Gedragscodes in internationaal, Europees en privaatrechtelijk perspectief

# Gedragscodes in internationaal, Europees en privaatrechtelijk perspectief

Juridische betekenis, effectiviteit en handhaving

Preadviezen Nederlandse Vereniging voor Burgerlijk Recht 2013

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# Inhoudsopgave

# Hoofdstuk 1

# Gedragscodes in een meergelaagd privaatrecht in Europa en Nederland

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## 1.1 Aanpak

1. Ondanks herhaalde oproepen om meer aandacht voor zelfregulering (wij zullen ons hier beperken tot gedragscodes) in het privaatrecht, is het onderwerp in Nederland nog steeds niet erg in beweging. Een quickscan wees uit dat op Europees niveau meer gebeurt. Voor ons is dit reden om het vizier ook op Europa te richten. Tot nu toe is dat in de Nederlandse privaatrechtelijke literatuur niet stelselmatig gedaan. Verder kiezen wij ervoor empirische gegevens te verzamelen over het verschijnsel gedragscodes in Europa en Nederland, meer in het bijzonder over hun functies. Ook dit is anders dan gebruikelijk.

Achtereenvolgens onderzoeken wij:

*a.* De stand van zaken in literatuur en wetgeving met betrekking tot zelfregulering (gedragscodes) in Europa en Nederland (paragraaf 1.2). Gedragscodes in Nederland die potentieel van belang zijn in privaatrechtelijke verhoudingen vinden voor een deel hun grondslag in Europese richtlijnen. Dat willen wij met voorbeelden van dergelijke gedragscodes laten zien (paragraaf 1.3).

*b.* Een empirisch onderzoek naar de functies van gedragscodes in Europa en Nederland (paragraaf 1.4). Daarin betrekken wij zowel gedragscodes met een wettelijke grondslag als gedragscodes die vooral of uitsluitend op eigen initiatief van private partijen tot stand zijn gekomen.

De te beantwoorden vraag in dit preadvies is vervolgens of uit de gegevens van a en b criteria zijn af te leiden voor het toekennen van (enigerlei vorm van) juridische betekenis aan gedragscodes (paragraaf 1.5). Wij formuleren daartoe aan het slot enkele discussiepunten en tentatieve conclusies. Een korte omschrijving van de begrippen 'zelfregulering', 'coregulering' en 'gedragscodes' nemen wij op in Bijlage A.

## 1.2 Stand van zaken in literatuur en wetgeving

2. In Nederland hebben civilisten in het algemeen weinig belangstelling voor het onderwerp van dit preadvies. Zelfs als men de thematiek verbreedt tot zelfregulering, waardoor ook andere instrumenten dan gedragscodes in beeld komen, zoals leidraden, protocollen, certificatie, normalisatie, standaardisatie, keurmerken, richtlijnen

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* Het preadvies is voor een belangrijk deel gebaseerd op en soms letterlijk ontleend aan het proefschrift dat mevrouw Menting over dit onderwerp voorbereidt. In het bijzonder geldt dit voor de paragrafen 1.3 en 1.4 van het preadvies. Prof. mr. J.B.M. Vranken is, samen met prof. mr. R.A.J. van Gestel, TiU, haar promotor.

en accreditatie, zijn de relevante publicaties in het privaatrecht niet talrijk. Enkelen[1] hebben de laatste tien jaar geprobeerd de bakens te verzetten, maar dat is niet erg gelukt. De discussie gaat vooral over de waarborgen voor de juridisch bindende kracht van (in dit preadvies) gedragscodes en over hun doorwerking in het privaatrecht, die een enkele keer direct, maar meestal indirect gebeurt door middel van vage normen. Een van de redenen voor de geringe aandacht is volgens ons dat civilisten niet erg geïnteresseerd zijn in regelgeving op een abstract niveau. Privaatrechtelijke regelgeving is, op een enkele heel kleine uitzondering na, afkomstig van de centrale overheid. Wanneer in de privaatrechtelijke literatuur wordt aangedrongen op wettelijke regulering is dit als vanzelfsprekend gericht aan de centrale overheid. Wat die wetgever moet doen en hoe, wordt niet geproblematiseerd. Inzichten uit de wetgevingsleer over bijvoorbeeld de vraag of het wel een probleem is dat op het bord van de centrale wetgever ligt en of er geen alternatieven zijn, worden zelden of nooit meegewogen. De rapporten en nota's over wetgevingskwaliteit, vanaf Zicht op wetgeving (1990) tot Vertrouwen in wetgeving (2008) en daarop betrekking hebbende literatuur, alsook de Europese ontwikkelingen op dit terrein (hierna nr. 3 en 4), blijven onvermeld.

3. In de loop van de afgelopen decennia is het beeld van de exclusiviteit van de centrale wetgever — maar niet dat van de veronderstelde onproblematische aard ervan — in twee opzichten gekanteld. In de eerste plaats door de Aanwijzingen voor de regelgeving (1992, met latere wijzigingen). Voor zover relevant bepaalt Aanwijzing 7 dat indien nieuwe regelgeving nodig is, onderzocht moet worden of deze tot stand kan worden gebracht door middel van het zelfregulerend vermogen van de betrokken sector dan wel of overheidsinterventie nodig is. Hieruit spreekt een voorkeur van zelfregulering boven centrale wetgeving, maar of dit in de praktijk voor het privaatrecht ook daadwerkelijk wordt gehanteerd, is twijfelachtig.[2] Een voorstel van Giesen, samen met Schelhaas,[3] om een Periodiek Overleg van Rechtsvormers op te richten waarin de diversiteit van gewone en alternatieve regelgeving onderling beter op elkaar afgestemd kan worden — wie doet wat en hoe past het bij elkaar? — heeft in de NJV-vergadering van 2007 weinig bijval gekregen. Men vreesde voor een zoveelste krachteloos overlegorgaan.[4]
In de tweede plaats is het beeld van de exclusiviteit van de centrale wetgever gekanteld doordat de rechterlijke rechtsvorming zich feitelijk een, overigens niet onomstreden, eigen plaats heeft veroverd naast wetgeving. 'Een eigen plaats' wil zeggen dat de waarborgen voor bindende kracht niet ontleend zijn aan of gebaseerd zijn op die voor wetgeving. Bij zelfregulering (gedragscodes) is deze stap (nog?) niet gezet. Illustratief is de regeling voor de zelfregulering die in artikel 6:214 BW is opgenomen voor wat is genoemd: een standaardregeling. De eisen die eraan gesteld worden, lijken in alles op wetgeving. Het verbaast niet dat een zo zwaar opgetuigde procedure nog geen enkele keer gebruikt is. Ook bij algemene voorwaarden is geen

1. Van Driel 1989, Vranken 2005, Giesen 2007a, 2007b en 2008, Kristic, Van Tilburg & Verbruggen 2009 en Akkermans 2011.
2. Uit Van Gestel & Menting 2011 blijkt dat in het wetgevingsproces over het algemeen weinig gezocht wordt naar alternatieven voor wetgeving.
3. In zijn preadvies voor de NJV uit 2007 (Giesen 2007a) en eerder ook al in een artikel samen met Schelhaas (Giesen & Schelhaas 2006).
4. Verslag Algemene vergadering NJV 2007, met name p. 42-45.

sprake van een 'eigen plaats'. Hoewel algemene voorwaarden beschouwd kunnen worden als een privaat reguleringsinstrument op abstract niveau — betrokkenen stellen immers zelf algemene regels op voor al hun individuele overeenkomsten met consumenten — gelden ze niet uit dien hoofde, maar pas nadat en omdat betrokkenen ze zelf in hun individuele overeenkomsten hebben opgenomen, en dan ook nog met zware inhoudelijke beperkingen. Daarmee zijn algemene voorwaarden ingebed in het gebruikelijke patroon van de centrale wetgever die de individuele contractsvrijheid van betrokkenen normeert. Anders dan bij de rechtspraak hebben algemene voorwaarden deze positie in het recht dus niet kunnen afdwingen uit kracht van hun feitelijkheid, dit wil zeggen doordat ze heel vaak voorkomen en er eigenlijk weinig handels- en dienstenactiviteiten zijn waarin geen gebruik wordt gemaakt van algemene voorwaarden.

4. In Europa is meer aandacht voor zelfregulering (gedragscodes) in het privaatrecht. Een van de redenen daarvoor is dat het wetgevings-/reguleringsproces in de EU anders is georganiseerd dan in nationale staten. Heel kort gezegd speelt het proces zich af op twee niveaus, nationaal en Europees, op basis van subsidiariteit en proportionaliteit. Voorts zijn de bevoegdheden en de onderlinge verhouding van Commissie, Raad en Parlement in de EU niet dezelfde als die van regering en parlement in de nationale staten. Daarnaast zijn er ook andere actoren dan statelijke, waaronder NGO's. En ten slotte heeft de EU uiteenlopende instrumenten ter beschikking om de doelstellingen te realiseren, zoals verordeningen, richtlijnen, soft law, zelfregulering en aanbevelingen. Wanneer moet welk instrument op welk niveau door welke actor worden ingezet en waarom? De groei van de EU en de toename van de regelgeving in de vorige eeuw heeft geleid tot veel kwantiteit en niet altijd voldoende kwaliteit. In 2002 werd het Actieplan vereenvoudiging en verbetering regelgeving ontwikkeld, waarmee een stap werd gezet naar een beoogd nieuw en beter Europees wetgevingsbeleid.[5] Het beleid kwam te rusten op twee samenhangende pijlers: deregulering en alternatieven voor wetgeving. De eerste pijler staat voor een vermindering van wetgeving en meer aandacht voor de kwaliteit ervan. Het doel onder de tweede pijler is om, waar mogelijk, meer gebruik te maken van andere vormen dan regulering door wetgeving, zoals zelfregulering en coregulering.[6] Het Interinstitutioneel Akkoord Better Regulation van 2003, het IIA, gesloten tussen Commissie, Raad en Parlement, formuleert voor het eerst een algemeen juridisch kader voor zelf- en coregulering en bevat criteria voor het hanteren ervan.[7]

5. Europese Commissie, 'Actieplan vereenvoudiging en verbetering regelgeving', COM(2002)275-278 def. De basis voor het opstellen van dit nieuwe wetgevingsbeleid werd gevormd door het Mandelkern-rapport (*Mandelkern Group on Better Regulation*, Final Report, 13 November 2001). Het Witboek voor Europese Governance (Europese Commissie, *Een Witboek voor Europese Governance*, 25 juli 2001, COM(2001)428) vormde het uitgangspunt voor het Actieplan, dat een vervolg op dit Witboek was. Een volledig overzicht van de Europese 'Better regulation-agenda' is te vinden op http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm, laatst geraadpleegd op 3 juni 2013. Zie voor een (kritische) bespreking van het Better Regulation beleid bijvoorbeeld Senden 2005, Van Gestel 2005, Wiener 2006, Weatherill 2007 en Best 2008.

6. Senden 2005, p. 4-11 voor een beschrijving van de pijlers.

7. Het Akkoord voorziet beide begrippen ook van een definitie. Coregulering wordt gedefinieerd als 'het mechanisme waarbij een communautair wetsbesluit de verwezenlijking van de door de wetgevingsautoriteit omschreven doelstellingen overlaat aan de erkende betrokken partijen op dit gebied (met name economische subjecten, sociale partners, niet-gouvernementele organisaties en verenigingen)' (overweging 18). Zelfregulering is 'de mogelijkheid dat economische subjecten, de sociale partners, niet-gouvernementele organisaties of verenigingen, onderling en voor henzelf gemeen-

Het belang van deze alternatieve reguleringsinstrumenten is in 2005 nog eens benadrukt in, onder andere, de Mededeling van de Commissie aan de Raad en het Europees Parlement inzake Betere regelgeving met het oog op economische groei en meer banen in de Europese Unie.[8] Om een indruk te geven, citeren wij op pagina 2:

> 'Het EU-beleid inzake betere regelgeving beoogt een beter geconcipieerde regelgeving met het oog op meer welvaart voor de burger, een doeltreffende naleving van voorschriften, zo laag mogelijke economische kosten, zulks overeenkomstig de proportionaliteits- en subsidiariteitsbeginselen van de EU. In de context van de hernieuwde strategie van Lissabon, specifiek gericht op meer groei en banen, heeft de Commissie haar intentie aangekondigd een alomvattend initiatief op te starten om het regelgevende kader in de EU te doen beantwoorden aan de eisen van de eenentwintigste eeuw. Dit initiatief bouwt voort op het initiatief van de Commissie uit 2002 voor een betere regelgeving…'

Intussen zijn er nieuwe initiatieven en worden het Actieplan en het Interinstitutioneel Akkoord herzien. In 2010 is hierover een Kaderakkoord over de betrekkingen tussen het Europees Parlement en de Europese Commissie[9] gesloten, maar de onderhandelingen zijn nog niet afgerond. Het is de vraag of zelfregulering daarin nog dezelfde prominente plaats zal innemen als in het IIA dan wel deze zal moeten afstaan aan soft law en verordeningen, die tegenwoordig meer in zwang lijken te zijn.[10]

5. De literatuur over zelfregulering (gedragscodes) in het Europese privaatrecht sluit, anders dan in Nederland, aan bij het debat over wetgevingsbeleid in de EU. Een bekende naam is Cafaggi die zelfregulering beschouwt als een belangrijk reguleringsinstrument voor het zich ontwikkelende Europese privaatrecht, niet als alternatief voor, maar als een aanvulling op regulering door de Europese instanties. Hij spreekt van 'new regulatory models coordinating public and private regulators.'[11] Volgens hem draagt zelfregulering, binnen de overigens bescheiden mogelijkheden die het privaatrecht heeft, op eigen wijze bij aan het bevorderen van de interne markt en het inzetten van privaatrechtelijke instrumenten om marktfalen tegen te gaan. De eigen wijze moet wel nog nader vorm worden gegeven, want de legitimatie van private regelgevers is niet zonder meer gegeven, ook niet als een richtlijn aandringt op zelfregulering (gedragscodes) op nationaal of Europees niveau of zelfs daartoe verplicht (hierna paragraaf 1.5). Ook kunnen private en publieke regelgevers

schappelijke richtsnoeren op Europees niveau vaststellen (met name gedragscodes of sectorale overeenkomsten)' (overweging 22). Deze begrippen zijn volgens Van Gestel echter niet duidelijk afgebakend (Van Gestel 2005, p. 106). Svilpaite geeft bovendien aan dat de begrippen vanuit een Europese en communautaire invalshoek zijn gedefinieerd, waardoor het aantal instrumenten dat onder de definities valt beperkt is (Svilpaite 2007b, p. 4 en, uitgebreider, Svilpaite 2007a, p. 9-16). Zie ook Verbruggen 2009 (coregulering) en Senden 2005, p. 11-13 voor een nadere conceptualisering van beide begrippen.

