

# Public and private interests: A new balance

An interdisciplinary research initiative on  
the role of private actors in safeguarding  
public interests

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# 1. Managing conflict and instability in public-private supervisory networks (vacancy)

Peter Mascini, Professor of Empirical Legal Studies

Michael Faure, Professor of Comparative private law and economics

Karin van Wingerde, Professor of Corporate Crime and Governance

## Introduction

Nowadays, government authorities share responsibilities for monitoring and oversight of business conduct with business itself, civil society organizations and consumers. For example, companies and industries self-regulate by implementing codes of conduct or outsourcing supervisory responsibilities to certification organizations or auditors. Civil society organizations act as watchdog or develop, monitor and assure private standards either alone or in collaboration with other stakeholders. In many cases, the activities of private actors and public supervisory organizations are coordinated in so-called public-private supervisory networks.

While the cooperation between public and private actors in supervisory networks can increase the legitimacy and effectiveness of supervision, it is not self-evident that the division of responsibilities and the coordination of tasks in these public-private supervisory networks run harmoniously and uninterrupted. For example, differences in working practices and objectives can cause conflict between network partners and lead to instability of the network. Moreover, differences in rules and procedures might hamper the exchange of knowledge and information. In some cases, network partners might curb these tensions by developing strategies to deal with conflict. Yet, partners will still have the tendency to steer networks in the direction they prefer. Previous research has shown that the (in)stability of networks depends on three factors: (dis)agreement about shared working practices, (dis)agreement about network boundaries and the presence of internal and or external parties capable of breaking through the status quo.

The current research project aims to contribute to a detailed understanding of conflict and instability in public-private supervisory networks.

## Research design

This project will be based on a comparative case study focusing for instance on specific locations where industrial activity and a high population density come together, on specific markets or industries that are monitored by a variety of supervisory authorities and inspectorates (taxes, environment, occupational safety, etc.) at different levels (international, national, regional, local) and on different types of supervisory networks (public & business; public & civil society; public, business & civil society). The candidate is expected to conduct a theoretically driven empirical study. We are therefore looking for candidates who can demonstrate experience in conducting empirical (legal) research.

Questions about the suitability of the research proposal that a job applicant has in mind can be posed to professor Mascini ([mascini@essb.eur.nl](mailto:mascini@essb.eur.nl)).

## 2. Effectiveness of regulatory interventions governing business to enable sustainability and human rights

Candice Foot, PhD candidate

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Martijn Scheltema, Professor of Private Law

### Introduction

Global challenges such as climate change and the consequences of globalization, like workers' abuse and human rights violations in global value chains, require innovative regulatory responses as current regulatory interventions are not sufficient and oftentimes not very effective. Yet business activity is increasingly connected to climate change, workers' and human rights related issues. This has caused the emergence of a new societal compact demanding accountability of multinational operating enterprises regarding their measures to counter climate change and irresponsible business conduct, also in their value chains.

Due to the global nature of these challenges traditional national legislation and public supervision for business enterprises with their seat in this country cannot provide a sufficient framework to address these challenges. For example, it is hard to regulate total emissions of an internationally operating enterprise, which is even more challenging because of adverse incentives in international markets and level playing field issues. Furthermore, workers' and human rights abuses are often not caused by the enterprise itself, but are the result of operations of a subsidiary or a supplier in other countries. Thus, innovative regulatory approaches are needed. Preferably, these approaches do not focus on one measure, for example a specific type of legislation, but aim to develop a 'smart mix' of instruments

However, the art of aligning different types of regulatory measures in order to develop a coherent and effective regulatory system, whether or not of a public or private nature or a mix of those two, has not been researched frequently. Furthermore, managerial stances of enterprises may influence their susceptibility to regulatory measures. For example, enterprises which have implemented a very proactive approach in this field may benefit from voluntary collaborative initiatives enabling them to learn from others and collectively improve their performance, whereas reactive companies may act upon legislation only.

Thus, the project aims to develop guidance for a smart mix of regulatory interventions which influence the day by day practice of enterprises these interventions are aiming at.

### PhD project

The PhD project implements part of the foregoing and focusses on the effects of three types of legislation in order to enable further thinking on the 'smart mix'. These types of legislation

require either (i) reporting or (ii) human rights due diligence or (iii) connect the duty of care to exercise (human rights) due diligence with access to remedy for affected individuals or communities. To date it is unclear how these types of legislation influence corporate behaviour in practice. The PhD research achieves to enlighten this issue.

The project focusses on four research questions: (a) how to identify managerial stances (inactive, reactive, active or proactive), (b) whether either reporting or human rights due diligence obligations or a duty of care connected with access to remedy are able to influence and alter these managerial stances, (c) which legislative intervention is most effective without hampering active or proactive enterprises in their efforts and (d) which role plays public or private supervision in this regard.

## Empirical research

To date little knowledge exists regarding the actual impact of legislative instruments on the day by day practice of (multinational) enterprises on which these instruments are aiming. This is even more so if one includes different managerial stances within enterprises in the equation. This project aims to develop concrete empirical steps to identify these managerial stances and the effects regulatory interventions have on these stances.

# 3. Classification societies and the public interest

Vivian van der Kuil, PhD candidate

Frank Smeele, Professor of Commercial Law

Frank Stevens, Associate Professor, Department of Commercial, Corporate and Financial Law

## Introduction

'Classification societies' (also simply known as 'class') are specialised entities in the maritime industry. Originally, in the 18th century, they started out as private commercial entities that surveyed vessels at the request of insurance companies that wanted to have reliable information on the condition of the vessels they insured or were asked to insure. Following the survey of the vessel, the classification society issued a 'class certificate', describing the condition of the vessel. It quickly became clear that this information was also valuable for other parties involved, such as charterers, cargo owners and authorities.

Since then, class has become such an integral part of the maritime industry that it is entirely impossible to operate a vessel commercially if it does not have a class certificate. As any commercial vessel needed class as soon as it entered service, however, it made sense to already involve the classification societies from the very start of the ship building process. Currently, classification societies have very detailed standards and rules on how a vessel should be built. The importance of their role today is apparent from the fact that both for the IMO and the EU classification societies are 'Recognized Organisations'. Furthermore, the Paris MoU has developed an innovative instrument to measure and rate the performance of such 'Recognized Organisations'.

The central role of classification societies in the maritime industry has made that, in addition to their services for private principals (ship owners, insurance companies, ship builders), they are also instructed by flag states. Under the Law of the Sea Convention, flag states are obliged to make sure that the vessels flying their flag are in a satisfactory condition. Not all flag states however, have the resources (or the desire) to carry out regulatory inspections of vessels, and therefore tend to delegate this task to classification societies, who after all are specialised in the technical aspects of vessels and have a worldwide network of offices and correspondents.

All this means that classification societies – although still private commercial companies – today may have and fulfil (very) important public functions. The task of developing and updating technical standards for vessels has to a very large extent been delegated to them, if not formally by law then at the least in practice. When they are acting on behalf of flag states, they are performing government tasks. On the other hand, besides a group of well-respected classification societies, who have organized themselves in the 'International Association of Classification Societies' (IACS), the profession has also attracted various classification societies of lesser repute.

Classification societies thus clearly present challenges in the field of 'private regulation of/and public interests'. They are instructed and paid for by interested parties (ship owners, insurance

companies, ship builders), but at the same time have to develop standards that protect the safety of shipping and all those touched by it. Here comparisons can be drawn with the role of chartered accountants when verifying the annual accounts of companies and that of credit rating agencies in relation to the creditworthiness of financial institutions. When acting on behalf of flag states, they may have to take decisions that go against their own interests or the interests of fellow class societies. Furthermore, the question arises how classification societies perceive and evaluate their role in protecting the public interest and to what extent they are accountable to stakeholders and the general public. This project looks at how classification societies, the insurance industry, the maritime industry at large and the national and international legislators and supervisory bodies deal with this issues.

