowledge as well as harmonization, but in a more centrally controlled fashion. In this model there is a centralized agency that does not inspect on its own, but instead coordinates and steers the efforts of national inspectorates. There is hierarchical relationship between the national and centralized level, but the principle of national inspectorates remains intact. Blanc, Versluis & Polak, and also Groenleer & Kartner, describe several examples of this format.

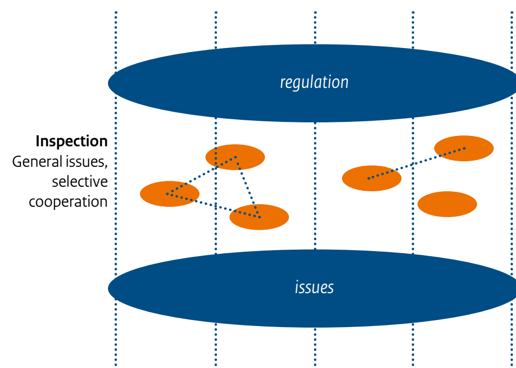
Figure 8: a joint centralized agency, for joint regulation, for joint issues, that coordinates and steers efforts of national inspectorates.



Clustered cooperation for joint issues: selected partners tackle joint issues

The figures 6, 7, and 8 represent models that organize all-encompassing cooperation and create equal inspection regimes for a particular issue, for *all* member-states. Such a high level of harmonization and inclusion can be a strategic choice, but other less encompassing options are also available. Figure 9 portrays a form in which a joint issue, under joint regulation, is tackled by coalitions of inspections in various countries that have emerged over time and appear to work well. Here, cooperation is not designed top-down, but instead grows bottom-up, in combinations that apparently 'fit' the needs of national inspectorates. In this way, clusters of cooperating inspections have the opportunity to emerge, which could further develop with time and establish additional levels of formality, harmonization, and even prelude a model more in line with figures 3, 4, and 5. This is also what Versluis & Polak suggest in their call for a strategy that relies on interrelatedness, trust, and a culture of informality: once there exists a sense of interrelatedness (issues, regulation), and a culture of trust and informality develops, there is little preventing inspectorates from enhancing their cooperation. This 'evolutionary' model could in time produce more integrated and harmonized practices than a top-down 'all-in' model of transnational cooperation. But as a model, it is not without risk; it suffers the potential to permit ever more dispersed, disconnected, and ineffective practices to remain in place as it grows.

Figure 9: clusters of selective cooperation, around joint issues and joint regulation.

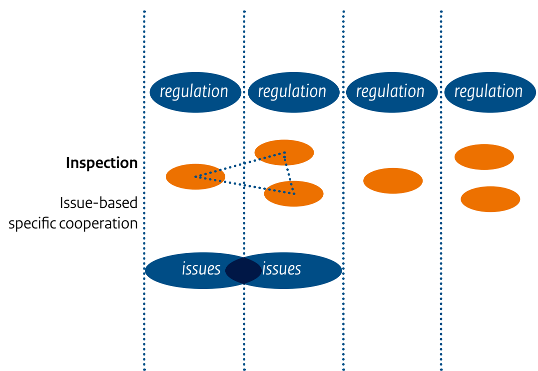


A clustered cooperation for shared country-specific issues

The clustered approach is common practice in instances where there exists some overlap of issues between countries in the context of national regulation. Inspections work together on specific themes that they share with others. Often, cooperation that begins on an ad-hoc basis has the potential to grow into a more institutionalized and formalized arrangement (*figure 10*). This type of cooperation is especially interesting for inspectorates that do not

operate in the domain of the single market, and/or enforce joint regulation, but nonetheless face mutual cross-border issues. Such inspections are not particularly in need of a single overarching framework or centralized inspection. They are likely better helped by improved lines of communication, increased mutual understanding, personal contacts between leaders, and synchronized methods.