8. COM(2005)97 def.
9. *PbEU* 2010, L 304/47.
10. Senden 2013 en Senden & Van den Brink 2012.
11. Cafaggi 2006, p. 3-20, en p. 5: 'The most important novelty is the integrated nature of the new regulatory models'. Vgl. ook Cafaggi 2008, p. 104-109 en Cafaggi 2011, p. 96 en p. 100-103.

verschillen over de wijze waarop, de mate waarmee en het tempo waarin de Europeanisering van het privaatrecht zich moet voltrekken. Cafaggi bepleit, samen met Janczuk, een op het privaatrecht toegesneden Europees kader voor zelfregulering. Zij noemen dit de 'European-level principles governing private regulation.' Doel ervan is om de legitimiteitsproblemen van zelfregulering te ondervangen zonder de waarde die zelfregulering heeft voor het bevorderen van de Europese interne markt aan te tasten.[12]
Ook anderen benadrukken de eigenheid van zelfregulering. Scott is een van hen.[13] Hij stelt voorop dat gezien het feit dat zelfregulering inmiddels in de praktijk vaak wordt gebruikt, het legitimiteitsprobleem van zelfregulering niet opgelost zal kunnen worden door alle regelgevende bevoegdheden weer terug te leiden naar de overheid (zo dit al zou kunnen). Er zal gezocht moeten worden naar alternatieve bronnen voor legitimiteit:

> 'An approach premised on the desirability of applying public law mechanisms to private actors appears to me to over-emphasise one set of legitimating mechanisms, at the expense of others which are, to a greater or lesser extent, particular to non-state actors. I suggest that a more fruitful approach might be to think first about the advantages, from a legitimacy perspective, of the involvement of non-state actors within governance regimes generally, and second to think more precisely about the various mechanisms through which non-state activities are themselves legitimated, which often go beyond traditional mechanisms of public accountability'.[14]

## 1.3 Enkele empirische gegevens

6. Bij privaatrechtelijke regelgeving moet zowel in Nederland als in Europa de wetgever de mogelijkheid en wenselijkheid van zelfregulering onderzoeken, blijkt uit paragraaf 1.2. Indien de wetgever tot de conclusie komt dat dit het geval is, heeft hij twee manieren om hieraan vorm te geven. De eerste manier ligt voor de hand en is tegelijk ook het meest zichtbaar: een expliciete verwijzing naar zelfregulering in de desbetreffende wettelijke regeling zelf. De andere manier is dat de wetgever bepaalde vraagstukken aan zelfregulering overlaat, zonder er in specifieke wettelijke bepalingen naar te verwijzen. Dit is een meer indirecte manier om zelfregulering een plaats te geven in het privaatrecht dan de eerste.[15] In dit hoofdstuk zullen wij enkele voorbeelden bespreken van verwijzingen in Europese en nationale regelgeving op het terrein van het privaatrecht naar één instrument van

12. Cafaggi & Janczuk 2010, p. 29-32. Zie ook Cafaggi 2011, p. 100 en Cafaggi 2008.
13. Zie met betrekking tot het Europese privaatrecht ook Schiek 2007 en Prosser 2008.
14. Scott 2008, p. 263.
15. Zo betekent het feit dat een Europese richtlijn niet expliciet verwijst naar zelfregulering (als implementatiewijze) niet dat er geen ruimte is voor het gebruik ervan binnen bepaalde zeer strikte voorwaarden en bij hoge uitzondering. Zie over de implementatie van richtlijnen door middel van zelfregulering bijvoorbeeld Verdoodt 2007, p. 280-282 en Svilpaite 2007b, p. 14-18. Een overzicht van de voorwaarden is te vinden in de handleiding 'Wetgeving en Europa. De voorbereiding, totstandkoming en nationale implementatie van Europese regelgeving' (2009) van het Expertisecentrum Europees Recht (ICER) (te downloaden op www.minbuza.nl/ecer/icer/handleidingen.html, laatst geraadpleegd op 17 juli 2013).

zelfregulering: gedragscodes. De bedoeling is om een indruk te geven van het daadwerkelijk opteren door de wetgevers in Europa en Nederland voor gedragscodes in het privaatrecht en welke onderwerpen er zoal in opgenomen zijn of kunnen worden. Wij beperken ons daarbij tot verwijzingen van de eerste, meest zichtbare soort. Ook binnen deze beperking pretenderen wij geen volledigheid, maar dat verhindert niet de bevestiging van wat in paragraaf 1.2 al is aangegeven, te weten dat Europa op dit punt veel actiever is dan Nederland.

7. Wij beginnen met Europa.

*Consumentenrecht*

Het Europese consumentenrecht is één van de terreinen waarop de Europese Commissie zelfregulering (expliciet) in haar wetgevingsbeleid betrekt. Zo gaf de Commissie in het Groenboek Consumentenbescherming van 2001 aan dat met zelfregulering bepaalde doelstellingen van consumentenbescherming kunnen worden gerealiseerd.[16] Doeltreffende zelfregulering met duidelijke, vrijwillige, bindende toezeggingen aan consumenten kan, mits op de juiste wijze gehandhaafd, de noodzaak tot regulering en mederegulering op dit terrein terugbrengen, aldus de Commissie.[17] Ook in de daaropvolgende strategienota's komt het gebruik van (verschillende vormen van) zelfregulering steeds terug.[18] Daarnaast zien we ook in Richtlijnen op het terrein van het consumentenrecht verwijzingen naar zelfregulering, veelal in de vorm van gedragscodes en buitengerechtelijke geschilbeslechting. Daarvan nu enkele voorbeelden.

*a. Richtlijn Oneerlijke Handelspraktijken*

Doel van de Richtlijn Oneerlijke Handelspraktijken (Richtlijn OHP)[19] is om door middel van maximumharmonisatie bij te dragen aan een goede werking van de

16. Europese Commissie, 'Groenboek over de consumentenbescherming in de Europese Unie', COM(2001)531 def. Vgl. ook Resolutie van de Raad van 28 juni 1999 inzake het consumentenbeleid van de Gemeenschap 1999-2001 (1999/C 206/01), overweging 8: 'Overwegende dat zelfregulering door het bedrijfsleven of convenanten tussen consumentenorganisaties en het bedrijfsleven onder bepaalde omstandigheden een passende aanvulling op of, in specifieke gevallen, een passend alternatief voor wetgeving kunnen vormen, met name om sneller te kunnen reageren op marktontwikkelingen; dat zelfregulering en convenanten moeten voldoen aan de doelstelling van een hoog niveau van consumentenbescherming, de rechten van de consument op informatie moeten beschermen en de mededinging niet aan banden mogen leggen; dat een goed toezicht op en een goede naleving van zelfregulering en convenanten van essentieel belang zijn voor de doeltreffendheid ervan, en dat het indien geen zelfregulering en convenanten tot stand worden gebracht, noodzakelijk zou kunnen zijn bindende regels aan te nemen'.
17. Europese Commissie, 'Groenboek over de consumentenbescherming in de Europese Unie', COM(2001)531 def., p. 15. De Commissie stelde voor een kaderrichtlijn consumentenbescherming op te stellen die tevens een grondslag zou moeten bieden voor Europese zelfregulering op het gebied van consumentenbescherming (p. 13). Zie ook Verdoodt 2007, p. 64 en Howells, Micklitz & Wilhelmsson 2006, p. 200-201.
18. Zie achtereenvolgens de verschillende mededelingen van de Commissie: 'Actieplan voor het consumentenbeleid 1999-2001', COM(1998)696; 'Strategie voor het consumentenbeleid 2002-2006', COM(2002)208 def.; 'EU-strategie voor het consumentenbeleid 2007-2013. Consumenten mondig maken, hun welzijn verbeteren en hun effectief bescherming bieden', COM(2007)99 def.; 'Een Europese consumentenagenda — Vertrouwen en groei stimuleren', COM(2012)225 def. Vgl. ook Huyse & Parmentier 1990 over het eerdere beleid.
19. Richtlijn 2005/29/EG van het Europees Parlement en de Raad van de Europese Unie van 11 mei 2005 betreffende oneerlijke handelspraktijken van ondernemingen tegen consumenten op de interne markt (*PbEU* 2005, L 149/22).

interne markt en aan het verwezenlijken van een hoog niveau van consumentenbescherming.[20] De Richtlijn betreft uitsluitend business-to-consumer-handelsrelaties (B2C-relaties).[21] Gedragscodes spelen materieelrechtelijk een rol daar waar niet-naleving van een gedragscode, respectievelijk het valselijk beweren een gedragscode te hebben ondertekend dan wel zeggen dat een gedragscode is erkend terwijl dat niet het geval is, een oneerlijke handelspraktijk oplevert.[22] Hiermee worden gedragscodes in B2C-handelsrelaties een stuk minder vrijblijvend. Het niet naleven ervan is onrechtmatig jegens consumenten.[23] Interessant is voorts de rol die gedragscodes spelen bij de invulling van de norm 'professionele toewijding'.[24] Wanneer zij regels bevatten omtrent 'de normale marktpraktijk' in een bepaalde branche, gelden die regels bij het invullen van de norm 'professionele toewijding' ook voor niet-aangesloten marktpartijen als referentie. Consumenten en handelaren binnen de branche worden 'dan immers geacht te weten wat de geldende normen zijn'.[25] Niet vereist is dat de handelaar in kwestie zich aan de gedragscode heeft gebonden.[26] Uit artikel 10 van de Richtlijn volgt dat gedragscodes ook handhaving en toezicht mogen regelen, als aanvulling op administratieve of rechterlijke procedures. Lidstaten mogen dit toezicht aanmoedigen, waarbij ze vrij zijn te bepalen dat een klacht eerst aan de houder van de gedragscode[27] moet worden voorgelegd, alvorens rechterlijke of administratieve instanties bevoegd zijn (artikel 11 lid 1).[28] Drijber ziet de Richtlijn als een compromis tussen twee stromingen, waarbij enerzijds wordt uitgegaan van een zo hoog mogelijke consumentenbescherming door middel van maximumharmonisatie van wetgeving en anderzijds van deregulering op basis van wederzijdse erkenning, met gedragscodes als 'surrogaat voor harmonisatie'.[29]

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20. Richtlijn 2005/29/EG, overweging 1 t/m 6 en artikel 4.
21. De Richtlijn OHP is niet van toepassing op B2B-relaties. Voor de regulering van deze relaties is op Europees niveau een start gemaakt met zelfregulering door middel van een Europese gedragscode 'Vertical relationships in the Food Supply Chain: Principles of Good Practice' (beschikbaar via http://ec.europa.eu/enterprise/sectors/food/competitiveness/forum_food/index_en.htm, laatst geraadpleegd op 18 juni 2013).
22. Richtlijn 2005/29/EG, artikel 6 lid 2 onderdeel b en artikel 5 lid 5 jo. bijlage 1.
23. Zie hierover voor Nederland onder meer Vollebregt 2010, p. 267 en Van Boom 2008, p. 19. Het begrip gedragscode wordt daarbij in artikel 6:193a onderdeel i BW ruim gedefinieerd. Volgens Vollebregt 2010, p. 267 lijkt iedere brancheafspraak over materiële en formele regels voor handelspraktijken onder het artikel te kunnen vallen. De reikwijdte wordt evenwel weer beperkt door de toevoeging dat het dient te gaan om vrijwillig opgestelde gedragscodes.
24. Zie Richtlijn 2005/29/EG, overweging 20, artikel 6 lid 2 onderdeel b en artikel 5 lid 5 jo. bijlage 1 en de Toelichting bij de Richtlijn (COM(2003)356 def.), p. 17 en p. 22. Vgl. hierover ook Collins 2005, p. 423-424 die opmerkt dat dit tot terughoudendheid bij handelaren zou kunnen leiden om zich te binden aan een code.
25. Zie hierover de implementatiewet: *Kamerstukken II* 2006/07, 30928, 3, p. 13 (MvT). Vgl. ook SER, 'Oneerlijke handelspraktijken op consumententerrein in de EU', SER-advies 04/06, Den Haag 2004, p. 39. Steijger 2007, p. 129 geeft aan dat niet alles wat in een bepaalde sector in feite gebruikelijk is meteen ook als 'professionele standaard' kan worden bestempeld.
26. Vgl. Duivenvoorde 2010, p. 152. Zie hierover ook Vollebregt 2010, p. 269.
27. Kort: degenen die de gedragscode hebben opgesteld en toezien op naleving ervan (artikel 2 onderdeel g Richtlijn 2005/29/EG).
28. Lidstaten wordt dus, in tegenstelling tot bijvoorbeeld de Richtlijn Elektronische handel (2000/31/EG), niet gevraagd om het opstellen van gedragscodes aan te moedigen (vgl. Howells, Micklitz & Wilhelmsson 2006, p. 211).
29. Drijber 2005, p. 184. Zie voor een gedetailleerdere uitwerking van het element 'gedragscodes' uit de Richtlijn Howells, Micklitz & Wilhelmsson 2006, p. 195-215 en Pavillon 2012, die aangeven dat de bijdrage van gedragscodes aan een hoog niveau van consumentenbescherming sinds de inwerkingtreding van de Richtlijn niet wezenlijk is toegenomen.

Wij werken dit niet verder uit omdat het tot het onderwerp van onze medepreadviseur behoort.[30]

*b. Richtlijn inzake Timeshare*

Het doel van de Timeshare Richtlijn is om bij te dragen aan een goede werking van de interne markt en een hoog niveau van consumentenbescherming tot stand te brengen (artikel 1).[31] Onderdeel daarvan is consumentenvoorlichting en buitengerechtelijke geschilbeslechting, zo volgt uit artikel 14. De Commissie moedigt in dat kader het opstellen van Europese gedragscodes aan, in het bijzonder door beroepsorganisaties, ter vergemakkelijking van het uitvoeren van de Richtlijn. Lidstaten dienen daarbij handelaren en beheerders van gedragscodes aan te sporen om consumenten, waar nodig, in te lichten over hun gedragscodes.[32] Daarnaast moeten zij stimuleren dat handelaren en hun brancheorganisaties buitengerechtelijke procedures ontwikkelen voor het beslechten van consumentengeschillen en daarover informatie aan consumenten verschaffen.[33]

*c. Richtlijn Consumentenrechten*

De recente Richtlijn Consumentenrechten verwijst naar gedragscodes als onderdeel van de informatievoorschriften voor overeenkomsten op afstand en voor overeenkomsten buiten verkoopruimten gesloten.[34] Net als de nog te bespreken Richtlijn Elektronische handel en de Dienstenrichtlijn, verplicht de Richtlijn Consumenten-

30. Voor een kort overzicht met verdere verwijzingen, onder meer Verkade 2009, hoofdstuk 7, nr. 67-88.

31. Richtlijn 2008/122/EG van het Europees Parlement en de Raad van 14 januari 2009 betreffende de bescherming van consumenten met betrekking tot bepaalde aspecten van overeenkomsten betreffende het gebruik in deeltijd, vakantieproducten van lange duur, doorverkoop en uitwisseling (*PbEU* 2009, L 33/10). Timesharing betreft een recht om elk jaar een week of meer in een vakantiehuisje of ander soort overnachtingsaccommodatie te mogen verblijven, aldus de Nederlandse wetgever (*Kamerstukken II* 2009/10, 32422, 3, p. 1).

32. Zie *Kamerstukken II* 2009/10, 32422, 3, p. 4 over de wijze waarop de Nederlandse wetgever hieraan uitvoering geeft: 'Enkele bepalingen van de richtlijn behoeven geen implementatie, omdat zij bijvoorbeeld verplichten tot feitelijk handelen […]. Allereerst gaat het hier om de begrippen van artikel 2 lid 1, onderdelen i en j (gedragscode en beheerder van een gedragscode). Deze begrippen worden gebruikt in artikel 14 lid 1, dat voorziet in een plicht voor de lidstaten om het gebruik van en de aandacht voor gedragscodes te bevorderen. Hieraan kan worden voldaan door bijvoorbeeld publicatie van gedragscodes via www.consuwijzer.nl'.

33. De Europese wetgever gaf bij de totstandkoming van de herziene versie van de Richtlijn (94/47/EG, *PbEG* 1994, L 280/83 — deze versie verwees niet naar gedragscodes) expliciet aan waarom wetgeving in aanvulling op de reeds bestaande gedragscode van de brancheorganisatie, de Resort Development Organisation (voorheen Organisation for Timeshare in Europe), toch noodzakelijk werd geacht: 'The Commission values self-regulation such as the Organisation for Timeshare in Europe's Codes of Ethics. However, such codes only apply to those traders who subscribe to the code. Unfortunately, a large part of the industry, such as many holiday discount clubs, do not subscribe to the OTE Code'. Zie Questions and Answers on timeshare and long-term holiday products, MEMO/07/231 (2007) — te vinden op http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/231&format=HTML&aged=0&language=EN&guiLanguage=en, laatst geraadpleegd op 9 juli 2013.Vgl. in dit verband ook het Voorstel van de Europese Commissie voor de Richtlijn (COM(2007)303 def.), p. 4 waaruit blijkt dat waar de meeste lidstaten, consumenten en andere belanghebbenden voor een herziening van de Richtlijn waren, de Europese timeshare-sector meer zag in betere handhaving, zelfregulering en consumentenvoorlichting om de bestaande problemen op te lossen.

34. Richtlijn 2011/83/EU van 25 oktober 2011 betreffende consumentenrechten (*PbEU* 2011, L 304/64). De Richtlijn vervangt de Richtlijn Koop op Afstand (97/7/EG, *PbEG* 1997, L 144/19) en de Colportagerichtlijn (85/577/EEG, *PbEG* 1985, L 372/31), en wijzigt de Richtlijn Oneerlijke bedingen (93/13/EEG, *PbEG* 1993, L 95/29) en de Richtlijn Consumentenkoop (1999/44/EG, *PbEG* 1999, L 171/12). Het oorspronkelijke Richtlijnvoorstel (COM(2008)614 def.) was ruimer en voorzag in een samenvoeging van alle vier de genoemde richtlijnen tot één Richtlijn Consumentenrechten.

rechten handelaren om de consument in de precontractuele fase informatie te verschaffen over, onder andere, het bestaan van relevante gedragscodes (artikel 6 lid 1 onderdeel n). Daarbij dient ook informatie verschaft te worden over buitengerechtelijke klachten- en geschilbeslechtingsprocedures waaraan de handelaar is onderworpen (artikel 6 lid 1 onderdeel t).[35] Deze informatie dient, anders dan bij de Richtlijn Elektronische handel en de Dienstenrichtlijn, integraal onderdeel van de genoemde overeenkomsten te vormen, en kan alleen worden gewijzigd indien partijen bij de overeenkomst uitdrukkelijk anders overeenkomen (artikel 6 lid 5). Het wetsvoorstel voor de implementatie van de Richtlijn legt deze informatieplicht neer in de nieuw in te voeren artikelen 6:230m en 6:230n BW.[36]

*Media*

Ook op het terrein van het mediarecht is er in Europees verband een rol weggelegd voor zelfregulering. Met name bij de regelgeving ter bescherming van minderjarigen en ter bestrijding van schadelijke en illegale inhoud op het internet is er aandacht voor het gebruik van zelfreguleringsinstrumenten, waaronder gedragscodes.[37] Zelfregulering is daarnaast ook sterk vertegenwoordigd in de reclamesector.