## PhD project

The PhD researcher will primarily study the way in which classification societies themselves see and deal with their public functions and obligations. Are they aware of the potential conflicts of interests, and do they have structures or procedures to deal with this issue? Do they report on how they are experiencing and performing their public duties? Secondly, the PhD researcher will look at the position of the legislators and customers. Are they worried about conflicts of interests and if so, how do they deal with it.

In conducting this research, the PhD researcher will also look at possible parallels with the roles of chartered accountants and credit rating agencies, which are also private commercial companies with an important public role and the potential for major (negative) impact.

## Empirical research

Some aspects of classification societies (e.g. liability for negligent surveys and/or incorrect certificates) have been the subject of case law and literature. For other aspects, there is far less material available in the traditional law sources. As part of the research project, the PhD researcher will therefore conduct interviews both with representatives of classification societies and the IACS and with various stakeholders such as ship-owners, ship-builders, the insurance industry, nautical and cargo surveyors, as well as maritime legislators and supervisory bodies.



## 4. Controlling the market for corporate control; conflicting public and private interests in listed companies

Maarten Verbrugh, Professor of European and Comparative Corporate Law

Kid Schwarz, Professor of Company Law

Marnix van Ginneken, Professor of International Corporate Law, in particular International Corporate Governance

### Introduction

Thinking about the Research Theme, the protection of public interests by private actors, translated in terms of the field of company law in a broad sense, brings to mind a range of research themes that share a common base, namely the influence of business activities on public interests and, *vice versa*, the influence of the design of public interests on developments that are desirable under private law.

With regard to whether or not enterprise in the private sector serves public interests, the overall theme can be found in the classical approach to corporate social responsibility (CSR). The CSR policy of companies has high social relevance, as the circle of the partial interests involved at those companies is large. This could range from the interests of shareholders via those of employees and (other) parties contracted to the enterprise to persons involuntarily involved in the effects of the business. The last category of stakeholders is also large and very diverse, ranging from the interests of residents of the earthquake zone in Groningen, to those of farmers who are not only held responsible for environmental pollution but who also, like construction companies, face harm to their interests through environmental problems, and to the interests of wineries in France, polar bears and the Inuit. In the field of tension between public and private interests, there are important themes that lend themselves to research involving the study of: i) the role that companies voluntarily accept in sustainable corporate policy, ii) the role that financiers play, such as institutional shareholders, and iii) the role of national and European government in enforcing CSR, less with a view to the activities of listed companies but mainly in relation to financing and production among small and medium-sized enterprises (SMEs). This study can take place both through classical legal research and through empirical research.

By setting requirements for monitoring of financing structures and production chains in relation to, for example, central procurement policy, both central government and local authorities contribute towards institutionalisation of a control mechanism that, among listed companies and other prominent producers, is formed by the 'Courts of Public Opinion', which are encouraged in their opinion-forming or are even influenced by the provision of information by NGOs and other activists that raise potential abuses by these type of companies. When SMEs operate outside the line of fire of these activists, it appears that the government has an important task in that regard. An interesting point in this connection is the fact that the stakeholder approach used in continental Europe for the definition of what the interests of the company entail is now increasingly also being embraced in Anglo-American

thinking, leading to a clearly visible convergence between the stakeholder model and the shareholder model.

Stimulating the involvement of the CSR aspect is not only related to the monitoring of and empirical research into the activities developed in the business and the board room dynamics, but also affects areas such as the broad field of socially responsible financing. With regard to the organisation of financing in private companies, in which reference is made to sustainable financing, this not only concerns the question of the financing of activities that are regarded as the opposite of socially responsible (such as the tobacco industry or the arms industry), but also the need to realise engaged shareholdership, possibly through formal or informal regulation, of institutional investors, for example, which are the most important shareholders in listed companies world-wide. In relation to the control of equity partners in listed companies, a discussion has been running for some time on the design of engaged shareholdership which, with regard to institutional investors, implies that control as shareholders should also be actually used, on the basis of carefully formulated investment policies. According to economists, it has been established that when the meeting of shareholders actually exercises its shareholder power in a responsible manner, the performance of the company improves in terms of scale and quality. Engaged shareholdership is also an aspect that plays a role in stabilising the business climate in a legal order, partly to avoid takeover bids from financiers that do not have the support of the company management because this is contrary to the interests of the company, as formulated in the policy, which therefore involves all interests of all stakeholders. From that point of view, protective structures can be regarded as being aimed at protection of corporate interests and thus also of the aforementioned stakeholders, even though they stand at a considerable distance from the (undertaking of the) company. Think of the view taken by Paul Polman of his tasks as CEO of Unilever when a bid was announced for the company by Kraft Heinz, which was primarily focused on financial results. Engaged shareholdership is therefore also interpreted as actual engagement with the corporate policy, which in fact entails a voting obligation for institutional investors, which in theory will lead to improvement of the corporate management. The implementation of the amended Shareholders Directive, which relates to these themes, also comes to mind in that regard.

Another important point for attention for research lies in the relationship between on the one hand the corporate interest, which, after all, in essence corresponds with the government aim to stimulate prosperity and well-being, and on the other hand the internal relationships and positions of authority within companies. After all, a buoyant economy is of major importance from the governance perspective of government authorities, which at the same time are required to keep their distance from influencing entrepreneurs and corporate structures. In this field of tension, there is much to savour. For example, the question that is receiving growing attention at present is whether the government should intervene in, for example, the market for corporate control.

Economists believe in an important role of that market, because the possibility of realising a hostile takeover of a target company can have a beneficial effect on optimising the performance of the management of larger companies. At the same time, a free takeover market makes it possible for bidders to acquire vital enterprises. This calls to mind the shock caused by the takeover of the German Kuga (robotics) company by the Chinese Midea group, when it suddenly became evident that leading technology is simply for sale and leaks away into the sphere of the acquiring company. In a free takeover market, the position of the shareholders will be a determining factor in their response to the bid, with the fact that the financial interests of those shareholders will often be decisive playing an important role here. This is why the view is sometimes defended that it would be better if the choice of whether to accept a takeover bid does not rest with the shareholders but with independent third

parties, such as directors of protective foundations, which could block a takeover bid by making use of the possibilities of placing (preference) shares with the foundation. Another question in that regard is how government regulation should be designed in relation to corporate interests. At present, a debate is in progress on the question of whether the government should be able to intervene in a takeover process in which vital knowledge or activities will 'leak away' to foreign parties. It is interesting to see how in this way, new life has been breathed into the debate on 'protective measures', which has continued since as long ago as the 1920s. We should be aware that protective measures arose because importance was attached to defending against involvement of foreign parties in Dutch companies. The question of whether national governments or, for instance, the European legislators should intervene as part of the creation of a global level playing field is also relevant here. Recently, there have been a growing number of calls for government intervention against the takeover possibilities of foreign businesses in the Netherlands or Europe, while similar takeover processes are not possible (factually or in practice) in those other legal systems. These calls have been sharpened by the fact that foreign parties with takeover plans are also funded by governments, or at least by local sovereign wealth funds. A crucial aspect in this regard is also the potentially necessary government involvement in the realisation of company acquisitions by foreign parties when the formation of the party that is now threatened was largely financed with government resources, such as subsidies or other support measures using public funds, including, for example, start-ups born through publicly funded university research. In that regard, the question arises of discounting of those investments in the takeover price of the shares, in which reference is now being made to 'true pricing'.