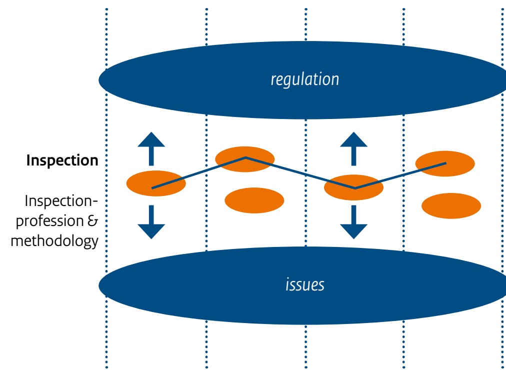
Figure 10: clusters of selective cooperation around country-specific issues and regulation.



Cooperation to professionalize the dealing with country specific issues

Mertens draws attention to another promising and already widely shared mode of cooperation between inspectorates: learning from professional exchange, rather than focusing on concrete issues or regulation (figure 11). Examples might include exchanges of methodology, professional skills, tools, and shared expertise. Even though the Inspections of Education probably have few cross-border objects to inspect, they can still learn a lot from a professional exchange. Cross-border cooperation has the potential to help them become more effective at dealing with their own national issues, as well as help them develop more compelling repertoires for influencing the national or European-level debates on better (joint) regulation. Experience in the Netherlands has shown that a more professionalized field of inspectorates can be more effective in a volatile debate about regulation, enforcement, risk, and compliance. Again, professional exchange and investments towards the development of a shared methodology can also act as a prelude for more institutionalized modes of cooperation.

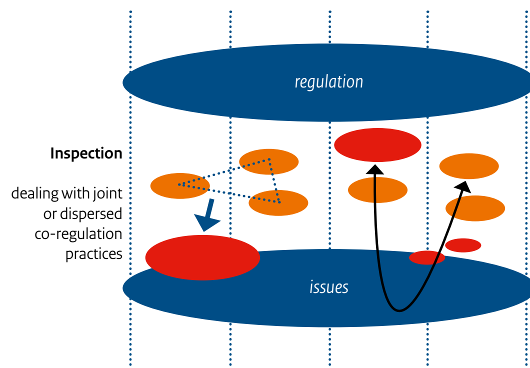
Figure 11: professional cooperation between inspections, undertaken in an effort to be more effective on joint issues and in the debate about better (joint) regulation.



Cooperation around transnational co-regulation for joint issues

The essay by Van der Voort introduces a new layer into the debate about transnational cooperation. Co-regulation is applied in many countries, both within single countries as well as at the supra-national level. In instances of transnational issues or regulation, this means that countries have to interact with one other's co-regulation regimes (figure 12). Certificates from one country enter the market of another country, and the question becomes whether each nation's respective inspectorates can accept them or not. The lower right side of figure 12 portrays this problem: different national practices of co-regulation migrate across national borders and national inspections encounter products of co-regulation (e.g. certificates) that are not part of the national inspection regime. Moreover, multi-national companies work with supra-national private inspection agencies, which then produce information asymmetries amongst the national inspectorates dealing with the private agencies. There are several means of dealing with these issues, depending on the particular form and level of co-regulation at hand. The lower left of figure 9 shows a cluster of several national inspections that harmonize their interactions through a transnational private inspection agency.

Figure 12: transnational cooperation to deal with co-regulation.



Epilogue: a debate about of cross-border cooperation

This volume outlines the variety of reasons and options for cross-border cooperation of inspections. We have attempted to take into account the full extent of the spectrum, in terms of *perspectives to look at cooperation*, in terms of *reasons or causes for cooperation (demand)*, and in terms of the *forms for cooperating (supply)*. There is good reason to take this variety seriously as a starting point for a discussion about cross-border cooperation; cooperation will only produce the added societal value if it is designed from an *issue-oriented perspective*, which just as well takes into account the practical aspects of cooperation as the more institutional and formal elements of cooperation. The purpose of our volume is to provide a language and a grammar for a productive discussion about that variety, which nevertheless allows actors to take next steps in the design of cross-border cooperation. Such language and grammar help to be more precise about the added value actors seek from cooperation, the key factors they see for a successful cooperation, and the boundaries they see for cooperation. A joint language and grammar to discuss inherent differences can help the process of designing more effective, more robust, and more adaptive forms of cross-border inspection. In order to work better together, first we need to better assess and appraise differences as well. This volume does not answer the question *what the best cross-border cooperation is*, but provides readers with a common language and a grammar to have a debate about that question – *to find joint answers amongst themselves*.

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EUNL2016
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