*d. Richtlijn Audiovisuele mediadiensten*

De Richtlijn Audiovisuele mediadiensten vormt een voorbeeld van wetgeving op het terrein van het mediarecht waarin verwezen wordt naar zelfregulering.[38] In haar voorstel voor deze Richtlijn gaf de Commissie nadrukkelijk aan dat er bij de toepassing van de Richtlijn expliciet een beroep gedaan wordt op zelfregulering en coregulering.[39] Zelfregulering wordt daarbij gezien als een aanvulling op wetgeving en geschilbeslechting van overheidswege, zo blijkt uit de overwegingen voorafgaand aan de Richtlijn. Het kan dienen als aanvullende manier om de Richtlijnbepalingen concreet toe te passen en daarmee een nuttige bijdrage leveren aan het verwezenlijken van de doelen ervan. Zelfregulering kan daarbij echter niet

35. De informatievoorschriften uit de Consumentenrichtlijn komen bovenop de informatievoorschriften uit de Dienstenrichtlijn (2006/123/EG) en de Richtlijn Elektronische handel (2000/31/EG), aldus artikel 6 lid 8. Vgl. ook de Richtlijn 2002/65/EG van het Europees Parlement en de Raad van 23 september 2002 betreffende de verkoop op afstand van financiële diensten aan consumenten en tot wijziging van de Richtlijnen 90/619/EEG, 97/7/EG en 98/27/EG van de Raad (*PbEG* 2002, L 271/16), overweging 23: 'Voor een optimale bescherming van de consument is het van belang dat deze voldoende wordt ingelicht over de bepalingen van deze richtlijn en van eventuele gedragscodes terzake, en dat hij beschikt over een herroepingsrecht'.
36. De Tweede Kamer heeft het wetsvoorstel inmiddels aangenomen. Het voorstel is thans (oktober 2013) ingediend bij de Eerste Kamer voor schriftelijke behandeling. De actuele stand van zaken omtrent het wetsvoorstel is te vinden op www.rijksoverheid.nl/documenten-en-publicaties/wetsvoorstellen/2012/11/01/wetsvoorstel-implementatie-richtlijn-consumentenrechten#, laatst geraadpleegd op 24 oktober 2013.
37. Zie over de Europese regulering van de media bijvoorbeeld Verdoodt 2007, met name p. 78 en p. 282 e.v. en, vanuit rechtsvergelijkend en empirisch perspectief met een specifieke focus op gedragscodes, Tambini, Leonardi & Marsden 2008.
38. Richtlijn 2010/13/EU van het Europees Parlement en de Raad van 10 maart 2010 betreffende de coördinatie van bepaalde wettelijke en bestuursrechtelijke bepalingen in de lidstaten inzake het aanbieden van audiovisuele mediadiensten (*PbEU* 2010, L 95/1).
39. Europese Commissie, 'Voorstel voor een richtlijn van het Europees Parlement en de Raad tot wijziging van Richtlijn 89/552/EEG van de Raad betreffende de coördinatie van bepaalde wettelijke en bestuursrechtelijke bepalingen in de lidstaten inzake de uitoefening van televisie-omroepactiviteiten', COM(2005)646 def., p. 10. Zie voor meer verwijzingen Verdoodt 2007, p. 289-291 die opmerkt dat de aandacht voor zelfregulering in het audiovisuele mediabeleid over de jaren duidelijk is toegenomen.

volledig de verplichtingen van de nationale wetgever vervangen. Coregulering vormt, in haar minimale vorm, de juridische schakel tussen zelfregulering en de nationale wetgever. Het dient ruimte te bieden voor overheidsoptreden indien het niet tot het gewenste resultaat leidt.[40]
Tegen deze achtergrond moedigt de Richtlijn het gebruik van zelfregulering en coregulering aan. Dit vinden we terug in artikel 4 waarin aangegeven wordt dat de lidstaten zelfregulering en coregulering op nationaal niveau stimuleren.[41] Daarbij worden als voorwaarden gesteld dat de betrokken regelingen dusdanig zijn dat 'zij in brede kring worden aanvaard door de belangrijkste belanghebbenden in de betrokken lidstaten en in effectieve handhaving voorzien'.[42] Naast deze meer algemene oproep, worden de lidstaten en de Commissie in artikel 9 lid 2 van de Richtlijn ook opgeroepen om aanbieders van mediadiensten te stimuleren om een gedragscode op te stellen met betrekking tot, kort gezegd, reclame voor voedingsmiddelen, gericht op kinderen.[43]

*e. Aanbeveling bescherming minderjarigen en menselijke waardigheid*
Een belangrijk element binnen het Europese audiovisuele beleid is de bescherming van minderjarigen en de menselijke waardigheid. Zelfregulering maakt onderdeel uit van de regulering op dit terrein. In het bijzonder kan hier gewezen worden op de uit 1998 stammende Aanbeveling die de zojuist besproken Richtlijn Audiovisuele mediadiensten aanvult.[44] Deze Aanbeveling roept lidstaten op om het bedrijfsleven te stimuleren om op vrijwillige basis en in aanvulling op bestaande wet- en regelgeving nationale zelfreguleringskaders tot stand te brengen, gericht op de bescherming van minderjarigen en de menselijke waardigheid.[45] De Aanbeveling geeft indicatieve richtsnoeren voor vier onderdelen van deze kaders die bij de vaststelling ervan in acht genomen moeten worden. Deze richtsnoeren betreffen het overleg met en het representatief karakter van de betrokken partijen, de inhoud van de op te stellen gedragscodes (waaronder procedures voor overtredingen van de gedragscodes), en het opstellen van een nationale instantie en een nationaal

40. Richtlijn 2010/13/EU, overweging 44.
41. Lidstaten zijn overigens niet verplicht om te voorzien in zelfregulering of coregulering. Bovendien mag een en ander niet leiden tot een verstoring of het in gevaar brengen van reeds bestaande initiatieven. Zie Richtlijn 2010/13/EU, overweging 44.
42. Richtlijn 2010/13/EU, artikel 4 lid 2. Zie ook Europese Commissie, 'Voorstel voor een richtlijn van het Europees Parlement en de Raad tot wijziging van Richtlijn 89/552/EEG van de Raad betreffende de coördinatie van bepaalde wettelijke en bestuursrechtelijke bepalingen in de lidstaten inzake de uitoefening van televisie-omroepactiviteiten', COM(2005)646 def., p. 10.
43. Artikel 9 lid 2 spreekt over een gedragscode 'betreffende ongeschikte audiovisuele commerciële communicatie, die kinderprogramma's vergezelt of daarvan deel uitmaakt, inzake voedingsmiddelen en dranken die voedingsstoffen en andere stoffen met nutritieve en fysiologische effecten bevatten, met name stoffen zoals vetten, transzuren, zout/natrium en suikers, waarvan een overmatig gebruik in het algehele voedingspatroon niet aanbevolen is'.
44. Zie nader bijvoorbeeld Verdoodt 2007, p. 291-294. Vgl. ook artikel 16 van de hierna te bespreken Richtlijn Elektronische handel over het stimuleren van het opstellen van gedragscodes op dit terrein.
45. Aanbeveling 98/560/EG van de Raad van 24 september 1998 betreffende de ontwikkeling van de concurrentiepositie van de Europese industrie van audiovisuele en informatiediensten door de bevordering van nationale kaders teneinde een vergelijkbaar en doeltreffend niveau van bescherming van minderjarigen en menselijke waardigheid te bereiken (*PbEG* 1998, L 270/48). Zie over het gebruik van Aanbevelingen om Europese zelfreguleringsinitiatieven te bevestigen of ondersteunen Senden 2005, p. 24-27. Een voorbeeld van een dergelijke aanbeveling betreft Aanbeveling 2001/193/EG van de Commissie van 1 maart 2001 betreffende de voorlichting die kredietgevers die woningkredieten aanbieden in de precontractuele fase aan de consumenten moeten geven (*PbEG* 2001, L 69/25) die de Europese gedragscode hypothecaire financieringen bekrachtigt.

evaluatiesysteem. De Aanbeveling werd in 2006 aangevuld en geactualiseerd met een nieuwe Aanbeveling, die de geldigheid van de Aanbeveling uit 1998 onverlet heeft gelaten. Hierin wordt opnieuw het belang van zelfregulering, onder andere in de vorm van een gedragscode, als aanvullend reguleringsinstrument benadrukt.[46]

*f. Reclame*[47]

Wij wijzen kort op de Richtlijn Misleidende en vergelijkende reclame, die uitsluitend B2B-verhoudingen betreft.[48] Aangezien vrijwillig toezicht op naleving door zelfreguleringscolleges op reclame-uitingen administratieve of gerechtelijke maatregelen kan voorkomen, dient dit te worden aangemoedigd, aldus de Richtlijn. Voorwaarde daarbij is wel dat er naast het private systeem van toezicht en geschilbeslechting de mogelijkheid bestaat om een gerechtelijke of administratieve procedure te starten.[49] Voor het toezicht op reclame voor geneesmiddelen geldt hetzelfde.[50]

*Overig*

*g. Richtlijn Elektronische handel*

De Richtlijn inzake Elektronische handel is gericht op het verwezenlijken en waarborgen van vrij verkeer van online-diensten.[51] Belangrijk daarbij is het vertrouwen van consumenten en industrie in de elektronische handel. Met het oog daarop beoogt de Richtlijn een duidelijk en algemeen juridisch kader vast te stellen, waarmee voldoende juridische zekerheid wordt gecreëerd.[52] De Richtlijn laat hierbij expliciet ruime voor zelfregulering. Meer in het bijzonder bepaalt de Richtlijn dat de Commissie en de lidstaten, onder andere, het opstellen van Europese (B2B- en B2C-)gedragscodes die bijdragen aan een goede toepassing van de Richtlijn moeten aanmoedigen, met betrokkenheid van consumentenorganisaties waar relevant. Ook dienen zij de opstelling van gedragscodes voor de bescherming

46. Aanbeveling 2006/952/EG van het Europees Parlement en de Raad van 20 december 2006 betreffende de bescherming van minderjarigen en de menselijke waardigheid en het recht op weerwoord in verband met de concurrentiepositie van de Europese industrie van audiovisuele en online-informatiediensten (*PbEG* 2006, L 378/72). Een overzicht van de maatregelen die genomen zijn in navolging van beide Aanbevelingen is te vinden in het Evaluatierapport van de Commissie uit 2011 (COM(2011)556 def.).
47. Zelfregulering van reclame is op Europees niveau in handen van de European Advertising Standards Alliance (EASA). Het betreft zelfregulering die tot stand is gekomen om gedetailleerde wetgeving te voorkomen, net als in de Nederlandse reclamesector het geval was. Informatie over EASA is beschikbaar op www.easa-alliance.org >> About EASA (>> History), laatst geraadpleegd op 12 juli 2013.
48. Richtlijn 2006/114/EG van het Europees Parlement en de Raad van 12 december 2006 inzake misleidende reclame en vergelijkende reclame (*PbEU* 2006, L 376/21).
49. Richtlijn 2006/114/EG, overweging 18 en artikel 2 onderdeel e, artikel 5 lid 1 jo. artikel 6. Zie voor het systeem in Nederland heel kort, met verdere verwijzingen, Verkade 2011, nr. 69.
50. Richtlijn 2001/83/EG van het Europees Parlement en de Raad van 6 november 2001 tot vaststelling van een communautair wetboek betreffende geneesmiddelen voor menselijk gebruik (*PbEG* 2001, L 311/67), artikel 97 lid 5.
51. Richtlijn 2000/31/EG van het Europees Parlement en de Raad van 8 juni 2000 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, met name de elektronische handel, in de interne markt (*PbEG* 2000, L 178/1). Blijkens artikel 1 is het doel van de Richtlijn 'bij te dragen aan de goede werking van de interne markt door het vrije verkeer van de diensten van de informatiemaatschappij tussen lidstaten te waarborgen'.
52. Richtlijn 2001/31/EG, overweging 7 en 8, Wagemans 2002, p. 67-68 en Verdoodt 2007, p. 294.

van minderjarigen en de menselijke waardigheid te stimuleren.[53] Lidstaten moeten alternatieve geschilbeslechting bevorderen en het nationale recht mag daarvoor geen belemmeringen opwerpen (artikel 17). Daarnaast legt de Richtlijn een informatieplicht op aan de dienstverlener om aan te geven welke gedragscodes hij onderschrijft (artikel 10 lid 2). Deze bepaling vinden we in het Nederlandse privaatrecht terug in artikel 6:227b lid 1 onderdeel e BW. De Richtlijn laat dus ruimte voor zelfregulering door de ontwikkeling van gedragscodes (ter uitwerking van de Richtlijnbepalingen) en private handhavingsmechanismen te stimuleren.[54]

*h. Dienstenrichtlijn*

Zelfregulering in de vorm van Europese gedragscodes speelt in het kader van de Dienstenrichtlijn een belangrijke rol bij de beoogde verhoging van de kwaliteit van diensten.[55] Het is daarom dat de Dienstenrichtlijn bepaalt dat het aan de lidstaten is om het opstellen van communautaire (Europese) gedragscodes, met name door beroepsorganisaties, te stimuleren. Deze gedragscodes hebben tot doel het stellen van minimumnormen voor gedrag en vullen als zodanig nationale wetgeving aan.[56] Hiermee dragen Europese gedragscodes bij aan het bereiken van het uiteindelijke doel van de Richtlijn: het creëren van een interne competitieve dienstenmarkt.[57] Om het bewustzijn van het bestaan van (Europese) gedragscodes te vergroten, bepaalt artikel 22 lid 3 dat de dienstverlener op verzoek van de afnemer de toepasselijke gedragscodes (onderdeel d) en informatie over een eventueel daaraan verbonden geschilbeslechtingsregeling (onderdeel e) beschikbaar dient te stellen. Deze bepaling vinden we in het nationale recht terug in artikel 6:230b lid 13 BW.
De Dienstenrichtlijn stelt zelf expliciet enkele eisen aan de gedragscodes. Zo dienen de gedragscodes in overeenstemming te zijn met het Gemeenschapsrecht, het mededingingsrecht in het bijzonder. Ze mogen bovendien niet in strijd zijn met de

53. Richtlijn 2000/31/EG, overweging 32 (met betrekking tot de gereglementeerde beroepen: 'Gedragscodes op communautair niveau zijn het beste instrument voor het vaststellen van beroepsethiek ten aanzien van commerciële communicatie. De opstelling of de eventuele aanpassing ervan moet worden aangemoedigd zonder afbreuk te doen aan de autonomie van beroepsverenigingen en -organisaties') en 49, artikel 8 en, in het bijzonder, artikel 16. Zie ook Mededeling van de Commissie, 'Het effect van de e-economie op de Europese ondernemingen: economische analyse en beleidsgevolgen', COM(2001)711 def., p. 19-20.
54. Wagemans 2002, p. 68-69. Zie ook Mededeling van de Commissie, 'Het effect van de e-economie op de Europese ondernemingen: economische analyse en beleidsgevolgen', COM(2001)711 def., p. 18: 'Wetgeving kan echter niet alle problemen oplossen. Zelfregulering kan een grote rol spelen bij de opbouw van vertrouwen tussen de partners in elektronische transacties. Het overheidsbeleid moet erop gericht zijn de geloofwaardigheid van zelfregulering te verhogen en de naleving van de gedragscodes af te dwingen door rechtsmiddelen ter beschikking te stellen voor het geval ze nodig zijn'. Een dergelijk beleid wordt ook op nationaal niveau gevoerd, zo blijkt uit de nota *Wetgeving voor de elektronische snelweg* (*Kamerstukken II* 1997/98, 25880, 1-2) waar regulering door middel van zelfregulering die aan de in de nota genoemde eisen voldoet de voorkeur krijgt boven wetgeving.
55. Richtlijn 2006/123/EG van het Europees Parlement en de Raad van 12 december 2006 betreffende diensten op de interne markt (*PbEU* 2006, L 376/36).
56. Richtlijn 2006/123/EG, overweging 113-115 en artikel 37. Het rapport van het DG Interne Markt, *Enhancing the quality of services in the Internal Market: The Role of European codes of conduct*, European Communities 2007, p. 17-19 geeft enkele voorbeelden van hoe het opstellen van gedragscodes zou kunnen worden gestimuleerd.
57. DG Interne Markt, *Enhancing the quality of services in the Internal Market: The Role of European codes of conduct*, European Communities 2007, p. 5-6. Het bestaan van nationale gedragscodes zorgt voor puur nationale percepties op 'kwaliteit van diensten'. Dit kan leiden tot fragmentatie van de markt. Zie voor meer voordelen van Europese gedragscodes in de ogen van de Commissie pagina 6 van het zojuist genoemde rapport.

nationale wettelijk bindende ethische regels en gedragsregels voor beroepsgroepen. Daarnaast geeft de Richtlijn in zeer algemene termen aan wat in de gedragscodes van beroepsorganisaties dient te staan.[58] Specifieker kan ook niet omdat beroepen daarvoor te verschillend zijn. De Dienstenrichtlijn bestrijkt tot nu toe niet meer dan ongeveer een kwart van alle economische activiteiten onder deze naam in Europa. Er wordt aan gewerkt het toepassingsbereik uit te breiden.