Many of these aspects may potentially be involved in the following PhD research project, with which the theme study of the sector plan in Company Law could begin.

## PhD project

The takeover market is perceived as a control and steering mechanism that is essential for the protection of risk-bearing capital providers in the company. This study considers factors that influence the effectiveness of this mechanism. In the Netherlands there are at least three, which lead to interesting research questions concerning the role of public interests in private companies.

Firstly, the 'own' corporate interest plays a role in the Netherlands as a legal guide for the functioning of management and supervision. According to established Supreme Court jurisprudence, the strategy pursued in the realisation of that interest is determined by the management. This gives the management substantial power as a gatekeeper, a position that is strengthened still further by recent actions of the legislators and regulators, for example in the 'Statutory Cooling-Off Time' Bill now before parliament and in the definition of corporate interests in the Corporate Governance Code 2016. A question that plays a role with this second factor is whether government intervention in shareholder activism is desirable or not. It is quite possible to defend the view that the introduction of a statutory cooling-off period could severely frustrate the dynamism in the Dutch market, where institutional parties predominate on the side of the investors, but at the same time have no activism tendencies. This absence of activism among institutional parties (which is assumed, if used in moderation, to have a stimulating effect in terms of the quality of management and, therefore, also on the profits of the company) can be explained in different ways, such as a tendency to not want to invest in greater shareholder engagement at global companies alone, because the other institutionals would then also benefit from the price effects (free-riding). The problem here is the fact that the performance of institutionals is assessed in relative terms, which does not encourage the managers of individual institutional investors to invest in greater shareholder

engagement. After all, with a relative performance assessment, such investment by definition leads to a negative score for the investing fund, which helps to improve the performance of non-investing funds. In that regard, activist shareholders such as hedge funds are seen as a catalyst for positive stock market developments, since these investors, after careful targeting, select a company at which they will direct their activist arrows in order to realise strong results in the short term for investments in that fund, which in practice usually involve less than 10 to 15% of the shares. In practice, such activists operate with the tacit support of a number of institutionals that, once things have been shaken up, can simply support the proposed policy of the activist as a group and so generate price gains. An interesting question here is whether proposed legislative plans in that regard would not be deadly to these market developments, in particular the Bill on a statutory cooling-off period, which would, after all, make it impossible for activists to play their role, since shareholders do not have the agenda rights during that cooling-off period which, in practice, are used to create the shake-up.

Finally, a clear tendency can be seen for increasing government control of merger processes in which foreign parties are involved. Motives relating to national security in a broad sense play a role here, with reference being made to protection of 'vital businesses', and the desire to create a global level playing field must also be considered. Lastly, the problem of sovereign wealth funds is an issue in this regard, where there is state involvement in takeover attempts by foreign parties.

This project focuses on the following potential sub-themes and research questions:

- Sub-theme 1. The role of corporate interests in hostile takeover bids  
To what extent does the authority to determine the strategy contribute to the power of the management to block an unwanted takeover and what is offered in return?
- Sub-theme 2. Regulation of shareholder activism  
How should government involvement in the market for corporate control be optimised, taking account of the stimulation of that engagement in relation to the stability of businesses, including in view of takeover threats, while at the same time avoiding excessive restriction of shareholder activism.
- Sub-theme 3. State influence on the acquisitions market  
What are the vital interests that the government must and may serve and what are the possibilities for intervention in unwanted takeovers?

These themes concern the tensions that the seepage of public interests into the private corporate environment entail. The inclusive approach to such themes in a single study is highly innovative and affords ample opportunities to combine empirical research methods with classical legal research.

## Link to existing expertise

Kid Schwarz (professor in Company Law) has published research that is relevant to this project, in which lines of research in this field were recently combined in his Rotterdam inaugural speech entitled 'The impact of the corporate interest' (2018).

Maarten Verbrugh (professor in European and comparative company law) has published on the stakeholder model and restructuring, for example in his *dissertation Herstructurering bij kapitaalvennootschappen en de positie van schuldeisers* ('Restructuring in stock companies and the position of creditors'), in the Dutch journal 'Ondernemingsrecht' ('Company law') and in a contribution to the Springer book series 'Studies in European Economic Law and Regulation'.

Marnix van Ginneken (professor in International company law, in particular international corporate governance) has published research relevant to this project, for example in his dissertation *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* ('Hostile takeovers: the role of company management in the Netherlands and the United States'). He is also a member of the Board of Directors, Executive Vice President and Chief Legal Officer of Koninklijke Philips N.V.

## 5. Safeguarding public interests in financial markets

Dominic van Kleef, PhD candidate

Fabian Amtenbrink, Professor of European Union Law

Kleis Broekhuizen, Professor of Law and Regulation of Financial Markets

Hélène Vletter-van Dort, Professor of Financial Law and Governance

### Introduction

National, European and international policy makers, regulators and (informal) standard setting bodies trust private actors with the pursue of public interests. This trend, which can be observed for some time, has not been (altogether) broken by the regulatory response to the recent global financial crisis. In this context the notion of public interest does not only embrace broadly formulated public goods, such as financial stability and integrity, but also more concrete facets, such as consumer protection.

### The role of private actors in financial market regulation and supervision

The transfer of ownership for the observance of public interests onto private actors takes different shapes. One prominent example is the introduction of open norms geared towards the protecting of public interests the implementation/application of which is largely left to the market actors themselves, albeit at times guided by policy makers or supervisors. Private actors are moreover relied upon to optimize certain market functions, such as in the case of financial analysts, accountants and credit rating agencies. Another example is the introduction of internal governance requirements for financial market actors, inter alia relating to compliance, audit and risk management, that also have as an objective to monitor compliance with laws and regulations

### Securing public interests as a major societal challenge

Against the backdrop of the major technologization wave (Fintech), the changing approach to the notion of the rational market participants (the emergence of the 'nudge movement') and a general sentiment that a new wind should blow through the financial sector (a culture of service and sustainability), securing public interests in financial markets faces major challenges and raises important questions both of a general and more specific nature, including inter alia:

- How feasible is a structural role of private actors in the implementation of essential financial regulatory and supervisory standards in the light of the public interest objectives pursued with the latter?
- Which alternative institutional and procedural arrangements or instruments can or should be utilized to create a structural role of private actors or government agencies in securing public interest objectives?
- What is the impact of the increased utilization of digital technology in banking and financial services, on the safeguarding of public interests, such as with regard to securing the principle of fairness in self-learning algorithms?
- To what extent should financial institutions and thus, private actors, be obliged to act in the interest of consumer protection, such as by influencing the financial decisions of consumers as part of a general private and/or public law duty of care ('nudging')?

- Should banks and other financial institutions fully embrace the promotion of specific public interests in their strategy, such as sustainable finance, or at least take certain public interests, such as climate related risks, into account in their risk management?
- What exactly is the mandate of national, European and international supervisory authorities in steering market participants towards an active role in promoting financial stability and other societal interests?
- How do financial market participants such as banks, insurance companies and pension funds relate to the current corporate law movement which critically discusses the role of the corporation in contemporary society?

The scientific and societal relevance of the research to be carried out by researchers linked to this project does not only derive from the fact that in the wake of the recent global financial crisis, next to the facilitation of market processes and market operation, the (better) safeguarding of public interests is a main driver of financial market regulation and supervision, but also from the contemporary societal developments that can be observed and that call for a constant reassessment of the existing financial market regulatory and supervisory systems.