*i. Gegevensbescherming*

Ook op het terrein van gegevensbescherming en privacy is een belangrijke rol weggelegd voor zelfregulering in de vorm van gedragscodes. Vooralsnog geldt op dit terrein onder andere de Privacyrichtlijn, waarin Europese en nationale gedragscodes worden beschouwd als nuttige instrumenten 'om een indicatie te geven omtrent de middelen waarmee de gegevens anoniem kunnen worden gemaakt en kunnen worden bewaard in een vorm die identificatie van de betrokkene niet langer mogelijk maakt'.[59] Er is dan ook een taak voor de Commissie en de lidstaten weggelegd om het opstellen van gedragscodes die bijdragen aan een goede toepassing van (de nationale bepalingen voortvloeiende uit) de Richtlijn, aan te moedigen.[60] Nationale gedragscodes moeten op nationaal niveau ter goedkeuring aan de nationale toezichthoudende autoriteit kunnen worden voorgelegd. Deze dient dan te beoordelen of de bepalingen uit de gedragscode in overeenstemming zijn met de nationale privacywetgeving opgesteld ter uitvoering van de Richtlijn. Europese gedragscodes kunnen worden voorgelegd aan de zogenaamde 'Artikel 29 Werkgroep', het onafhankelijke advies- en overlegorgaan van Europese privacytoezichthouders.[61] Er kunnen op deze manier Europese en nationale gedragscodes worden opgesteld ter uitwerking van de bepalingen van de Richtlijn respectievelijk de nationale privacywetgeving.

De implementatie van de Richtlijn heeft in Nederland plaatsgevonden in de Wet bescherming persoonsgegevens (Wbp)[62] van 2000. Artikel 25 Wbp bevat de bepaling over het gebruik van gedragscodes. Private partijen kunnen er voor kiezen om de algemene normen van de Wbp nader te concretiseren in een door het College bescherming persoonsgegevens (CBP) goedgekeurde gedragscode. Een dergelijk systeem bestond in Nederland ook al onder de Wet persoonsregistraties (WPR). Zoals blijkt uit de memorie van toelichting van de Wbp heeft het systeem van de WPR op dit punt model gestaan voor de Europese Privacyrichtlijn.[63] Een gedragscode kan pas worden gekwalificeerd als een code in de zin van artikel 25 Wbp respectievelijk goedkeuring verkrijgen van het CBP indien aan een aantal vereisten is voldaan. De formele eisen vloeien voort uit artikel 25 Wbp zelf. Uit het feit dat een organisatie

58. Richtlijn 2006/123/EG, overweging 100, 113 en 114 en artikel 37. Zie over deze eisen ook DG Interne Markt, *Enhancing the quality of services in the Internal Market: The Role of European codes of conduct*, European Communities 2007, p. 8 en p. 11-12.
59. Richtlijn 95/46/EG van het Europees Parlement en de Raad van 24 oktober 1995 betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens (*PbEG* 1995, L 281/31), overweging 26.
60. Richtlijn 95/46/EG, overweging 61 en artikel 27 lid 1.
61. Richtlijn 95/46/EG, artikel 27 en artikel 29. Zie over de Artikel 29 Werkgroep http://ec.europa.eu/justice/data-protection/article-29/index_en.htm en www.cbpweb.nl/Pages/ind_cbpint_art29.aspx, laatst geraadpleegd op 10 juli 2013.
62. Wet van 6 juni 2000, houdende regels inzake de bescherming van persoonsgegevens, *Stb*. 2000, 302, zoals naderhand gewijzigd.
63. *Kamerstukken II* 1997/98, 25892, 3, p. 16 en p. 128-129.

het CBP kan verzoeken te verklaren dat een gedragscode een juiste uitwerking vormt van de Wbp of andere wettelijke bepalingen met betrekking tot de verwerking van persoonsgegevens (lid 1), vloeit allereerst voort dat de bepalingen van de gedragscode *overeen dienen te stemmen met de wet*.[64] Het CBP hoeft een dergelijk verzoek slechts in behandeling te nemen als hij, onder andere, van oordeel is dat de verzoekers *voldoende representatief* zijn (lid 3). De organisaties dienen met andere woorden voldoende maatschappelijk draagvlak te hebben.[65] Ook stelt artikel 25 lid 1 Wbp de eis dat, indien de gedragscode voorziet in geschilbeslechtingsmechanismen in geval van niet-naleving van de code, het CBP pas een goedkeurende verklaring afgeeft wanneer de gedragscode voldoende waarborgen biedt voor de *onafhankelijkheid* hiervan. Het CBP stelt daarnaast nog een aantal inhoudelijke eisen.[66] Een goedkeurende verklaring van het CBP impliceert dat naleving van de code ook naleving van de wet betekent.[67] Een overzicht van de in Nederland opgestelde gedragscodes met goedkeurende verklaring CBP is te vinden op www.cbpweb.nl/Pages/ind_reg_gedragscodes.aspx.

Momenteel wordt er door de Commissie gewerkt aan een herziening van het communautair juridisch kader voor de bescherming van persoonsgegevens. Onderdeel daarvan is de vervanging van de bestaande Privacyrichtlijn door een nieuwe Privacyverordening. In haar Mededeling over de voorgestelde herziening geeft de Commissie aan dat daarbij een rol blijft weggelegd voor zelfregulering, waaronder gedragscodes, en dat zij het gebruik daarvan actief zal promoten.[68] In overeenstemming hiermee bepaalt de voorgestelde Algemene verordening gegevensbescherming[69] op een met de huidige Privacyrichtlijn vergelijkbare wijze dat er Europese en nationale gedragscodes kunnen worden opgesteld ter uitwerking van de Verordening, met name ten aanzien van bepaalde, nader genoemde punten. Nieuw en

64. *Kamerstukken II* 1997/98, 25892, 3, p. 16 en p. 129-130: 'In de toetsing staat centraal de vraag of de regels "gelet op de bijzondere kenmerken van de sector van de samenleving" waarom het gaat "een juiste uitwerking vormen van de wet". Er zal dus sprake moeten zijn van een vertaling van de normen van de wet naar de informatiepraktijk van de betrokken sector en vooral op die punten waar de behoefte aan meer concrete waarborgen zich het meest voordoet. Uitgangspunt is echter wel een toetsing aan wettelijke regels. De regels in de gedragscode dienen wel de wettelijke regels te preciseren naar gelang de sector waarvoor de code geldt. De algemene en flexibele normen van de wet dienen in een gedragscode een nauwkeuriger vertaling te krijgen in het licht van de desbetreffende sector. Dit komt ook de rechtszekerheid ten goede. Een gedragscode kan daarom niet volstaan met het grotendeels eenvoudig herhalen van een aantal wettelijke bepalingen. Dit laat onverlet dat desgewenst een aantal wettelijke bepalingen, indien deze zich in de desbetreffende sector niet goed lenen voor een nadere uitwerking, toch volledigheidshalve kunnen worden overgenomen. De code bevat dan binnen de sector een totaalbeeld van de geldende regels.'
65. *Kamerstukken II* 1997/98, 25892, 3, p. 130.
66. Zie www.cbpweb.nl/Pages/ind_wetten_zelfr_gedr.aspx, laatst geraadpleegd op 12 juli 2013.
67. *Kamerstukken II* 1997/98, 25892, 3, p. 132: 'Indien voor de rechter een geschil aanhangig zou worden over de toepassing van de wet, dan behelst de verklaring van de Kamer dat naar haar oordeel naleving van de code ook naleving van de wet betekent'.
68. Mededeling van de Commissie, 'Een integrale aanpak van de bescherming van persoonsgegevens in de Europese Unie', COM(2010)609 def., p. 14-15 (op p. 14: 'De Commissie blijft van mening dat zelfregulerende initiatieven van de voor gegevensverwerking verantwoordelijken kunnen bijdragen tot een betere handhaving van de regels inzake gegevensbescherming').
69. Zie het Voorstel voor een Verordening van het Europees Parlement en de Raad betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens (algemene verordening gegevensbescherming), COM(2012)11 def., p. 12, overweging 76 en artikel 38.

opvallend is de bevoegdheid van de Commissie om gedragscodes algemeen geldig te verklaren binnen de Europese Unie.[70]

*j. Corporate governance code*

Eén van de Europese Richtlijnen op het terrein van het vennootschapsrecht, de Richtlijn Jaarrekening, geeft aan dat beursgenoteerde vennootschappen in hun jaarverslag dienen te vermelden welke corporate governance code zij toepassen. Indien zij afwijken van deze code dan wel geen code toepassen, moeten ze dit gemotiveerd aangeven.[71] Dit is de comply or explain benadering. In het Nederlandse privaatrecht is een dergelijke verplichting opgenomen in artikel 2:391 lid 5 BW.[72] De bepaling bevat de wettelijke grondslag voor bij algemene maatregel van bestuur aan te wijzen gedragscodes die betrekking hebben op de inhoud van het jaarverslag. De Corporate Governance Code, de Code Banken en de Governance Principes Verzekeraars, alle drie vormen van zelfregulering,[73] hebben op deze wijze wettelijke verankering gekregen.[74] Beursgenoteerde vennootschappen moeten in hun jaarverslag mededeling doen over de naleving van deze codes. De comply or explain benadering wordt ook hier toegepast.[75] De aandeelhoudersvergadering kan het bestuur en de raad van commissarissen van de vennootschappen ter verantwoording roepen over de naleving van de code.[76] De AFM toetst of de mededeling ook daadwerkelijk in het jaarverslag is opgenomen en of de inhoud ervan strookt met de rest van het jaarverslag en met andere openbare informatie.[77]

8. Net als op Europees niveau, komen ook in het Nederlandse privaatrecht verwijzingen naar gedragscodes voor. De meeste vloeien echter voort uit de hiervoor besproken Europese richtlijnen. Hier nemen wij enkele verwijzingen naar gedragscodes op die hun oorsprong uitsluitend vinden in het nationale recht. Het zijn er heel, heel weinig.

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70. Zie artikel 38 van de Verordening.
71. Het betreft Richtlijn 2006/46 EG van het Europees Parlement en de Raad van 14 juni 2006 tot wijziging van de Richtlijnen 78/660/EEG van de Raad betreffende de jaarrekening van bepaalde vennootschapsvormen, 83/349/EEG van de Raad betreffende de geconsolideerde jaarrekening, 86/635/EEG van de Raad betreffende de jaarrekening en de geconsolideerde jaarrekening van banken en andere financiële instellingen en 91/674/EEG van de Raad betreffende de jaarrekening en de geconsolideerde jaarrekening van verzekeringsondernemingen (*PbEU* 2006, L 224/1). Zie artikel 1 lid 7 van de Richtlijn. Inmiddels heeft de Commissie naar aanleiding van kritiek op de gebrekkige motivering van vennootschappen op dit punt aangekondigd in 2013 actie te ondernemen teneinde de kwaliteit van de verslagen, in het bijzonder op dit punt, te verbeteren (Mededeling van de Commissie, 'Actieplan: Europees vennootschapsrecht en corporate governance — een modern rechtskader voor meer betrokken aandeelhouders en duurzamere ondernemingen', COM(2012)740 def.).
72. Zie *Kamerstukken II* 2007/08, 31508, 3.
73. Hoewel die kwalificatie ook wel wordt bestreden. Zie bijvoorbeeld Raaijmakers 2004.
74. Zie *Kamerstukken II* 2003/04, 29449, 1 (met verdere verwijzingen) naar de ratio achter het gebruik van zelfregulering en de wettelijke verankering. Zie voor de verschillende codes onderscheidenlijk http://commissiecorporategovernance.nl/, www.mcverzekeraars.nl en www.commissiecodebanken.nl/, laatst geraadpleegd op 15 juli 2013.
75. Memelink 2010, p. 43. Dat wil echter niet zeggen dat de codes geen juridisch karakter zouden kunnen hebben. Zie over de status van de corporate governance codes voor het positieve recht bijvoorbeeld Memelink 2010, Schouten 2004 en Groffen 2004.
76. Nederlandse Corporate Governance Code (2008), p. 6, onder 4. De Code is te downloaden op http://commissiecorporategovernance.nl/, laatst geraadpleegd op 15 juli 2013.
77. De AFM toetst dus de aanwezigheid en consistentie van de verklaring, aldus de nota van toelichting bij het Besluit van 23 augustus 2011 tot vaststelling van nadere voorschriften omtrent de inhoud van het jaarverslag van verzekeraars, *Stb.* 2011, 396, p. 3-4.

*a. Reclame Code*

Het belang van zelfregulering op het terrein van reclame is in de vorige paragraaf al kort aangestipt. In Nederland worden algemene reclame-uitingen voor een heel groot deel gereguleerd door de reclamebranche zelf die verenigd is in de Stichting Reclame Code (SRC). Deze heeft de Nederlandse Reclame Code (NRC) opgesteld.[78] Voor de dagelijkse reclamepraktijk van oneerlijke en misleidende reclame is dit zelfreguleringsstelsel van grotere betekenis dan wetgeving en handhaving door de civiele rechter. De NRC en daaraan aangehangen bijzondere reclamecodes bevatten onnoemelijk veel meer normen dan die van de Richtlijnen Oneerlijke Handelspraktijken en Misleidende Reclame die, overigens, in de NRC zijn gecodificeerd en, anders dan bij de OHP in het BW gebeurt, ook van toepassing zijn verklaard op B2B-reclame. De handhaving van de NRC is in handen van de Reclame Code Commissie (RCC), met een beroepsmogelijkheid op het College van Beroep voor het bedrijfsleven. Iedereen kan klachten indienen.[79] Het hele systeem bestaat sinds 1964 en is op particulier initiatief tot stand gebracht. Tussen 1964 en 2009 zijn meer dan 15 000 gemotiveerde uitspraken gedaan. Dat is ongeveer 40% van de binnengekomen klachten.[80]

De Nederlandse praktijk van handhaving van de reclamenormen voldoet aan de door Europa gestelde eisen.[81] Verwijzingen in wetgeving naar de (inhoud van de) regels voor reclame zelf of naar de NRC zullen wij echter niet terugvinden: de code werd juist opgesteld om een wettelijke regeling van reclame te voorkomen.[82] De Nederlandse wetgever reguleert reclame dus slechts voor een deel, maar kan wel ingrijpen als de SRC tekortschiet bij de implementatie van Europese regels.[83] Om die reden noemen wij de SRC en de NRC hier toch.

*b. Mediawet*

In artikel 2.3 Mediawet 2008 wordt de Stichting Nederlandse Publieke Omroep verplicht een gedragscode op te stellen ter bevordering van goed bestuur en integriteit. Aangegeven wordt wat inhoudelijk in ieder geval in de gedragscode dient te staan. Onder andere zijn dit regels voor toezicht en naleving van de gedragscode (artikel 2.3 lid 3 Mediawet).