## PhD project

Situated in the above described research area will be a PhD research project that focuses on one particular public interest in financial markets, that is consumer protection.

The financial crisis of 2008 severely shook the faith in efficient and rational markets and the ability of financial markets to regulate themselves. It also unmasked the rational person as the standard for consumer protection pursuant to financial supervision law. Studies examining how decisions are taken and choices are made highlight not only that rationality is limited by cognitive ability, such as the ability to perform mathematical calculations, but also that rationality is often limited due to intuitive thought processes. European policy makers and regulators are increasingly seeking inspiration from the insights of behavioral sciences, as limited rational behavior and the consequences resulting from it is understood as a specific form of market failure. In order to prevent this market failure, policy makers and regulators encourage financial market actors to consider the limited rationality of financial consumers when dealing with them. At the same time however, it appears that rules of financial supervision law, such as regarding the provision of information, continue to assume that the average financial consumer is, essentially and as a rule, a rational decision-maker.

The basic question at the heart of the PhD research project with the working title *'Towards a New Consumer Concept in National And European Financial Market Law'* is how the gap between what policy makers and regulators expect of financial market actors and the rationale that forms the fundament of today's national and European financial market regulatory and supervisory framework can be bridged in order to ensure that financial market actors observe the societal interests at hand. The envisaged PhD research will take both an interdisciplinary and comparative approach, as insights from behavioral sciences and a study of several relevant national regulatory systems, next to that at the European Union level, form an integral part of the project.

## 6. The future of work (vacancy)

Ruben Houweling, Professor of Employment Law

Zef Even, Professor of European Labour Law

### Introduction

The central theme of the 'Future of work' project is to find an optimal mix of autonomy and market forces versus safeguarding of fundamental principles, in particular with regard to the labour market and the players acting in this. An altered playing field in the labour market increases the importance of the question of which public interests (such as sustainable development and the inclusiveness of and in the labour market, safeguarding the principles referred to in the European Pillar of Social Rights) can and should be protected by private actors, and in which way, and which should remain with the government.

The interplay of major economic transformations through globalisation, the application of new technologies (robotisation/digitisation/platformisation), demographic shifts (ageing and greater diversity of the labour force) and sustainability of production processes and service provision have a major impact on our economy and labour market.<sup>1</sup> Although these transformations can have a positive effect on our welfare, they also face us with new challenges in the labour market.

The labour market increasingly shows signs of 'job polarisation'; work is being pushed to the two outermost extremes of the training spectrum – highly qualified or low-skilled - with the centre being squeezed out. This division of the labour market leads to a group of *insiders* with strong protection and a growing group of *outsiders* with little or no protection.<sup>2</sup> The deployment of cheaper forms of labour with fewer or no risks leads to the displacement of insiders. Overall, this trend is not favourable for companies and institutions either. If increased flexibility is realised in a low-value manner, this has negative consequences for productivity and the innovative capacity of labour organisations and consequently, for our (knowledge) economy as a whole. Furthermore, the level playing field between companies is disrupted through 'working conditions competition'. Finally, the diminishing percentage of 'employees' leads to issues in the field of (financing of) social security: a growing group no longer contributes to the system and remains uninsured. This reinforces the already polarised labour market. It also shows that the classical government steering mechanism (imposing obligations on employers in relation to employees) is outdated. All these developments raise the question of whether current labour law regulations, which are based on (permanent) employment contracts between an employer and an employee, on which a large part of social insurance is based, are due for reform.<sup>3</sup>

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<sup>1</sup> *Work for a brighter future - Global Commission on the Future of Work*, ILO 2019 (online, public).

<sup>2</sup> E. Verhulp, *De arbeidsovereenkomst voor onbepaalde tijd als onbereikbaar statussymbool na inwerkingtreding Wetsvoorstel Werk en Zekerheid?* ('The permanent employment contract as an unattainable status symbol after the Work and Security Bill comes into force?'), TRA 2014/24, Issue 3, pgs. 21-29

<sup>3</sup> See e.g. F.G. Laagland & J. Kloostera, *De Engelse tussencategorie als oplossing voor platformwerk: mythe of werkelijkheid?* ('The British intermediate category as a solution for platform work: myth or reality?'), *Ondernemingsrecht* 2019/7, Issue 1, pg. 41, J.M. van Slooten, *Het arbeidsrecht moet op de schop* ('Labour law needs an overhaul'), *Ondernemingsrecht* 2018/43, Issue 6, pgs. 261-262 and P.T. Sick, *Haastige spoed....* ('More haste ...'), TRA 2018/69, Issue 9/10, pg. 14.



This reform has national and international (European) components. Protection of the Dutch labour market will naturally take shape via national actors such as the government, the social partners and other national stakeholders. But national solutions must not conflict with European law, such as freedom of movement and service provision and free competition. Given the open borders in the EU, employees and service providers from other member states also have an impact on the Dutch labour market. Furthermore, some solutions can be reached more effectively at the EU level than on a national level.

## PhD project

The PhD study will relate to 'contract form-free regulation of work'. If the object, the worker, is the focus with regard to international labour law protection, protection must be offered separately from the type of employment contract. Where safe and healthy working conditions are concerned, it should make no difference whether a person works on the basis of an employment contract or as a self-employed person. But in that case, what will the regulation of the legal position of such workers comprise? Who does the term 'worker' cover? Does it mean small businesses as well as conventional employees? How does the regulation of the worker relate to contract freedom, EU freedoms and competition law? Which tasks are vested in the government, and why? Which tasks could better be performed by private actors, and why?

Further concretisation of the PhD study could relate to (two examples):

- Disability and reintegration: who and what is involved, how and with which powers, responsibilities and obligations, if a worker is absent due to disability? In the event of the absence of a worker due to illness, the employer, the employee and the Employment Insurance Agency (UWV) (government) are currently involved and financial incentives work very well for reintegration in the labour market. Which incentives could facilitate the same effect in working relationships that do not qualify as employment contracts (e.g. self-employment relationships), in which the employer and the UWV are lacking as (co-)responsible actors?
- Sustainable development (life-long learning): who and what is involved, how, with which powers, responsibilities and obligations, with regard to sustainable development of workers? Does the government have a task in this regard, and if so, which? What is the most effective steering mechanism to encourage non-employees (e.g. the self-employed) to invest in their own training and development? Only fiscal incentives, and are the fiscal instruments intended for/adequate for this?

## Empirical research

The chosen research object always concerns two questions (a) who has which responsibilities relating to the research object and the sub-theme and (b) what works best?

Part 'b., What works?' refers to which steering mechanisms the government/public sector has and also the private actors involved, to promote desirable behaviour of the worker. Insight into the behaviour of the actors involved is of major importance in this part. In order to gain this insight (further) empirical research could and should hold a serious place in this part.

An example. In the case of occupational disability, it is first necessary to define how the existing group of workers deals with this risk/is even aware of it. Which numbers are involved? (How) Do these workers insure themselves against loss of income? Does a work-provider behave differently (with greater or fewer risks) if it is not co-responsible for income provision

during the worker's illness? Why is this? Which instruments work best under the current regulations? Why? Etc.

The candidate will not avoid ELS, either because he/she will actively perform ELS himself/herself, or because he/she will use existing ELS work, which he/she must be able to assess in terms of its value. The optimal mix of personal performance and analysis of ELS is naturally the desired outcome.

# 7. The needle in the haystack: international exchange of fiscal information 2.0 in the public and private interest

Ashwin Kalpoe, PhD candidate

Sigrid Hemels, Professor of Tax Law

Reinout Kok, Professor of Taxation of Multinational Corporations in a Globalized World

Maarten de Wilde, Professor of International and European Tax Law

## Introduction

Tax evasion by multinationals has already been a focus of political and social interest for a number of years. Tax is on the front pages of newspapers and has become a hot topic in the board room. This is an important research topic for the scientific field of international and European tax law and corporation tax. The fundamental underlying question is whether the existing corporation tax system and the international treaties allocating taxing rights to countries are still appropriate in the digital age. As long as there is no new system, however, countries must work with the systems that exist and aim for greater transparency and exchange of information. The OECD/G20 Base Erosion and Profit Shifting (BEPS) project and the follow-up of the EU have led to a far-reaching obligations of companies and intermediaries to provide tax administrations with information which is subsequently exchanged internationally. The aim is to enable tax administrations to detect and combat tax avoidance and tax evasion more effectively. However, the first signs appear to show that efforts of both private and public actors are currently directed primarily at compliance with the information obligations but are losing sight of the goal, the actual use of the information. Public parties struggle with an information overload and some countries have not even opened the database with the information gathered (Report from the Commission to the European Parliament and the Council on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation, Brussels, 17 December 2018, COM(2018) 844 final). Reform of information exchange practice therefore appears to be called for, a reform in which the interests of both public and private actors play a role.

## PhD project

The key question of this research project is how the information obligations and the exchange of information can be made smarter and how the focus can shift from gathering information to the use of information. A great deal of research into (international) tax law concerns the rules themselves. Little or no research takes place into the compliance aspects (meeting the rules, the way in which this takes place administratively and the effects of this). The project aims to change this and thus to accommodate a process of bringing the current practice of gathering information by private and public actors on a higher level, a situation in which public actors are able to actually use that information effectively. Finding a needle (relevant fiscal information) in the haystack of the information provided by businesses and exchanged by tax administrations is the biggest challenge that tax authorities face in the

coming years. This research is not only in the interest of public actors, but is also important for businesses, because a more effective and smarter system may reduce the administrative burden of companies. It is also important from an economic point of view that the considerable efforts, and the associated deployment of people and resources that can no longer be deployed in other ways, leads to actual results, the reduction of tax avoidance and tax evasion and therefore, tax information exchange becomes an effective tool rather than an end in itself.

The use of the ICT and knowledge of some member states, such as the Baltic States, which are far ahead of most other member states in the use of smart IT applications in the tax domain, could be helpful here. This study lends itself to an inter-disciplinary approach (tax and information technology) and a diversified method (doctrinal tax research and empirical research).

Concrete research questions are:

- What are the effects for public and private actors of the far-reaching gathering and exchange of tax information in the EU as a result of the BEPS project?
- How can the use of exchanged information be improved?
- Are there best practices in the EU for effective use by public actors or information provided by private actors?

## Empirical research

In view of the research questions, which are partly of an empirical nature, it is not more than logical that the PhD student will also conduct empirical research. In fact, this is encompassed by all three of the above research questions, which concern the effects of gathering the information, improving this and the best practices. This also means that in this project, tax specialists and empirically trained legal researchers must work together, because they each possess only part of the necessary toolkit: the tax specialist has the fiscal knowledge but is generally not trained in empirical research methods, while empirical legal researchers are generally not entirely familiar with the intricacies of (international, European and corporation) tax law. This project therefore naturally calls for a partnership between both types of expertise.

## 8. Responsible partnership with private actors in criminal law enforcement

Daniel Grimmelikhuijzen, PhD candidate

Paul Mevis, Professor of Criminal Law and Criminal Procedure

Pieter Verrest, Professor of Criminal Law and Criminal Procedure

Sanne Struijk, Associate Professor, Department of Criminal Law

### Introduction

The wider umbrella of the research covers the possible shift in theory and practice from protecting public-law interests through the deployment of private actors. This project begins on the basis of criminal law. In current criminal law only public law enforcement takes priority. Nevertheless, that exclusiveness can no longer be taken for granted. This fact makes it relevant as such to study all aspects (in theory and practice) of more private forms of law enforcement. Within this overall goal of the research project, the key question is the conditions under which the government seek responsible partnerships with private actors. The exclusiveness of public law enforcement can also no longer be taken for granted in the broader field of public law, including administrative law. In relation to the control of insurance fraud, for example, there is a partnership covenant in which the Public Prosecution Service prosecutes without prior police investigation: this is left to the (private) branches.

In the project, a number of comprehensive substantive conditions for responsible public-private partnerships in law enforcement will/must be developed first. This particularly concerns the questions of the standards for determining the extent to which there are good reasons for such partnerships. Which arguments broadly determine the need for or desirability of a partnership with private actors? Is that purely a matter of efficiency and if so, in order to realise which objectives? And how can that need and desirability be empirically assessed, in the sense of prediction or control?

Secondly, the project must also address the limits of transferring government tasks to a partnership with private actors. After all, even when such a partnership exists, the government always remains responsible for the enforcement of criminal law (including protecting the fundamental rights of citizens). Yet, as for the exclusive right of using violence, the situation is different because under specific circumstances, the government may take its distance to a certain degree. This also applies for constitutional and administrative law, regarding the deployment of armed security officers. This calls for adequate rules and control mechanisms.

Thirdly, the project will devote attention in a general sense to the determination and design of the legal position of private actors with which the government works as a partner and for which it must also be possible to set requirements and demand assurances.

Summarizing, the essence of the project is a search for a responsible public-private partnership within criminal law enforcement: will enforcement be left entirely to private actors within a criminal law setting of control or will private actors, as part of a partnership agreement, be involved in the execution and design of the government task? How can all the relevant interests involved be protected? Which examples of conscious and adequate involvement of private parties, companies in particular, exist in the performance of public

tasks? As criminal law is not unique in that regard, there are ample grounds and possibilities for inter-disciplinary research in this project.

## PhD project

In the PhD study, exploratory research will first be conducted into a number of concrete cases in which partnerships with private actors could make an attractive and responsible contribution to criminal law enforcement. Two examples of such cases are private security on board of Dutch maritime vessels and public-private cooperation within the prison system. Yet, other cases exist and are possible to include in this study. The abovementioned general aspects will be defined in specific terms for the relevant case or, vice versa, will be deduced from this.

Secondly, a legal framework will be developed on the basis of both the different case positions and a theoretical framework. As a result, the necessary conditions for a partnership with private actors described above will be developed in such a manner that offers legislators and policy-makers adequate guidance regarding the question whether partnership with a private actor is legitimate for certain parts of criminal law. This therefore concerns the provision of a decision-making model based on the specific research of the PhD student, derived from the general themes described above.

The third and last part of the PhD study will consist of the application of the developed framework to the concrete case positions. The aim is to fully complete the framework for these case positions, so that a legal business case arises.

## Empirical research

As already mentioned, the PhD study will start with exploratory research into a number of concrete cases concerning criminal law enforcement. Naturally that study also covers the research into what is known about the relevant case in empirical and quantitative terms. As for the example of private security on board of Dutch maritime vessels, it is important to note that no experience has yet been gained with the relevant regulation in the Netherlands, as the regulation has yet to enter into force (and will do so in the near future). However, experiences in other countries with different legal systems do exist and are essential here. In the context of this project, collaborations with other scientists already exist in order to conduct a comparative study of the regulation and practice in a number of other countries and to organize an international conference.

The second example of public-private partnership – the involvement of private actors within the prison system – also has an empirical and a quantitative component. Due to the capacity shortage within the Dutch prison system, the use of public-private partnership has already been considered since the start of this millennium. This is mainly positioned as cost-efficient. Experiences in other countries with such public-private partnerships show that it indeed may generate substantial cost savings. However, given the current emphasis in Dutch detention policy on effectiveness and efficiency, the question arises which components and tasks of the prison service could still involve the need and desirability for (further) cost savings.