78. Daarnaast is er ook nog de Gedragscode Geneesmiddelenreclame. Die blijft hier verder buiten beschouwing.
79. Verkade 2009, nr. 88.
80. Verkade 2009, nr. 88 en Hondius 2013, nr. 39.
81. Van Boom e.a. 2009, p. 58 en *Kamerstukken II* 2000/01, 27619, 3, p. 9-10. Zie voor meer informatie over de NRC en de werkwijze van de toezichthouders www.reclamecode.nl/nrc/, laatst geraadpleegd op 12 juli 2013.
82. Van Boom e.a. 2009, p. 53 e.v.
83. Cf. Hans Bredow Institut, *Final Report. Study on Co-Regulation Measures in the Media Sector*, Study for the European Commission, Directorate Information Society and Media, June 2006, p. 129: 'The regulatory process itself is not regulated by the state'.Het rapport is beschikbaar via http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf, laatst geraadpleegd op 12 juli 2013. Voor de manier waarop de Nederlandse wetgever controle kan uitoefenen, zie bijvoorbeeld artikel 9.16 Mediawet 2008: 'Onze Minister stelt regels ter uitvoering van de artikelen 12, 15 en 16 van de Europese richtlijn, voor zover naar het oordeel van Onze Minister een of meer van deze artikelen niet, niet voldoende, niet juist of niet tijdig zijn uitgewerkt in de Nederlandse Reclame Code of in een vergelijkbare door de Stichting Reclame Code tot stand gebrachte regeling, dan wel de Stichting Reclame Code in gebreke blijft met het toezicht daarop'.

*c. Rolreglementen voor procesrecht*
Rolreglementen scharen wij niet onder de gedragscodes die wij in dit preadvies op het oog hebben, omdat zij geen zelfregulering zijn, maar het staatsorgaan 'de rechterlijke macht' reguleren.[84] Voor ons zijn rolreglementen hulpmiddelen, instrumenten ter begeleiding van de omgang met het procesrecht. Dit geldt ook voor checklists, beslagsyllabi, helpdesks, kantonrechtersformules e.d.[85] Wel is er een verwijzing in artikel 35 Rv die de wetgever de bevoegdheid geeft dergelijke regelingen tot stand te brengen als de sector zelf er niet in slaagt ze tijdig tot stand te brengen.

9. Samenvattend laten de voorbeelden zien dat de besproken gedragscodes als aanvulling worden gebruikt op regelgeving. Gelet op hun herkomst — verwijzingen door de Europese of nationale wetgever — verbaast dit niet. Soms is zelfregulering verplicht, op nationaal of op Europees niveau, andere keren wordt het aangeboden als een mogelijkheid, al of niet vergezeld van de (dringende) oproep aan nationale autoriteiten er voor te zorgen dat ze door de betrokken branches ook opgesteld worden. Onderwerpen in gedragscodes zijn onder meer het nader invullen van normen om de doelstelling van de wetgeving (Richtlijnen in Europa) beter te verzekeren. Ook kunnen daartoe informatieplichten zijn opgenomen. Vaak bevatten ze tevens bepalingen over handhaving, toezicht en alternatieve geschilbeslechting. Soms werken ze vooral intern doordat ze goed en integer bestuur van vennootschappen en organisaties willen bevorderen, soms beogen ze heel duidelijk de bescherming van consumenten te dienen. Dit laatste gebeurt onder meer door inhoudelijke voorschriften op te nemen, en ook wel door de opstellers van de codes te verplichten consumenten van het bestaan en de inhoud van gedragscodes op de hoogte te stellen. Inhoudelijke voorschriften kunnen algemeen zijn, maar ook heel gedetailleerd. Interessant zijn die Richtlijnen die min of meer een kader aanreiken waaraan gedragscodes moeten voldoen (zie nr. 7 onderdeel e bijvoorbeeld). Opvallend is dat soms gedragscodes kunnen worden goedgekeurd door daartoe aangewezen nationale of Europese autoriteiten (nr. 7 onderdeel i). Dat komt dan al dicht in de buurt van gedelegeerde regelgeving. Daarvan is ook, wellicht nog sterker, sprake als de algemeenverbindendverklaring van gedragscodes wettelijk wordt mogelijk gemaakt (nr. 7 onderdeel i over de ontwerp Privacyverordening).
Interessant is de verhouding tussen zelfregulering (gedragscodes) en minimum- of maximumharmonisatie. Wij citeren wat Cafaggi hierover zegt.[86] Om te beginnen over maximumharmonisatie:

> 'When complete harmonization is chosen, it not only pre-empts Member States from legislating in the same domain but it may also affect private regulation. Complete harmonization does not however reduce the space of private regulation; rather, it changes its scope. Private regulators are only allowed to specify and implement but should not be able to adopt stricter standards, undermining the goal of harmonization. In this respect the European Commission seems to have changed perspective, moving

84. Hierover Teuben 2004 en Giesen 2007a, o.m. noot 75, p. 85 e.v. en p. 110 e.v. Zie ook de discussie hierover in het verslag, p. 30-34 en p. 37-38.
85. Zie voor deze kwalificatie Vranken & Giesen 2004, o.m. p. 51 e.v.
86. Cafaggi 2011, p. 101-102.

> away from the earlier position which held co regulation incompatible with uniform legislation as in the case of complete harmonization directives. Now co-regulatory arrangements both at European and national level are accepted even when complete legislative harmonization is in place.'

En over minimumharmonisatie:

> 'How, instead, does minimum harmonization affect private standard setting? While minimum harmonization permits higher regulatory standard it would not allow lower standards. Clearly lower private regulatory standards would constitute violations of the law. For example a code of conduct concerning product safety can only set higher standards or specify them, yet it could never narrow the standards defined by the product liability directive or the market surveillance regime.'

## 1.4 Functies van gedragscodes, een empirisch onderzoek[87]

*Methodologie*

10. Het empirisch onderzoek naar de functies van gedragscodes in het privaatrecht concentreert zich op Europese en Nederlandse gedragscodes, die zijn opgesteld op brancheniveau.[88] Om tot een functieoverzicht te komen, is gebruik gemaakt van een relatief groot en divers sample van Europese en Nederlandse gedragscodes, opgesteld op basis van bestaande overzichten van zelfreguleringsinitiatieven,[89] bestaand empirisch onderzoek naar gedragscodes en een systematische zoektocht op het internet.[90] Er is gekozen voor de bestudering van gedragscodes binnen een selectie van *branches*. Uiteindelijk zijn uit de lijst van Europese en Nederlandse gedragscodes binnen de geselecteerde branches op basis van een proportionele 'random'selectie 80 gedragscodes (34 Europese codes en 46 Nederlandse codes) geselecteerd en bestudeerd.[91] Het gaat om publiek toegankelijke, d.w.z. gepubliceerde

87. Dit hoofdstuk is gebaseerd op empirisch onderzoek naar de functies van Europese en Nederlandse gedragscodes (op brancheniveau) in het privaatrecht dat mevrouw Menting in het kader van haar dissertatie heeft verricht. De hier gepresenteerde resultaten zullen daar in uitgebreidere vorm worden besproken.
88. Ook enkele beroepscodes zijn meegenomen, maar geen beroepscodes die wettelijk zijn vastgelegd en/of wettelijk tuchtrecht kennen, zoals bij advocaten en accountants.
89. De 'Self- and Co-regulation Database' van het Europees Economisch en Sociaal Comité (EESC) (www.eesc.europa.eu/?i=portal.en.self-and-co-regulation) en de Social Dialogue texts database (http://ec.europa.eu/social/main.jsp?catId=521&langId=en, beide websites laatst geraadpleegd op 17 juli 2013). Daarbij verdient opmerking dat niet alle Europese zelfreguleringsinitiatieven in deze databases zijn opgenomen en dat de database van het EESC bovendien niet up-to-date is.
90. Hierbij is gebruikgemaakt van Google en is gekeken naar de websites van Europese en Nederlandse brancheorganisaties, respectievelijk organisaties op brancheniveau.
91. Het betreft gedragscodes binnen de volgende sectoren: informatie en communicatie; detailhandel; industrie; financiële dienstverlening; advisering, onderzoek en overige specialistische dienstverlening en zakelijke dienstverlening. Voor het overzicht van de verschillende branches is gebruikgemaakt van de Standaard Bedrijfsindeling 2008 van het Centraal Bureau voor de Statistiek. De SBI 2008 is te vinden op www.cbs.nl/nl-NL/menu/methoden/classificaties/overzicht/sbi/default.htm, laatst geraadpleegd op 17 juli 2013. Deze indeling komt overeen met de internationale classificatie, de International Standard Industrial Classification of All Economisch Activities (ISIC) en de Europese classificatie, de Nomenclature statistique des activités économiques dans la Communauté Européenne (NACE).

gedragscodes die zien op, en relevant zijn in privaatrechtelijke verhoudingen, hetzij B2B, hetzij B2C.[92] Sommige berusten op wetgeving in de zin als bedoeld in het vorige hoofdstuk, andere zijn door de branche (in hoofdzaak) op eigen initiatief tot stand gebracht. De gedragscodes zijn bestudeerd aan de hand van een analyseschema dat is ontwikkeld voor het achterhalen van de functies van gedragscodes.[93] Een korte omschrijving van dit analyseschema is opgenomen in Bijlage B.[94]

*Functieoverzicht*

11. Een eerste, algemeen overzicht van de verschillende functies levert het onderstaande beeld op. Zoals hierna uit de beschrijving van de functies zal blijken, vertonen de functies hier en daar overlap en hangen zij op enkele punten samen. Gezien het feit dat er toch duidelijk aanwijsbare verschillen zijn, is ervoor gekozen om, ondanks deze overlap, de functies toch apart te benoemen teneinde de nuances niet te verliezen.[95]

| **Overzicht functies** |
|---|
| 1. Corporate governance functie |
| 2. Harmonisatiefunctie |
| 3. Kaderfunctie |
| 4. Algemene voorwaardenfunctie |
| 5. Beleidsinstrumentele functie |
| 6. Aanvullende functie |
| 7. Compliance functie |
| 8. Waarborgfunctie |
| 9. Signaalfunctie |

92. Dat betekent dat gedragscodes die bijvoorbeeld louter technische standaarden bevatten of regels omtrent de labeling van producten buiten beschouwing zijn gebleven.
93. Zie voor onderzoek dat op soortgelijke wijze de inhoud gedragscodes onderzoekt bijvoorbeeld Van Tulder & Kolk 2001, Price & Verhulst 2005, Tambini, Leonardi & Marsden 2008 en Van der Zeijden & Van der Horst 2008. De laatste twee publicaties zijn ook interessant met het oog op de hierna te bespreken functies, nu beide op basis van een empirisch onderzoek verschillende redenen voor het opstellen van gedragscodes noemen. In de empirische studie waarvan de resultaten zijn gepubliceerd in Tambini, Leonardi & Marsden 2008 worden de volgende redenen genoemd: alternatief voor of ter voorkoming van wet- en regelgeving; om vertrouwen te winnen van externe partijen; het voorkomen van aansprakelijkheid; het beschermen van bepaalde groepen; om morele druk uit te oefenen op anderen; als uiting van professionaliteit; om het publieke imago van de opstellers te bevorderen; om een goedkoper/sneller alternatief voor geschilbeslechting door de rechter te bieden; om professionele standaarden op te leggen en om een competitief voordeel te behalen/versterken. Daarbij wordt opgemerkt dat deze motieven elkaar niet uitsluiten: een aantal versterkt elkaar juist. Zie het rapport 'Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis' van het Oxford University Centre for Socio-Legal Studies, 2004, p. 6-7 (executive summary) en p. 17-18 en Tambini, Leonardi & Marsden 2008, p. 51. Enkele van deze redenen zien we ook terug in de studie van Van der Zeijden & Van der Horst 2008, p. 19-29.
94. Voor een volledige beschrijving van de onderzoeksmethoden wordt verwezen naar het 'methodenhoofdstuk' uit de dissertatie van Menting zelf.
95. In de dissertatie van Menting worden meer functies onderscheiden. Ze zullen daarin verder worden geclusterd.

De functies zullen hieronder kort worden toegelicht. Of een bepaalde functie aan een gedragscode kan worden toegekend, wordt bepaald door de uitkomsten van het analyseschema. De verschillende elementen uit dit schema vormen dan ook de interpretatiecriteria voor toekenning, maar een bepaalde functie kan ook worden toegekend als de gedragscode deze met zoveel woorden zelf noemt.

### 1.4.1 Corporate governance functie

Een aantal gedragscodes schrijft voor hoe de inrichting van en de leiding over de ondernemingen binnen de branche op verantwoorde wijze vormgegeven kan of moet worden. Deze gedragscodes hebben, logischerwijs, een corporate governance functie.

### 1.4.2 Harmonisatiefunctie

Op zichzelf is het feit dat gedragscodes een standaard aan normen introduceren weinig onderscheidend. Immers, het gaat in codes steeds om normen die branchebreed, of althans binnen de kring van aangesloten bedrijven, dienen te worden toegepast. In die zin hebben alle gedragscodes een zekere mate van standaardiserende of harmoniserende werking, zeker wanneer de normen voor de betrokkenen bindend zijn. Zo bezien zouden alle gedragscodes een harmoniserende functie (kunnen) hebben. Teneinde deze functie onderscheidend vermogen te geven, kan onderscheid gemaakt worden naar het type harmonisatie (minimum en maximum) en naar de richting van harmonisatie (horizontaal en verticaal).[96]
Minimumharmonisatie verwijst naar regelgeving waarbij de betrokkenen zelf verdergaande normen mogen opleggen, indien gewenst. In het geval van maximumharmonisatie is het betrokkenen niet toegestaan om af te wijken van de opgelegde normen. Beide vormen van harmonisatie kunnen leiden tot een bepaalde mate van convergentie van regels.[97] Gedragscodes die bindende minimumnormen opleggen aan betrokkenen kunnen leiden tot *minimum*harmonisatie. Deze gedragscodes hebben hiermee het effect dat een bepaald minimumniveau van normstelling wordt bereikt en normen in zekere mate convergeren. Gedragscodes waarvan de normen bindende kracht hebben, zonder dat de mogelijkheid tot afwijken bestaat, kunnen leiden tot *maximum*harmonisatie. Aldus kan er door een gedragscode een (minimum) gelijk speelveld voor aangesloten marktpartijen gecreëerd worden ('equal level playing field').
Daarbij kan het harmoniserende effect in twee richtingen werken: horizontaal en verticaal. Er is sprake van *horizontale* harmonisatie wanneer de gedragscode minimumnormen oplegt aan branchegenoten (betrokkenen die zich op hetzelfde 'niveau' binnen de branche bevinden) op hetzelfde geografische niveau (Europees of nationaal). Ook indien de normen van de gedragscode via de contractuele weg worden opgelegd aan een wederpartij (zoals bij algemene voorwaarden) is er in zekere zin sprake van horizontale harmonisatie. In geval van *verticale* harmonisatie gaat het om gedragscodes waarbij de minimumnormen via een 'keten' naar een lager niveau

96. Deze onderscheiden vormen kunnen ook in combinatie met elkaar voorkomen (dus maximum-verticaal, maximum-horizontaal, minimum-verticaal en minimum-horizontaal). Vgl. ook Cafaggi & Janczuk 2010 en Cafaggi 2010 over de rol van zelfregulering in 'European legal integration'.
97. Of gedragscodes dit effect in de praktijk daadwerkelijk hebben, is in dit preadvies niet onderzocht.

toe doorwerken. Dit kan een lager niveau in *geografische* zin zijn; het gaat dan om Europese gedragscodes met minimumnormen die op nationaal niveau doorwerken (zie ook de hierna te bespreken kaderfunctie). Het kan echter ook gaan om gedragscodes waarbij sprake is van zogenaamde *ketenverantwoordelijkheid*. De normen (al dan niet met het karakter van minimumnormen) uit de gedragscode werken dan via de primair betrokkene door in de onderliggende schakels in de productieketen of keten van dienstverlening. Dit kan op verschillende manieren. Ten eerste door de primair betrokkene (meestal als partij bovenin de keten) verantwoordelijk te stellen voor naleving van de gedragscode door de volgende partijen in de keten. Aannemelijk is dat dit door middel van contractuele mechanismen, zoals ketting- of derdenbedingen, zal geschieden.[98] Ten tweede doordat de gedragscode zelf een soort ketting- of derdenbeding bevat. Naleving van de gedragscode werkt dan steeds door naar de opvolgende partijen respectievelijk moet aan hen worden opgelegd bij een kettingbeding. Gedragscodes worden aldus topdown verspreid over de keten. Dit past in het plaatje van de harmonisatie (vgl. ook de hierna te bespreken algemene voorwaardenfunctie).
Tot slot verdient in het kader van de harmonisatiefunctie nog vermelding dat er ook gedragscodes zijn die aangeven dat moet worden toegezien op naleving van de gedragscode door werknemers en vertegenwoordigers van betrokkene. Ook in deze gevallen kan er een zekere mate van harmoniserende werking van de gedragscode uitgaan.