As a result of this approach, the PhD study will thus also contain an empirical component in addition to a normative component. By investigating and analyzing what is known about public-private partnership in empirical and quantitative terms, the study may contribute to developing a model for a responsible partnership.

# 9. Responsabilising private actors for the governance of safety and security

Cybele Atme, PhD candidate

Richard Staring, Professor of Mobility, control and crime

Karin van Wingerde, Assistant Professor, Department of Criminology

Lieselot Bisschop, Assistant Professor, Department of Criminology

## Introduction

The governance of safety and security were traditionally seen as state tasks. In recent decades however, private actors are increasingly being responsabilised to actively contribute to the governance of safety and security. Self-regulation by companies and institutions, monitoring and reporting obligations, but also oversight and guardianship by citizens, interest groups, NGOs and the media are examples of the privatisation and responsabilisation of the governance of safety and security. These developments raise various ethical, legal and empirical questions, for example about the scope and legality of private actors' actions, about the protection of individuals and institutions that face monitoring, control, supervision and enforcement by private parties, and questions about the effectiveness of governance by private actors compared to public monitoring and control. Moreover, these developments also have consequences for the monitoring and control of safety and security by public bodies that increasingly are only involved when private modes of governance are not feasible or have failed. This raises the question how different modes of governance – public and private – interact in governing safety and security. Does the responsabilisation of private actors imply that public modes of governance also improve? Or does the monitoring and control of safety and security by public actors crumble in light of the increasingly large role of private actors? To what extent do we have to deal with different modes of governance that operate relatively independently of each other, reinforce each other or weaken each other? And if private and public actors interact, who takes up a leading role and who holds whom to account?

## Research questions

- How can the role of private actors in the governance of crime and insecurity be understood and explained?
- How do different types of private governance of safety and security work in practice and what impact do they have on the governance of safety and security?
- How does this relate to the public monitoring and control of safety and security?
- How can the relationship between private actors and the public authorities be understood and explained?

## Approach and methodology

This research project allows for various subprojects to focus on the role played by different types of private actors such as citizens, businesses, interest groups and NGOs in the governance of various issues surrounding safety and security. Specific areas of attention are financial and economic crime and environmental crime because these have seen the increased responsabilisation of both private and public actors in prevention and control. Central to this project is the question how governance of safety and security by private actors takes shape in practice and what effects and side-effects this has. This research project

therefore primarily aims to provide empirical findings about governance by private actors. However, this topic also raises ethical and legal questions and, therefore, this research project also offers ample opportunities for cooperation between criminologists and other social scientists, (legal) philosophers and various legal disciplines.

## PhD project: the role of professional service providers as gatekeepers in governing financial-economic crime

One of the key features of the global fight against serious financial and economic crime, such as money laundering, corruption and tax evasion, is the responsabilisation of commercial, non-state actors, such as notaries, lawyers, tax advisers, banks and other financial institutions. These actors are expected to prevent serious financial and economic crimes by monitoring (potential) clients and by signaling and reporting risks to the authorities. These service providers are therefore assumed to act as gatekeepers who protect the integrity of the financial system. Yet, serious and organized crime groups cannot operate without these gatekeepers. They need them as intermediaries between 'upperworld' and 'underworld' for instance by setting up companies or for the movement of wealth and assets.

Recent scandals such as the prosecution of various European banks for money laundering and the prosecution of notaries and legal professionals following the Panama and Paradise Papers have demonstrated an emerging narrative of criminalizing gatekeepers' roles.

This project aims to provide insights into the role of these professional service providers as gatekeepers of various forms of financial and economic crime and into their interaction with public supervisory and enforcement authorities. For example, it is not inconceivable that the increasing criminal prosecution of these gatekeepers undermines their willingness to cooperate with supervisory and enforcement authorities in the control and prevention of financial and economic crime.

### Research questions

- How can the role of professional service providers as gatekeepers in governing financial and economic crime be understood and explained?
- How do professional service providers deal with the increasing social expectation of fulfilling a role as gatekeepers in the fight against financial and economic crime?
- How do these developments affect the cooperation between the private sector and the supervisory and enforcement authorities?

### Approach and methodology

The research can focus on one more types of gatekeepers, such as lawyers, notaries, financial service providers, tax advisers and accountants. An international comparison would also be an interesting empirical avenue. This research project primarily aims to provide empirical findings into the role of gatekeepers. In order to contextualize and sufficiently grasp these empirical findings about gatekeepers and their interactions, knowledge of corporate law, tax law and/or criminal law is also required, depending on which type of gatekeepers the research focuses on. The intended candidate therefore preferably has social-scientific knowledge and skills as well as legal knowledge and skills.



# 10. From participation to legitimacy: the new role of civil society in defining public interest

Antonia Christopoulou, PhD candidate

Xandra Kramer, Professor of European Civil Procedure

Jos Hoevenaars, Academic Researcher, Department of Civil Law

## Investigating shifts in public and private enforcement responsibilities

Civil society organizations supporting public interest have started to leave their mark in public policy and decision-making processes at national and international levels. Some striking examples of this are 'Follow This', which, as a (very small) shareholder and with the help of a few institutional investors, is exerting pressure on Shell to commit to the Paris agreement, Oxfam Novib has encouraged Dutch supermarket chain Albert Heijn with its 'Behind the Barcodes' campaign to introduce a new policy in the field of human rights and sustainability, and the 2015 Urgenda Climate Case against the Dutch Government was the first in the world in which citizens established that their government has a legal duty to prevent dangerous climate change.

In recent years, we have seen a trend in the promotion of active citizenship by both governments and civil society organizations incentivizing individuals to play active roles in policy-making, decision-making and to an extent enforcement at the European and national levels. Through mechanisms such as European Citizen Initiatives (ECIs), complaining to ombudsmen about maladministration by public authorities, awareness campaigns, as well as starting legal actions against governments and corporations, private parties can, and are incentivized to participate in the norm setting as well as enforcement of public interests.

These developments come as a response to the multiple crises in civil society and as echo a willingness to make the voice of citizens better heard at local, national and European level, while also signaling important shifts in the division of labor of public and private enforcers and civil society organizations actively filling the gap left by the reshuffling of regulation and enforcement responsibilities. Moreover, modern models of governance and regulation appear to be increasingly dependent on such new forms of participation and the legitimacy associated with them.

Nevertheless, there are signs that the precise role of these new actors is still uncertain and under discussion. On the one hand, the 'toolbox' that enables citizens to actively participate in policymaking is expanded (eg ECI), on the other hand we see a counter-movement in which various legislative proposals to promote the voice of citizens (see, for example, the recently adopted and abolished Referendum Act in the Netherlands) excluded or taken under fire. It is clear that there is a shift in the relationships between public and private parties, with citizens and civil society organizations becoming important players who can directly and indirectly influence decision-making processes and governance models and can actively insist on

maintaining the public interest. This evolution raises a number of important legal and social questions.

## PhD project: from participation to legitimacy

Within this context the PhD project 'From Participation to Legitimacy' will scrutinize these developments and answer the following questions:

- Which (new) instruments enable civil society organizations to participate in the formulation and enforcement of policies supporting the public interest?
- How effective is this 'toolbox'?
- What are the effects of these new forms of participation on the norm-setting process and the safeguarding of public interests at local, national and European level, as well as the legitimacy associated with it?
- How and to what extent should the voice of civil society organizations be included in the policy-process?

The aim of this research is to study in-depth, using a case study approach and qualitative research methodology (e.g., interviews with stakeholders), the various instruments used by civil society in contributing to the formulation as well as enforcement of public interest by putting pressure on both businesses as well as governments. By mapping current developments and organizations this project will reassess the relationship between private and public parties in the formulation and enforcement of public interests and scrutinize the related legitimacy.

# 11. Regulation of autonomous robots in health care

Kostina Prifti, PhD candidate

Klaus Heine, Professor of Law and Economics and European Policy

Evert Stamhuis, Professor of Law and Innovation

## Introduction

This project combines a number of regulation issues regarding disruptive technology induced changes in a concrete societal sector. Health care is a sector where public interests are in the hands of public, private or hybrid actors, such as hospitals, doctors, health tech industry, health insurance and various state supervisory bodies. One immediate regulation issue comes to the forefront: Which jurisdictional level is best suited to regulate a health related activity? At the moment there is EU regulation (a.o. re medical devices), member state legislation (a.o. re market supervision), medical self-regulation and contract law (including liability law). Another obvious regulation issue is the plurality of interests of the various stakeholders, whereas the regulations aim to combine norms. There is the interest of the patient, the interest of the doctor, the interest of the hospital and the public policy interests, but also the interest of the insurance sector and of the health tech industry.

## PhD project

The use of robots in health care for supporting nursing and medical treatment (such as surgery) is going on for a while and becomes incrementally embedded in the current regulation of routines and practices in hospitals as well as nursing homes. As a consequence of advancing technology robots develop into autonomous actors and create new legal challenges. The extra utility of the autonomous machine action might collide with the appreciations of patients and doctors and the incumbent framework of legal and ethical rules and principles. To meet those challenges may require far-reaching innovation of the law.

The overarching theme of the research is the analysis of regulation of disruptive innovation in a specific sector that comprises various levels of regulation and a plurality of actors: patients, doctors, hospitals, producers, insurers. The focus of the PhD is the deep analysis of current and future regulation of autonomous robots for treatment and nursing in health care.

## Empirical research

The empirical component in this project is modest but no less important. In order to be able to answer the questions of regulation the research has to comprise a reliable inventory of the current medical practices with robotics in one specific subsector, yet to be chosen. How health care professionals perceive the human-machine interaction and what regulatory framework they would expect to assist them in balancing all the relevant interests might be included in a qualitative field study as a subproject.

# 12. Mobilizing public interests: a pluralistic perspective

María Campo Comba, postdoctoral researcher

Jeroen Temperman, Professor of Law and Religion

Wibren van der Burg, Professor of Legal Philosophy and Jurisprudence

## Introduction

This project investigates the various manifestations, usages and mobilizations of “public interests” amongst various actors in the (legally) pluralist state with a principal focus on private actors. The currently detected scholarly bifurcation of public interests within legal settings, such is the project’s hypothesis, is an oversimplification. That is, in the pluralist state, merely to distinguish between two chief mobilizations of public interest, viz. one wherein public authorities – the state – mobilizes public interests vis-à-vis private actors with a view towards regulating the latter’s behaviour versus bottom-up self-regulation by private actors by way of transparently appealing to the need to promote public values (like sustainability), is no longer adequate. Increasingly, private actors invoke public interests in additional and novel ways, both vis-à-vis each other (i.e. other non-state actors), as well as vis-à-vis the state. Increasingly, too, this potentially leads to apparent stand-offs between public interests. These deadlocks pertain to such interests and values as sustainability, fair competition, and corporate fundamental freedoms and (or versus) individual fundamental freedoms and equality.

While it may be a matter of course that public actors do not have a monopoly on mobilizing “public interests”, this project addresses the question when and under which circumstances especially private actors’ appeals to public interests ought to impact (legal) conflicts involving public values. Legal pluralism in the more strict sense of the concept is even more apparent within the current area by taking into account in this research novel business modalities, including corporations premised on public values (‘public interest companies’, ‘community interest companies’) but also those private businesses that collectively appeal, as legal entities, to the public values enshrined within formerly strictly individual human rights discourse (such as “religious ethos companies” or “culture-based companies”). Also, (novel) instances of civil disobedience may be characterized by private actors’ assessment that they, under circumstances, may secure public interests better than do public authorities.

Within the wider ESL and EUR this project hence connects and resonates, among other research, with research into such areas as private actors & international law (with various projects within the ESL-IEUL department), human rights law (notably prof. Temperman’s EUR Fellowship-funded research project on corporate invocations of human rights standards), STEM research projects on respectively contemporary forms of civil disobedience (Prof. Van der Burg) and legal mobilization (Prof. Taekema, with EUR-ISS), and such areas of expertise as law & sustainability, competition law, and trade law.

## Postdoc project

The postdoc shall be responsible as leading researcher for the project entitled "Mobilizing public interests: A pluralist perspective". This project investigates the various manifestations, usages and mobilizations of "public interests" amongst various actors in the pluralist state with a principal focus on private actors. The chief objective is to reassess the current bifurcation of the legal usage of public interests in the pluralist state. In so doing, the project shall, firstly, offer an empirically informed analysis of public interest mobilization by private actors so as to, secondly, propose a more complete (and complex) theoretical framework of the usage of public interests in the actor- and value-pluralist state. It is hence expressly envisaged that the project shall build towards a novel normative theoretical framework on the basis of which public interest mobilization can both be better explained analytically but also on the basis of which concrete instances of public interest mobilization can be assessed on their legal merits.

As these disciplines harbour the principal methods to be deployed, the postdoc shall have qualifications in the area of legal theory (especially in relation to non-state actors and public interests), and international and comparative law.

## Empirical research

See also under *postdoc project*: This empirically-informed project on public interest (legal) mobilization relies on empirical legal studies especially in its first – descriptive – phase.

# 13. The rule of law in the face of rising private powers

Ioannis Kampourakis, postdoctoral researcher

Alessandra Arcuri, Professor of Inclusive Global Law and Governance

Sanne Taekema, Professor of Jurisprudence and Legal Theory

## Introduction

The Rule of Law, as meta-normative framework for most western legal systems, is based on the conviction that the exercise of power needs to be controlled. Traditionally, legal debates on the rule of law focus on the exercise of public power. The Human Rights (HRs) regime resonates with this view, whereby only States are bearer of obligations. As private actors exercise increasingly more power, the rule of law can be seen as a meta-normative framework of use also to constrain public power exercised by private actors. As put by legal theorist, Martin Krygier (2008) 'the scope of the reach of institutions of restraint' of power should be broad enough to include both state and non-state actors. If institutions of restraint 'are to matter, they have to be able to reach those who matter.' In short, the need for control of power does not distinguish between public or private ownership of power. This particular insight may be read also in different manifestations of law, such as antitrust law. For example, the former US senator John Sherman who wrote the US Antitrust Act of 1890 famously stated: 'If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life.' This conviction led one hundred years ago to the adoption of a series of laws that regulated private power in the national context. Katharina Pistor in her book, *The Code of Capital*, goes back to a 1927 publication by Cohen showing how property and sovereignty (as dominium and imperium) mirror each other. While the tensions between dominium and imperium had been already long ago under the radar, framing the exercise of modern transnational private power is still precarious. The raising inequalities within countries worldwide, as documented among others by Piketty, may be the result - among other things - of the lack of attention by contemporary legal systems (and scholarship) of the need to constrain the exercise of power by private actors. Rather than assume that institutions wielding public power can effectively govern power by private actors, novel ways of conceptualizing a rule of law framework to address power by private actors more directly need to be developed.