### 1.4.3 **Kaderfunctie**

Er zijn Europese gedragscodes die betrokkenen de verplichting opleggen om de normen uit de gedragscode te implementeren in hun eigen (nieuwe of bestaande) nationale gedragscode. In die gevallen wordt ook toezicht en handhaving naar het nationale niveau gedelegeerd. Deze Europese gedragscodes functioneren hierbij als kaders voor nationale gedragscodes. Ook op nationaal niveau zijn gedragscodes met een dergelijke kaderfunctie te vinden. Het gaat dan om nationale gedragscodes van brancheorganisaties die ruimte laten om de code op bedrijfsniveau verder uit te werken.
Hiermee raakt de kaderfunctie aan de zojuist besproken (verticale) harmonisatiefunctie. De bovenliggende raamwerkcode geeft immers het kader aan waaraan de gedragscode die wordt opgesteld om het raamwerk uit te werken (al dan niet door de normen aan te passen aan nationale respectievelijk bedrijfsomstandigheden) minimaal dient te voldoen. Het kan partijen vrij staan om in de uitwerking verder te gaan dan de kadercode.

98. Vgl. Van der Heijden 2013. Vermeldenswaardig in dit verband is de conclusie die Vytopil trekt uit een empirisch onderzoek naar het MVO-beleid van Nederlandse multinationals, te weten dat: '[i]n de handelsketen gedragscodes niet gebruikt worden in de oorspronkelijke, vrijwillige zin des woords. In de praktijk verkrijgen bedrijven werkelijk contractuele controle over hun handelsketens. Dat doen zij door te bewerkstelligen dat hun handelspartners hun gedragscode ondertekenen en daarnaast door die code en eventueel andere MVO-maatregelen te verankeren door middel van algemene voorwaarden of contracten. In het kader van de handelsketen is de discussie over de vraag of gedragscodes juridisch bindend zijn dan ook weinig relevant. Bedrijven zorgen er immers zelf al voor dat de door hen genomen MVO-maatregelen contractueel bindend zijn. Dat betekent dat sommige vragen die voor de rechtswetenschap in theorie zeer interessant zijn (zoals de vraag naar de juridische verbindendheid van gedragscodes die (niet ondertekend) in de handelsketen gebruikt worden), in de praktijk van weinig belang zijn' (Vytopil 2011, p. 70).

### 1.4.4 Algemene voorwaardenfunctie

Gedragscodes kunnen bepalen dat een betrokkene naleving van de gedragscode moet bedingen ingeval hij een (contractuele) relatie aangaat met een andere partij. Dit heeft tot gevolg dat naleving van de gedragscode ook verplicht is voor degene met wie hij een contractuele relatie aangaat. De normen uit de gedragscode worden in het contract opgenomen. De werking van deze gedragscodes strekt zich aldus, als onderdeel van het contract, uit tot derden die geen partij zijn bij de gedragscode. Hiermee lijkt de gedragscode het karakter te krijgen van een algemene voorwaarde. Dit karakter kan zich beperken tot een enkele wederpartij, maar kan zich in geval van ketenverantwoordelijkheid ook over meerdere schakels uitstrekken.

### 1.4.5 Beleidsinstrumentele functie

Gedragscodes kunnen door de wetgever op Europees en nationaal niveau worden ingezet als instrument om een bepaald beleid of bepaalde, beleidsgeoriënteerde doelen te realiseren.[99] Gedragscodes die door de wetgever worden geïnitieerd hebben in de regel een beleidsinstrumentele functie.
De wetgever kan op verschillende manieren het gebruik van gedragscodes stimuleren/initiëren. De wetgever kan, zoals wij zagen in paragraaf 1.3, in Europese richtlijnen en nationale wetgeving soms expliciet ruimte laten om gedragscodes op te stellen ter implementatie of uitwerking van de wettelijke bepalingen. In lijn hiermee kunnen nationale wetgevers onder voorwaarden ook gebruikmaken van gedragscodes om Europese richtlijnen te implementeren.[100] Ook kan gedacht worden aan situaties waarin de wetgever regulering welbewust overlaat aan de markt of druk uitoefent op de sector om een gedragscode op te stellen (of aan te scherpen) dan wel een dialoog organiseert om de totstandkoming van een gedragscode te faciliteren.

### 1.4.6 Aanvullende functie

In paragraaf 1.3 (nr. 9) hebben wij geconstateerd dat gedragscodes in de daar genoemde voorbeelden meestal worden gebruikt als aanvulling op of als uitwerking van wet- en regelgeving. Uit het empirisch onderzoek blijkt voorts dat gedragscodes ook kunnen functioneren als alternatief voor of ter voorkoming van wet- en regelgeving. Deze functies van gedragscodes komen terug in de resultaten van het empirisch onderzoek.[101]

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99. Vgl. op Europees niveau het Interinstitutioneel Akkoord beter wetgeven (*PbEU* 2003, C 321/1) en voor het Nederlandse wetgevingsbeleid de Aanwijzingen voor de regelgeving (*Stcrt.* 2011, 6602). Zie paragraaf 1.2. Vgl. ook Oude Vrielink 2011, p. 66: de overheid ziet zelfregulering als instrument dat kan worden ingezet om beleid uit te voeren.
100. Zie voor het overzicht van deze voorwaarden de handleiding 'Wetgeving en Europa. De voorbereiding, totstandkoming en nationale implementatie van Europese regelgeving' (2009) van het Expertisecentrum Europees Recht (ICER).
101. Zie over soortgelijke functies en de relatie tussen zelfregulering en wetgeving in de context van het privaatrecht bijvoorbeeld ook Huyse & Parmentier 1990, p. 262-263, Schiek 2007, p. 459, Cafaggi & Janczuk 2010, p. 21-26 en Van Driel 1989, p. 1-3 en p. 7. Vgl. ook Cafaggi & Renda 2012, p. 5-9.

### 1.4.7 **Compliance functie**

Er zijn gedragscodes die regels bevatten over de naleving van geldende wet- en regelgeving. Vaak gaat het dan om een bepaling die aangeeft dat betrokkenen in overeenstemming met de geldende wet- en regelgeving moeten handelen. Het kan zijn dat de gedragscode de wettelijke bepalingen (bijna) letterlijk overneemt. Zie paragraaf 1.3, nr. 7 onder j, waar wij ook het principe van comply or explain vermeld hebben. Het dient als stimulans voor betrokkenen zich aan de wet- en regelgeving te houden, tenzij zij goede redenen hebben ervan af te wijken. Als de bepaling afkomstig is van betrokkene zelf zonder overheidsdruk, zou ze ook kunnen zijn opgesteld om zich in te dekken tegen juridische aansprakelijkheid (exoneratie). In beide gevallen gaat het er in ieder geval om dat betrokkenen de wet- en regelgeving naleven (*compliance*).

### 1.4.8 **Waarborgfunctie**

Bij de waarborgfunctie staan *belangen* centraal; de gedragscode beoogt (mede) bepaalde belangen te waarborgen of te beschermen. Dit kunnen de eigen belangen van de opstellers zijn, maar ook andere belangen. Al naar gelang het belang dat met de gedragscode gediend wordt, valt de waarborgfunctie uiteen in de volgende twee te onderscheiden, maar verband houdende functies: (i) de interne waarborgfunctie of 'consoliderende' functie en (ii) de externe waarborgfunctie of beschermingsfunctie. Een belangrijke vraag die bij dit onderscheid een rol speelt, is de vraag welke belangen de gedragscode beoogt te waarborgen.

*(i) Interne waarborgfunctie ('consoliderende' functie)*
Gedragscodes die de status quo willen handhaven, die de toekomst van een bepaalde manier van zaken doen of de toekomst van hun eigen industrie veilig willen stellen, hebben een *interne* waarborgfunctie. Het gaat er immers om de eigen of interne belangen van de industrie, branche of organisatie op een bepaald punt te verzekeren door middel van een gedragscode. Dit kan zowel uit 'positieve' overwegingen gebeuren (bijv. een goed werkend zelfregulerend systeem, hogere standaarden) als uit meer 'negatieve' (zoals het opwerpen van drempels voor markttoegang of mededingingsafspraken met als doel het beschermen van de groep tegen buitenstaanders).

*(ii) Externe waarborgfunctie of beschermingsfunctie*
Door het voorschrijven van bepaald gedrag en het opleggen van bepaalde normen, kunnen gedragscodes bepaalde belangen *van anderen* beschermen. Op zichzelf is dit weinig onderscheidend, immers elke gedragscode zal op de een of andere manier bepaalde waarborgen bieden (zoals voor ethisch handelen, tegen misleidende smsdiensten). Er zijn echter ook gedragscodes die heel specifiek (mede) als doel hebben de *bescherming* van de wederpartij van betrokkene (veelal de consument, maar soms ook de wederpartij in B2B-relaties). Deze groep van gedragscodes heeft dan een *externe* waarborgfunctie of een *beschermingsfunctie.*

### 1.4.9 **Signaalfunctie**[102]

Bij de signaalfunctie gaat het, zoals de naam al zegt, om gedragscodes die een *signaal* afgeven aan betrokkenen (*interne* signaalfunctie[103]) of aan externe partijen, zoals stakeholders, de overheid en maatschappelijke actoren (*externe* signaalfunctie). In de interne signaalfunctie is de gedragscode bedoeld om ten aanzien van een bepaald onderwerp bewustzijn te creëren bij betrokkenen. In geval van de externe signaalfunctie draagt de gedragscode de branche op een bepaalde manier uit, meestal als betrouwbaar, integer en maatschappelijk verantwoord. Een gedragscode kan hierbij het karakter krijgen van een visitekaartje.[104] Ook kan een gedragscode worden gebruikt om het imago van de branche of beroepsgroep te verbeteren. Aldus kan een gedragscode (met de signaalfunctie) het vertrouwen in en de herkenbaarheid van de opstellers vergroten.
Uit het bovenstaande volgt dat de (externe) signaalfunctie in de praktijk op verschillende manieren kan worden vormgegeven. Al naar gelang hiervan komen nieuwe, concrete functies naar voren. De signaalfunctie is hiermee een overkoepelende functie waaronder door de nuances in de praktijk verschillende, maar samenhangende functies samenkomen. Dit zijn achtereenvolgens de imagofunctie, de kwaliteitbewakingsfunctie, de keurmerkfunctie en de Maatschappelijk Verantwoord Ondernemen (MVO)-functie.[105]

## 1.5 **Juridische betekenis van gedragscodes**

12. In de stukken over wetgevingsbeleid zijn soms criteria, eisen of aanbevelingen voor het gebruikmaken van zelfregulering geformuleerd. Meestal hebben ze betrekking op zelfregulering in het algemeen, soms specifiek op gedragscodes. Voor Europa noemen wij achtereenvolgens:

*a. Het Interinstitutioneel Akkoord Better Regulation 2003 (IIA)*
Het onderstaande citaat uit het IIA introduceert een algemeen kader voor het gebruik van zelfregulering op Europees niveau:[106]

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102. Vgl. wat Kaptein, Klamer & Wieringa (2003) zien als de 'onderscheidende functie' ('Een code vergroot de *herkenbaarheid* van de organisatie naar buiten toe: de organisatie bekent kleur en "smoel".') en de 'legitimerende functie' ('Met een code maakt de organisatie duidelijk wat zij wel en niet doet en waardoor zij zich laat leiden. Een code kan daarom het *vertrouwen* in de organisatie vergroten bij mensen, groepen en stakeholders') van bedrijfscodes. Zie ook Hoff 2006, p. 95-102.
103. Vgl. de interne functies 'oriënterende functie', de 'expliciterende functie' en de 'sturende functie' van Kaptein, Klamer & Wieringa 2003 ('Een code vergroot het *bewustzijn* en de *alertheid* op de missie van het bedrijf, de geldende waarden en confronteert betrokkenen met ingesleten gewoonten', 'Een code formuleert een aantal *verwachtingen* naar medewerkers, stuurt daarmee hun handelen, geeft kaders en richting', respectievelijk 'Een code verschaft *duidelijkheid* over de geldende verantwoordelijkheden. De code trekt grenzen, stelt klip en klaar wat de spelregels zijn en waar de *bottomline* ligt'). Zie ook Hoff 2006, p. 95-102.
104. Vgl. Bos, Dekkers & Homborg 2007, p. 64 en Kaptein, Klamer & Wieringa 2003, p. 19.
105. Deze functies worden in het proefschrift van mevrouw Menting nader uitgewerkt.
106. Interinstitutioneel akkoord inzake Beter Wetgeven (*PbEU* 2003, C 321/1), overweging 17. Voor coregulering geldt daarbij specifiek nog dat het kan worden toegepast op basis van de criteria die in het wetsbesluit dat als basis voor het toepassen van coregulering geldt, worden omschreven. Dit wetsbesluit bepaalt ook de reikwijdte van het coreguleringsinstrument (overweging 18 en 21 van het IIA).

> 'De Commissie ziet er op toe dat de toepassing van co-regulerings- en zelfreguleringsmechanismen steeds in overeenstemming is met het Gemeenschapsrecht en dat de criteria van transparantie (met name de openbaarmaking van de akkoorden) en de representativiteit van de betrokken partijen daarbij steeds in acht worden genomen. De toepassing van deze mechanismen moet bovendien steeds een toegevoegde waarde voor het algemeen belang hebben. Deze mechanismen mogen niet worden toegepast wanneer het grondrechten of belangrijke beleidskeuzen betreft of in situaties waarin de regels in alle lidstaten op eenvormige wijze dienden te worden toegepast. Zij moeten een snelle en flexibele regulering tot doel hebben, die de mededingingsbeginselen van de interne markt niet aantast.'

Concreet formuleert het IIA de volgende eisen:

*1. Overeenstemming met het Gemeenschapsrecht*
De eis dat zelfregulering in overeenstemming dient te zijn met het Gemeenschapsrecht is een brede verplichting. Het omvat niet alleen de eis dat zelfregulering niet strijdig mag zijn met de beginselen en bepalingen uit het VWEU, maar ziet ook op de overeenstemming van zelfregulering met andere bindende secundaire, sectorspecifieke regels van EU-recht. Nog breder bezien, dienen alternatieve reguleringsinstrumenten ook in overeenstemming te zijn met soft law waarin eisen ten aanzien van hun gebruik worden gesteld,[107] alsmede met de internationale verplichtingen van de Europese Unie.[108]

*2. Transparantie*
Het transparantievereiste ziet op het door middel van publicatie of op andere directe wijze openbaar maken van zelfreguleringsinstrumenten, maar het is ook van toepassing op de fase van de totstandkoming, meer in het bijzonder op de deelname, de wijze van besluiten en de organisatiestructuur van de private partijen die betrokken zijn bij de alternatieve reguleringsmechanismen.[109]

*3. Representativiteit*
Het IIA stelt de eis dat de bij zelfregulering betrokken private partijen representatief zijn. Het Akkoord geeft echter niet aan wanneer de opstellende partijen als voldoende representatief kunnen worden beschouwd. Svilpaite wijst wel op enkele criteria die in verschillende documenten worden genoemd om de representativiteit van de private opstellers te beoordelen:[110]

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107. Zie bijvoorbeeld uit de periode voor het IIA de Mededeling van de Europese Commissie over milieuconvenanten waarin ten aanzien van het gebruik ervan wettelijke basisvoorwaarden, beoordelingscriteria en procedurele vereisten zijn geformuleerd (Mededeling van de Commissie aan het Europees Parlement, de Raad, het Economisch en Sociaal Comité en het Comité van Regio's, Milieuconvenanten op het niveau van de Gemeenschap binnen het kader van het actieplan inzake de vereenvoudiging en verbetering van de regelgeving, COM(2002)412 def.).
108. Svilpaite 2007b, p. 7-10.
109. Svilpaite 2007b, p. 20-22.
110. Svilpaite 2007b, p. 23, met verwijzingen naar de documenten waarin deze eisen zijn genoemd. Vgl. ook het EESC-rapport *The Current State of Co-Regulation and Self-Regulation in the Single Market* met een versie uit 2005 (p. 19-20) en 2013 (p. 23-29).

> 'The following quantitative and qualitative criteria have been mentioned as indicative for the assessment of the representation test in various documents: the representation of the *vast majority* of the relevant economic sector, with as few exceptions as possible; *proportional coverage* of the sector (e.g., sectoral and geographical cover), or scope of a measure; the *consultations* with the interested and affected parties and taking into account variety of interests; etc. In some documents and reports, the requirement of representativeness is supplemented by the requirement to be *organized* and responsible, have means to *ensure effective implementation* and *compliance* of the agreed rules, and be *accountable*'. (cursiveringen toegevoegd — MM en JBMV)

Ook wijst Svilpaite in dit verband nog op enkele criteria die het Europees Economisch en Sociaal Comité (EESC) naar voren heeft gebracht:[111]

> 'Before the conclusion of the IIA the EESC proposed eight criteria for the evaluation of representativeness of organizations involved in public consultations over policymaking: 1) existing permanently at Community level'; 2) providing direct access to its members' expertise and hence rapid and constructive consultation; 3) representing general concerns that tally with the interests of European society; 4) comprising bodies that are recognised at Member State level as representative of particular interests; 5) having member organisations in most of the EU Member States; 6) providing for accountability to its members; 7) being independent and mandatory, not bound by instructions from outside bodies; and 8) being transparent especially financially and in its decision-making structures. As it is evident that some of these conditions have been reflected among the criteria imposed generally in the private rule-making by the IIA, it is still not clear whether the Commission intends to follow all of these suggested characteristics'.