Within the wider ESL and EUR this project connects and resonates, among other research, with research into such areas as private actors & international law (with various projects within the ESL-IEUL department), international economic law (prof. Arcuri research project on investment agreements and the rule of law), research into the theory of rule of law and legal pluralism (Prof. Taekema and Prof Van der Burg, with EUR-ISS), and such areas of expertise as law & sustainability, competition law, and international trade and investment law.

## Postdoc project

The postdoc on *The Rule of Law in the face of rising Private Powers* will be responsible for developing innovative and interdisciplinary research, which studies the contemporary

challenges posed by the increased exercise of public powers by private actors. Effective control of the exercise of transnational private power has thereby to address two very different challenges: On the one hand, private actors exercise power whose impact on the life of citizens is comparably intrusive as public power ('privatization of sovereignty'). On the other hand, traditional public power is steadily changing its shape and features, with States behaving like market actors. Examples of the above are investment contracts concluded between States and multinational corporations, mainly for the exploitation of natural resources, and the access for foreign investors to investor-State dispute settlement (ISDS). Such manifestation of power is visible at different levels, including through the intensified external action of the EU, as evidenced by the recent conclusion of a number of International Investment Agreements like CETA. Other examples include ways in which transnational regulatory platforms (e.g. International Swaps and Derivatives Association; ISO, etc.) entrust in various ways rights on private actors de facto limiting the policy space of sovereign actors. This state of affairs raises several questions: what are the existing and/or imaginable legal avenues to control power exercised by private actors? To what extent are these avenues already employed? What are the limits and potential of such avenues? What conceptualization of the rule of law may serve to evaluate these legal avenues? Drawing on the rich literature on Rule of Law, critical legal studies and empirical work in transnational socio-legal studies, the postdoc researcher will further develop the conceptual and normative frameworks to analyse and assess such legal avenues and their alternatives. The theoretical research may be complemented with case studies, if the postdoc researcher's own elaboration of the project requires this.

# 14. Beyond pure voluntariness: the case for a recalibration of self-regulation and public regulation

Michał Stambulski, postdoctoral researcher

Ellen Hey, Professor of Public International Law

René Repasi, Assistant Professor of International and European Union Law

## Introduction

This project considers the relationship between private self-regulation and public regulation with the aim of recalibrating this relationship in order to increase the effective implementation of public interests in a globalised world where the influence of single state (public) regulators is declining. Self-regulation as a tool to order markets gained relevance over the last three decades mainly as a reaction to two trends. First, globalisation (transnationalisation) of economic activities and supply chains has led to a de-territorialisation of regulatory authority. Second, the belief that market actors regulate their own affairs in a more efficient manner than public regulators. The former trend results in involuntary regulatory gaps because multiple applicable legal orders fail to align with each other. The second trend leads to voluntary regulatory voids due to the politically endorsed retreat of the state as a market regulator. In the EU, these trends are complemented by a regulatory gap that emerges from the disapplication of national regulation that is in conflict with the four fundamental freedoms and the lack of compensating EU secondary law because of gridlocked decision-making processes at the EU level.

These regulatory gaps have been filled with private regulation adopted by private actors. Private regulation took, amongst others, the shape of codes of conduct for corporate social responsibility, unified standards recommended to industries (such as the standards by the International Organization for Standardization (ISO)) or certification issued by private organisations (such as e.g. the Forest Stewardship Council).

As it stands, the effectiveness of self-regulation with a view to implement public goals (such as environmental protection, consumer protection or privacy) is called into question for various reasons. For one, in areas where markets were given the power to self-regulate affairs with a view to promote public interests, general market regulation impeded self-regulation to unfold its full potential. Competition law, for example, restrained the protection of animal welfare by a voluntary cooperation of supermarkets (the Dutch case of the 'Kip van Morgen'). Recent research,<sup>1</sup> based on empirical evidence, also found that when private actors enter into self-regulation ultimately private interests outweigh public interests. For example, Bartley (2018: 259) found, that one of the problems of private corporate responsibility lies in the fact that the search for low prices remains central to the operation of firms. Private actors, then, attach greater importance to their own private interests than general public interests even

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<sup>1</sup> Timothy Bartley, *Rules without Rights* (OUP 2018); John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) 22 *Brown Journal of World Affairs* 99.



when acting in their capacity as self-regulators. In the field of privacy and 'fake news' the effectiveness of self-regulation by monopolistic social media platforms to protect citizens and societies is increasingly questioned by regulators in the EU and in the US.

A growing body of research shows the inability of private self-regulation to fill regulatory gaps. At the same time, attempts are lacking either to make self-regulation more meaningful in terms of implementing public interests or to strengthen the role of public regulators in enforcing public interests on transnational economic activities and actors.

In analysing the relationship between self-regulation and public regulation, this project is to stimulate a meaningful dialogue between the two approaches that are at the heart of contemporary societal debates regarding the regulation of private sector actors, be it in terms of the reduction of poverty or climate change and at all levels of governance, ranging from national to global level. One approach focuses on self-regulation of the private sector in which the public sector serves as a last resort regulator; the other approach assumes that the public sector is the source of regulation with the private sector as the object of regulation. These approaches shape the academic and practical discourse in the field of economic regulation. In practice the two modes are likely to operate side-by-side, which as such may be part of the problem. The project seeks to develop conceptual clarity about these two approaches and make an intellectually sound contribution to the societal debate involving public and private interests.

## Postdoc project

The post-doc will be responsible for conducting research on the theme of 'self-regulation and public regulation as different means to realise public interests'. The aim of the research is twofold. On the one hand, it considers public regulation and its effectiveness realising public interests. Where public regulation is found to be ineffective, the focus of the research will shift to the question whether private regulation has the potential to better achieve public interests. On the other hand, the research will consider existing private self-regulation schemes, at both national and transnational level, and assess their effectiveness with a view to realizing public interests. Where private regulation is to be ineffective, the focus of the research will shift to the question whether public regulation has the potential to better realise public interests. Both strands of research will take on board the particular challenge of effective public interest protection in multilevel legal orders such as the EU.

The starting point of the research will be competition law, but the project may be expanded to other areas of law to be identified by the researcher. On the one hand, competition law sets limits to the cooperation of market operators also when they cooperate for the sake of realising public interests. Traditionally, these limits are defined by the yardstick of 'consumer welfare'. Public interests are hard to integrate into this yardstick. The narrower this yardstick is defined, the more competition law limits self-regulation that aims to further public interests. On the other hand, competition law can serve as a public regulatory tool to realise public interests where self-regulation of market operators fails. This can currently be observed in the case of 'Facebook' where privacy rights of consumers are largely ignored by the social media platform and where this lack of effective protection of personal data is considered to be an abuse of a dominant market position. In other words, competition law represents both sides of the uneven relationship between private self-regulation and public regulation when it comes to the implementation of public interests: it protects and limits at the same time the private regulation of markets. The role of public interests in competition law beyond regulating the traditional well-functioning of free competition is currently highly debated. As a result, it is core to determine the role that competition law is to play in recalibrating the

relationship between self-regulation and public regulation. The post-doc's research is intended to contribute to the dialogue between the above-mentioned approaches to economic regulation. It will be a task of the post-doc researcher to develop conceptual clarity about these approaches with a view making an intellectually sound contribution to the societal debate on the realisation of public interests through public or private regulation and, more generally, on the role of public and private interests in defining markets.

## Empirical research

Empirical research will be part of the research project in order to evaluate the effectiveness of private sector self-regulation and public regulation with a view to realising public interests.