*4. Toegevoegde waarde voor het algemeen belang*

Zelfregulering mag alleen worden toegepast indien dit een toegevoegde waarde voor het algemeen belang heeft. Svilpaite concludeert dat deze toegevoegde waarde enerzijds is gelegen in de 'operational qualities' van zelfregulering, zoals snelle en flexibele regulering.[112] Anderzijds moeten de alternatieve reguleringsinstrumenten zelf ook bijdragen aan het algemeen belang. Wij citeren kort:

> 'Firstly, (…) self-regulation must form part of a general interest approach and this must be seen to be the case. (…). Thus (…) self-regulation must take place in an atmosphere of trust and shared responsibility, with a desire to respect and promote certain fundamental values such as honesty,

111. Svilpaite 2007b, p. 23-24.
112. Svilpaite 2007b, p. 18-20. Zie ook IIA, overweging 17: 'Zij [coregulerings- en zelfreguleringsmechanismen, MM en JBMV] moeten een snelle en flexibele regulering tot doel hebben […]'.

good faith, and respect for others, openness to partnership, and a competitive spirit'.[113]

*5. Toepassing uitgesloten*
Het IIA geeft aan dat zelfregulering niet mag worden ingezet wanneer grondrechten of belangrijke beleidskeuzes in het geding zijn, of wanneer een eenvormige wijze van regeltoepassing in alle lidstaten vereist is.[114] Dit is een belangrijke beperking die hierna nog enkele keren terugkomt, ook in Nederland (hierna nr. 13).

*6. Effectieve mededinging niet beperken*
Blijkens de slotzin van het citaat uit het IIA mag zelfregulering niet aan een effectieve mededinging in de weg staan. Zie ook hierna voor Nederland nr. 13 onder a (Commissie-Geelhoed).

*b. Principles for Better Self- and Co-Regulation (2013)*
Hoewel het onderwerp maatschappelijk verantwoord ondernemen (MVO) buiten het bestek van dit preadvies valt, willen we hier niet voorbijgaan aan een van de actiepunten van de EU-strategie op het terrein van MVO: het ontwikkelen van principes ter verbetering van de doeltreffendheid van het MVO-proces.[115] Begin 2013 werd gevolg gegeven aan dit actiepunt met het opstellen van de (*best practice*) *Principles for Better Self- and Co-Regulation*.[116] De Principles omvatten zowel bepalingen voor het opstellen van zelfregulering als bepalingen voor de implementatie ervan. De bepalingen voor de 'ontwerpfase' zien op onderwerpen als de representativiteit van de betrokken partijen, de transparantie van het ontwikkelingsproces, de goede trouw van de betrokken partijen, duidelijke doelstellingen van het beoogde instrument en overeenstemming met wet- en regelgeving. De bepalingen voor de 'implementatiefase' betreffen evaluatie en verbetering, toezicht, geschilbeslechting en financiën. De principes dienen hiermee als een 'benchmark' voor effectieve zelfregulering voor betrokkenen in het MVO-proces. De Principles zijn geformuleerd in het kader van het MVO-beleid van de Commissie, maar lijken gezien hun neutrale bewoordingen (geen verwijzingen naar MVO) een potentieel breder toepassingsbereik te hebben. Deze bredere relevantie lijkt ook te volgen uit het feit dat ze een van

113. EESC, *The Current State of Co-Regulation and Self-Regulation in the Single Market*, 2005, p. 19. Svilpaite 2007b, p. 19 geeft ten aanzien van deze passage aan dat '[i]t is likely that these features of a private measure constitute its added value for the general interest'.
114. Svilpaite wijst in aanvulling hierop nog op een kwestie waar het IIA niet op ingaat, maar die volgens Svilpaite wel van belang is, namelijk de vraag '[t]o what extent the implementation of directives and international agreements is a precluded area for privately generated instrument, especially self-regulation' (Svilpaite 2007b, p. 14, met op p. 14-18 een uitwerking van deze kwestie).
115. Mededeling van de Commissie, 'Een vernieuwde EU-strategie 2011-2014 ter bevordering van maatschappelijk verantwoord ondernemen', COM(2011)681 def., p. 11 — actiepunt 5: 'De Commissie is voornemens: in 2012 een initiatief met bedrijven en andere stakeholders op te starten om een code van goede praktijken voor zelf- en coregulering te ontwikkelen ter verbetering van de doeltreffendheid van het MVO-proces'. Vgl. ook Mededeling van de Commissie over de sociale verantwoordelijkheid van bedrijven: een bijdrage van het bedrijfsleven aan duurzame ontwikkeling, COM(2002)347 def., p. 14-15.
116. De Principles en een kort overzicht van hun totstandkomingsproces zijn te vinden op https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice, laatst geraadpleegd op 10 juli 2013.

de 'building blocks' zullen vormen bij de aangekondigde herziening van de Impact Assessment Guidelines.[117]

*c. Richtlijnen*
Ook uit verschillende in paragraaf 1.3 besproken Richtlijnen en Aanbevelingen zijn soms criteria af te leiden voor het gebruik van zelfregulering (gedragscodes). Vergelijk onder meer:

- de Richtlijn Audiovisuele mediadiensten (nr. 7 onderdeel d). Voorwaarde is dat de gedragscodes 'in brede kring worden aanvaard door de belangrijkste belanghebbenden in de betrokken lidstaten en voorzien in effectieve handhaving';[118]
- de Aanbeveling bescherming minderjarigen en menselijke waardigheid (nr. 7 onderdeel e). De Aanbeveling geeft indicatieve richtsnoeren voor vier onderdelen van nationale zelfreguleringskaders die bij de vaststelling ervan in acht genomen moeten worden. Deze richtsnoeren betreffen het overleg met en het representatief karakter van de betrokken partijen, de inhoud van de op te stellen gedragscodes (waaronder procedures voor overtredingen van de gedragscodes), het opstellen van een nationale instantie en een nationaal evaluatiesysteem;
- de Dienstenrichtlijn (nr. 7 onderdeel h). De Richtlijn stelt expliciet enkele eisen aan de gedragscodes. Zo dienen de gedragscodes in overeenstemming te zijn met het Gemeenschapsrecht, het mededingingsrecht in het bijzonder. Ze mogen bovendien niet in strijd zijn met de nationale wettelijk bindende ethische regels en gedragsregels voor beroepsgroepen.

13. Voor Nederland noemen wij achtereenvolgens:

*a. De Commissie-Geelhoed*[119]
De Commissie omschrijft op pagina 44 van haar Eindbericht aan welke kwalitatieve minimumvereisten zelfregulering dient te voldoen:

> 'Zelfregulering moet, wil zij effectief zijn, evenals overheidsregulering aan zekere kwalitatieve minimumvereisten voldoen, zoals *kenbaarheid* en *duidelijkheid* van de normen en een voldoende mate van *zekerheid* dat zij inderdaad worden nageleefd. En voor zover deze vormen van regulering voorzien in eigen privaatrechtelijke geschillenregelingen, dienen ze zoveel mogelijk aan de beginselen van een *behoorlijk proces* te voldoen. Inhoudelijk zal zelfregulering niet mogen ontaarden in een (te) eenzijdige bescherming van bepaalde belangen. Dan zouden de desbetreffende regelingen op gespannen voet kunnen komen met de beginselen van een *effectieve en eerlijke mededinging* en zo het optreden van de overheid uitlokken dat ze juist

117. Aldus https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice, laatst geraadpleegd op 10 juli 2013. Dat de Principles een breder toepassingsbereik zouden kunnen hebben, wordt ook gesuggereerd door de neutrale bewoordingen in het Activity Report (beschikbaar via http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1629, laatst geraadpleegd op 10 juli 2013).
118. Richtlijn 2010/13/EU, artikel 4 lid 2.
119. Eindbericht van de Commissie voor de vermindering en vereenvoudiging van overheidsregels, *Kamerstukken II* 1983/84, 17931, 9.

> beogen te voorkomen. Wellicht zal de figuur van standaardregelingen waartoe het NBW (Artikel 6.5.1.2) de weg opent, een voor partijen en overheid aanvaardbare tussenoplossing bieden. In elk geval geldt voor een zelfgereguleerd ordelijk economisch verkeer dat het mededingingsproces niet zo ordelijk mag worden, dat er geen effectieve mededinging meer mogelijk is.' (cursiveringen toegevoegd — MM en JBMV)

Deze criteria zijn niet in een algemeen, formeel kader gegoten.

*b. Nota Zicht op wetgeving*[120]

De nota *Zicht op wetgeving* (1990) formuleert algemene kwaliteitseisen voor wetgeving: (1) rechtmatigheid en verwerkelijking van rechtsbeginselen; (2) doeltreffendheid en doelmatigheid; (3) subsidiariteit en proportionaliteit; (4) uitvoerbaarheid en handhaafbaarheid; (5) onderlinge afstemming; en (6) eenvoud, duidelijkheid en toegankelijkheid. Voor zelfregulering wordt een belangrijke plaats ingeruimd, met name bij subsidiariteit en proportionaliteit. De wetgever dient waar mogelijk ruimte te laten voor zelfregulering binnen kaders. Hiermee introduceert hij het concept van wettelijk geconditioneerde en gestructureerde zelfregulering:[121]

> 'De wetgever kan soms volstaan met het geven van een kader en het bieden van de mogelijkheid van controle achteraf. Het gaat er dan om het juiste evenwicht te vinden tussen overheidsregulering, als uitdrukking van overheidsverantwoordelijkheid, en zelfregulering door burgers en maatschappelijke organisaties binnen dat kader: de wettelijk gestructureerde en geconditioneerde zelfregulering.'

*c. Aanwijzingen voor de Regelgeving (Awr)*[122]

De eisen van subsidiariteit en proportionaliteit en de daaruit voortvloeiende ruimte voor, maar ook plicht om zelfregulering te overwegen zijn, samen met de andere kwaliteitseisen die aan wetgeving worden gesteld, geconcretiseerd in de Aanwijzingen voor de Regelgeving (Awr). In Aanwijzing 6, 7 en 8 vinden we de kern van het wetgevingsbeleid ten aanzien van zelfregulering terug:

Aanwijzing 6
1. Tot het tot stand brengen van nieuwe regelingen wordt alleen besloten, indien de noodzaak daarvan is komen vast te staan. […].

Aanwijzing 7
[c.] onderzocht wordt of de gekozen doelstellingen kunnen worden bereikt door middel van het zelfregulerend vermogen in de betrokken sector of sectoren dan wel daarvoor overheidsinterventie noodzakelijk is;
d. indien overheidsinterventie noodzakelijk is, wordt onderzocht of de gekozen doelstellingen kunnen worden bereikt door aanpassing of beter gebruik van be-

120. *Kamerstukken II* 1990/91, 21800, 1-2.
121. Nota *Zicht op wetgeving*, p. 26.
122. De Awr zijn gepubliceerd in *Stcrt*. 1992, 230 en later verschillende keren herzien. De laatste versie (negende wijziging) dateert uit 2011 (*Stcrt*. 2011, 6602). Zie ook Van Gestel & Menting 2011, p. 452 en Veerman, De Kok & Clement 2012, p. 186.

staande instrumenten dan wel, indien dit niet mogelijk blijkt, welke andere mogelijkheden daartoe bestaan;
e. de diverse mogelijkheden worden zorgvuldig tegen elkaar afgewogen.

Aanwijzing 8
Bij het bepalen van de keuze voor een mogelijkheid tot overheidsinterventie om een doelstelling te bereiken wordt zoveel mogelijk aangesloten bij het zelfregulerend vermogen in de betrokken sector of sectoren.

De wetgever is dus bij voorgenomen wetgeving gehouden tot het instellen van een alternatievenonderzoek.[123] Anders dan op Europees niveau, waar de Impact Assessment Guidelines eenzelfde onderzoek uitdrukkelijk voorschrijven[124] als onderdeel van de ex ante evaluatie,[125] zijn in Nederland voor de beoordeling van het gebruik van zelfregulering echter geen criteria in de vorm van een algemeen formeel wettelijk kader beschikbaar, zoals wel is opgenomen in het Interinstitutioneel Akkoord Better Regulation (IIA). Zie hiervoor nr. 12 onder a.

*d. Latere nota's wetgevingsbeleid*
In de latere wetgevingsnota's *Marktwerking, deregulering en wetgevingskwaliteit* (1994), *Bruikbare rechtsorde* (2004) en *Vertrouwen in wetgeving* (2008) wordt de lijn die met betrekking tot alternatieven voor wetgeving is ingezet met *Zicht op wetgeving* (1990) doorgetrokken.[126] Hoewel met wat andere accenten, is er ook in deze nota's aandacht voor het gebruik van (wettelijk geconditioneerde) zelfregulering als alternatief voor wetgeving.[127] In de nota *Vertrouwen in wetgeving* is bovendien het Integraal Afwegingskader (IAK) geïntroduceerd om tegemoet te komen aan, onder andere, het probleem dat de keuze voor de in te zetten instrumenten al in een (te) vroeg stadium moet worden gemaakt.[128] Met onder meer het opnemen van kwalitatieve criteria in een integraal afwegingskader wordt beoogd een goede en zorgvuldige wetgevingstoetsing te bevorderen.[129] Er zijn drie algemene randvoorwaarden waaraan de sector/beroepsgroep dient te voldoen voor het toepassen van zelfregulering: een bepaald kennisniveau, draagvlak en een voldoende organisatie. Daarnaast is er een overzicht van succes- en faalfactoren per instrument van zelfregulering. Er is echter nog steeds niet sprake van criteria in de vorm van een algemeen wettelijk kader voor

123. Dit gebeurt echter nog nauwelijks, zo blijkt uit Van Gestel & Menting 2011.
124. Zie aanwijzing 7 van de Impact Assessment Guidelines (European Commission, 'Impact Assessment Guidelines', SEC(2009)92, 15 januari 2009) en Annex I, p. 24-25 en p. 26-27.
125. Maar ook hier lijkt de praktijk achter te blijven bij de norm. Zie Meuwese & Senden 2009, die heel kritisch zijn.
126. *Kamerstukken II* 1994/95, 24036, 1 (Marktwerking, deregulering en wetgevingskwaliteit), *Kamerstukken II* 2003/04, 29279, 9 (nota *Bruikbare rechtsorde*) en *Kamerstukken II* 2008/09, 31731, 1 (nota *Vertrouwen in wetgeving*). Vgl. Van Ommeren 2008, p. 77-78 en Van Gestel 2009.
127. Zo wijst Van Gestel erop dat bij de nota *Vertrouwen in wetgeving* er ook wat meer aandacht is voor de eerste fasen van beleidsvoorbereiding (Van Gestel 2009, p. 145). In dit licht past de invoering van 'een integraal afwegingskader voor beleid en wetgeving' door de nota. De nota *Bruikbare rechtsorde* plaatste de aandacht voor alternatieven voor wetgeving in het kader van het verminderen van regeldruk, waarbij zelfregulering en zelfhandhaving in de plaats zouden kunnen komen van overheidsregulering- en handhaving ('meta-toezicht'). Zie Van Gestel 2004, Eijlander 2007, p. 45 en Veerman, De Kok & Clement 2012, p. 196-197.
128. Zie www.kc-wetgeving.nl/kennisbank/alt-integraal-afwegingskader-beleid-en-regelgeving/6-wat-is-het-beste-instrument/61-beleidsinstrumenten/#c23371, laatst geraadpleegd op 5 juni 2013.
129. Vgl. nota *Vertrouwen in wetgeving* (*Kamerstukken II* 2008/09, 31731, 1), p. 10 en Meuwese 2012.

het toepassen van zelfregulering, zoals voor Europa in het IIA bestaat (nr. 12 onder a). Wel zijn er informele criteria die soms breed gedeeld worden, aldus Veerman. Hij noemt onder meer dat sectoren niet sterk gepolitiseerd zijn, dat er geen Europese belemmeringen zijn, zoals bijvoorbeeld bij de implementatie van richtlijnen, dat zelfregulering kenbaar moet zijn en de rechtszekerheid niet mag aantasten, en voorts dat de mededinging niet ongeoorloofd mag worden beperkt.[130]

*e. Criteria buiten het algemeen wetgevingsbeleid*
Hoewel zelfregulering met de nota *Zicht op wetgeving* en de latere nota's volgens Van Gestel en Hertogh een 'hechte verankering' heeft gekregen in het algemeen wetgevingsbeleid, ontbreekt in deze nota's echter een algemeen kader met eisen voor de toepassing van (wettelijk gestructureerde en geconditioneerde) zelfregulering als alternatief reguleringsinstrument.[131] Dat wil echter niet zeggen dat er elders, in wetgeving of in beleidsdocumenten op specifieke terreinen, geen criteria bestaan die min of meer vergelijkbaar zijn met wat op het Europese niveau geldt. Wij geven enkele voorbeelden.

*Wet financiële dienstverlening (2006)*
De memorie van toelichting bij de inmiddels vervallen Wet financiële dienstverlening bevat een redelijk uitgebreide beschrijving van criteria waaraan gedragscodes voor financiële dienstverleners, opgesteld ter uitwerking van de wet, zullen worden getoetst.[132] Het zijn de volgende criteria:

1) *Inhoud*
'De inhoud van de gedragscode dient te worden getoetst aan de publieke belangen zoals deze in de vorm van kwaliteitskenmerken zijn verwoord in het wetsvoorstel, dienen noodzakelijk te zijn voor en proportioneel te zijn aan deze publieke doelen en zo min mogelijk belastend voor de normadressaat. […]'.

2) *Cross-sector- en distributieconsistentie*
'De gedragscode dient betrekking te hebben op de dienstverlening in alle financiële sectoren, waarbij in de normstelling geen onderscheid is gemaakt tussen deze sectoren of de gekozen distributiemethode, tenzij er een objectieve reden kan worden gegeven voor een dergelijk onderscheid'.

3) *Draagvlak*
'Meerdere representatieve organisaties van financiële dienstverleners uit alle sectoren van de financiële markten moeten de gedragscode volledig en onvoorwaardelijk onderschrijven'.

130. Veerman & Hendriks-De Lange 2007, p. 259-261.
131. Van Gestel & Hertogh 2006, p. 35 en p. 37-38.
132. *Kamerstukken II* 2003/04, 29507, 3, met name p. 14-16. Alleen indien aan deze criteria is voldaan en de gedragscode bovendien is erkend en getoetst door de Minister van Financiën kan de code in de plaats komen van overheidsregulering. Deze erkenning houdt in dat het voldoen aan de zelf opgestelde regels betekent dat ook voldaan wordt aan de wettelijke eisen, aldus de memorie van toelichting (p. 15-16).

4) *Marktdekkendheid*
'De betreffende organisaties dienen gezamenlijk te kunnen realiseren dat binnen een redelijke termijn na inwerkingtreding een groot aantal financiële dienstverleners de gedragscode onderschrijft en naleeft'.

5) *Handhaafbaarheid*
'De betreffende organisaties dienen voldoende zicht te hebben op de naleving van de gedragscode door de aangesloten financiële dienstverleners en dienen in staat te zijn de naleving van deze code zonodig af te dwingen, bijvoorbeeld door druk uit te oefenen op de betreffende ondernemingen of door deze effectieve sancties op te leggen'.

6) *Geen onverantwoorde beperking van de mededinging*
'De in de gedragscode opgenomen eisen dienen niet alleen in een redelijke verhouding te staan met de te bereiken publieke doelen, maar mogen ook niet tot gevolg hebben dat een dermate hoge standaard wordt gezet in de markt, dat de toetreding door nieuwe financiële dienstverleners daardoor aanzienlijk wordt belemmerd. […]'.

7) *Rechtmatigheid*
'De gedragscode zal op geen enkel onderdeel in strijd mogen zijn met wettelijke regelingen (waaronder ook begrepen de Mededingingswet)'.

In de memorie van toelichting bij de Wet op het financieel toezicht (2007), de vervanger van de Wet financiële dienstverlening, keren de criteria als zodanig niet meer terug.

*Groenboek consumentenbescherming (2001)*
Ook de reactie van de Nederlandse regering op het Europese groenboek over consumentenbescherming geeft een kijkje in het standpunt van de Nederlandse wetgever omtrent (de) criteria voor zelfregulering. Op een van de vraagpunten wordt namelijk het volgende antwoord gegeven:

> 'Waar dit instrument zelfregulering in plaats van of ter aanvulling van wetgeving wordt gehanteerd, moet erop worden gelet dat de doelgroepen *voldoende georganiseerd* zijn, er een *gelijkwaardige afweging van alle betrokken belangen* plaatsvindt, dat er *voldoende binding* van de partijen is en dat de *handhaving* van de afspraken voldoende is verzekerd.'[133] (cursiveringen toegevoegd — MM en JBMV)

Daarbij geeft de Nederlandse regering aan dat het onwenselijk is om alle verschillende vormen van zelfregulering op Europees niveau te laten bepalen. Dit zou niet

133. Aldus *Kamerstukken II* 2001/02, 27879, 3, p. 7 in antwoord op de vraag 'Zou het nuttig zijn in een eventuele kaderrichtlijn de basis te leggen voor zelfregulering? Zo ja, wat zijn de hoofdelementen van deze opties en de criteria voor opneming daarvan?'. Vgl. ook p. 8 waar het belang van participatie van alle belanghebbenden nog eens benadrukt wordt, en de regering aangeeft dat zelfregulering waarbij voldoende representatieve organisaties van zowel consumentenzijde als de kant van het bedrijfsleven betrokken zijn de voorkeur verdient.

alleen een veelheid aan criteria vereisen, maar er ook toe kunnen leiden dat bepaalde vormen van zelfregulering onmogelijk worden. De regering geeft de voorkeur aan het formuleren van minimum-kwaliteitscriteria en een vrijwillig 'Europees zelfreguleringsmodel'.[134]

*Elektronische snelweg (1998)*
Soortgelijke criteria vinden we terug in de nota *Wetgeving voor de elektronische snelweg*, waarin een toetsingskader is ontwikkeld voor wetgeving rondom de 'elektronische snelweg'.[135] Dit toetsingskader vormt voor deze regelgeving een verbijzondering van de Aanwijzingen voor de regelgeving.[136] Zelfregulering door de betrokken partijen verdient volgens de nota de voorkeur boven wetgeving: vormen van zelfregulering moeten zoveel mogelijk worden gestimuleerd. Dat is echter niet het geval wanneer fundamentele normen en waarden in het geding zijn. Bovendien is zelfregulering slechts aanvaardbaar als alternatief voor overheidsregulering wanneer het aan een aantal eisen voldoet:[137]

> 'Zelfregulering als alternatief voor overheidsregulering is niet geschikt indien *fundamentele normen en waarden* van de democratische rechtsstaat in het geding zijn. […] Zelfregulering zal, om aanvaardbaar te zijn als alternatief voor overheidsregulering, aan de volgende elementaire voorwaarden moeten voldoen: De doelgroepen die in het geding zijn, zijn *voldoende georganiseerd*; Er vindt een *gelijkwaardige* behartiging van de maatschappelijke belangen plaats; Er vindt *voldoende binding* plaats van alle partijen; De *handhaving* van de afspraken is voldoende verzekerd. Deze set van voorwaarden verschilt niet wezenlijk van de eisen die men ook buiten de elektronische snelweg aan zelfregulering stelt. […] Het is de taak van de

134. *Kamerstukken II* 2001/02, 27879, 3, p. 7-8: 'Het geven van wettelijke ondersteuning aan zelfreguleringsafspraken kan zinvol zijn, maar kan — gezien de verscheidenheid per marktsector — beter geschieden in de specifieke richtlijnen. De Commissie zou zich volgens Nederland eerder moeten richten op stimuleringsvarianten dan op verplichtende vormen van wettelijke ondersteuning. Dit omdat zelfreguleringsafspraken op vrijwilligheid zijn gebaseerd en niet gebaat zijn bij een (strak) keurslijf van regels. Niet alleen bestaan er in de lidstaten verschillende vormen van zelfregulering (bijv. alleen tussen bedrijfsgenoten of samen met consumentenorganisaties), maar ook tussen de lidstaten bestaan verschillen in deze vormen van zelfregulering. Om al deze vormen van zelfregulering te "reguleren" zou wellicht een veelheid aan criteria moeten worden opgesteld. Resultaat zou kunnen zijn dat bepaalde zelfregulering niet meer mogelijk is. Dit acht Nederland niet gewenst. Wel valt te denken aan een aantal minimum-kwaliteitscriteria en aan een vrijwillig soort Europees zelfreguleringsmodel, waarbij dan ook nog eens typen zelfregulering zouden kunnen worden onderscheiden, al naar gelang het type markt of de mate van gewenste binding'.
135. 'De nota ontwikkelt voor de wetgever een toetsingskader, […]. Dit toetsingskader is gericht tot de actoren in het wetgevingsproces. Daaronder vallen mede diegenen die namens Nederland in Europees of internationaal verband onderhandelen over de totstandkoming van wetgeving. Het kader moet hen in staat stellen om consistente afwegingen te maken bij het voorbereiden en opstellen van regelgeving. Meer in het bijzonder is het toetsingskader gericht op een goede motivering van gemaakte keuzes, vooral waar die afwijken van de in het kader genoemde hoofdregels. Het toetsingskader heeft geen dwingend karakter en kan dit, gelet op de complexiteit van de te beantwoorden vragen, ook niet hebben. Bovendien is voor sommige vraagstukken niet één specifiek instrument, maar juist een combinatie van de genoemde instrumenten het meest geschikt' (*Kamerstukken II* 1997/98, 25880, 1-2, p. 11-12).
136. Met name van Aanwijzing 6: 'Tot het totstandbrengen van nieuwe regelingen wordt alleen besloten als de noodzaak daarvan is komen vast te staan'. Vgl. *Kamerstukken II* 1997/98, 25880, 1-2, p. 12.
137. *Kamerstukken II* 1997/98, 25880, 1-2, p. 12-13 en p. 181.

> overheid om er voor te zorgen dat deze voorwaarden worden nageleefd'.[138]
> (cursiveringen toegevoegd — MM en JBMV)

Dit zijn dus criteria voor het gebruik van zelfregulering in het Nederlandse wetgevingsbeleid in de context van de 'elektronische snelweg'. Getuige de voorlaatste zin van het citaat zijn dit volgens de Nederlandse wetgever eisen die in het algemeen gelden voor zelfregulering. Uit onze schets tot nu toe volgt dat dit een juiste constatering is. De nota *Elektronische snelweg* en het *Groenboek consumentenbescherming* zijn op dit punt zelfs identiek, behoudens de uitzondering voor fundamentele normen en waarden in de nota.

*14. Enkele discussiepunten en tentatieve conclusies uit paragrafen 1.2, 1.3 en 1.4*
a. De uit het wetgevingsbeleid en uit het empirisch onderzoek blijkende eisen, criteria en aanbevelingen voor het gebruik van zelfregulering in Europa en in Nederland liggen niet ver uit elkaar. Onder meer geldt dit voor de uitsluiting van zelfregulering bij fundamentele normen en waarden (en public goods), bij strijd met het Europese gemeenschapsrecht, waaronder het mededingingsrecht, en ten aanzien van de eisen van representativiteit, kenbaarheid en afdwingbaarheid. Europa heeft de eisen alleen iets strakker in een algemeen formeel kader gegoten, maar of dit in de praktijk tot een intensievere afweging van zelfregulering als instrument leidt, bijvoorbeeld door de verplicht uit te voeren Impact Assessments, is allerminst zeker.[139] Ook is onzeker wat de nabije toekomst in Europa brengt voor het Interinstitutioneel Akkoord Better Regulation 2003 en de daarbij behorende Impact Assessment Guidelines. Zie hierboven nr. 4 slot.

b. Voor de discussie over (enigerlei vorm van) juridische betekenis van gedragscodes kunnen de uit het wetgevingsbeleid en uit het empirisch onderzoek blijkende eisen, criteria en aanbevelingen fungeren als een toetsingskader voor de vraag of en in hoeverre zelfregulering (in ons preadvies beperkt tot gedragscodes) juridische betekenis heeft. Hiervan uitgaande bevat het toetsingskader een aantal gezichtspunten die in de Nederlandse literatuur over zelfregulering (gedragscodes) nog niet zo scherp benoemd en besproken zijn. Daarin krijgen wel aandacht representativiteit, transparantie, verantwoording en handhaafbaarheid, maar niet of minder:

*Beperkingen*
1. De materie is niet te politiek of te maatschappelijk omstreden.
2. De materie betreft niet fundamentele waarden en beginselen (vergelijk de beschermingsfunctie). Maar: deze uitsluiting kan niet over de gehele linie plaatsvinden. Denk aan de medische sector, aan de media en aan privacy waarbij gedragscodes goede diensten kunnen bewijzen.
3. Gedragscodes verhinderen niet een effectieve mededinging. In dit verband zal echter de verhouding van gedragscodes en marktwerking opnieuw doordacht moeten worden. Gedragscodes in het Europese privaatrecht zijn nauw verbonden met het bevorderen van marktwerking, maar zeker voor public goods zijn hiermee niet uitsluitend positieve ervaringen opgedaan in het verleden. Sommige zaken

138. *Kamerstukken II* 1997/98, 25880, 1-2, p. 181.
139. Heel kritisch zijn bijvoorbeeld Meuwese & Senden 2009.

blijken te belangrijk om aan de markt over te laten. Competition law bepaalt niet alleen de grenzen. Nader onderzoek is nodig.

*Inhoudelijke kwaliteit*

4. Gedragscodes geven blijk van een voldoende kennisniveau van de materie, hanteren een duidelijke doelstelling, bevatten zo concreet mogelijke voorschriften en berusten op een evenwichtige belangenafweging. Maar soms zijn juist algemene normen nodig, bijvoorbeeld als eerste stap om tot overeenstemming binnen de branche te komen.

5. Gedragscodes tonen aan dat ze een publiek belang dienen. Hiermee is niet onverenigbaar dat gedragscodes ook het eigen belang van de branche dienen (dat doen ze bijna altijd — vgl. de signaalfunctie).

6. Gedragscodes zijn in overeenstemming met de wet- en regelgeving in Europa en Nederland. Dit heeft o.m. betekenis voor gedragscodes als instrument voor de implementatie van richtlijnen, en voor de inhoud van gedragscodes als aanvulling op of uitwerking van richtlijnen met een minimum- of maximumharmonisatie (aanvullende functie).

7. Gedragscodes die gericht zijn op consumentenbescherming (beschermingsfunctie), zijn mogelijk eerder juridisch bindend dan gedragscodes met een andere doelstelling, zeker als ze concrete normen bevatten. Een branche mag op basis van vrijwilligheid meer doen voor de 'afnemers' dan wettelijk geboden of toegestaan is.

*Betrokkenheid overheid*

8. Juridische binding van gedragscodes ligt voor de hand bij:

*a.* gedragscodes waarbij de overheid intensief is betrokken, bijvoorbeeld wanneer zij gedragscodes verplicht stelt en mede de inhoud ervan bepaalt door concreet voor te schrijven hoe ze tot stand komen en wat ze inhouden (voorbeeld aanvullende functie OHP);

*b.* gedragscodes die zijn goedgekeurd door de overheid of door daartoe aangewezen nationale of Europese instanties (voorbeeld privacy);

*c.* gedragscodes die algemeen verbindend zijn verklaard (voorbeeld consumentenrechten);

*d.* gedragscodes die tot stand zijn gebracht door de desbetreffende branche in nauwe en gelijkwaardige samenwerking met de 'afnemers';

*e.* gedragscodes waar in overeenkomsten naar wordt verwezen dan wel als derdenbeding of als kettingbeding worden opgelegd.

*Procedurele kaders*

9. Een ontwikkeling waarbij net als bij Algemene Voorwaarden gedragscodes op voet van gelijkheid tot stand worden gebracht door de gezamenlijke inspanning van alle betrokkenen — kort: de branche en de 'afnemers' onder leiding van de SER — verdient aanbeveling.

10. Regelmatige evaluaties en aanpassing van gedragscodes wanneer de evaluaties daartoe aanleiding geven, zijn wenselijk.

11. Geschilbeslechting in gedragscodes opgelegd, moet aan eisen van een behoorlijke procedure voldoen.

*Algemeen*

12. Wij hebben onvoldoende duidelijke en betrouwbare empirische gegevens kunnen verzamelen over het bestaan en het daadwerkelijke gebruik van branchegedragscodes in de praktijk van alledag, noch over de eventuele problemen die het gebruik oproept. Nader onderzoek is nodig.

13. Indien gedragscodes in het privaatrecht als reguleringsinstrument of als organisatiemodel een eigen plaats naast wetgeving en rechtspraak hebben, dienen ze aan eigen criteria te voldoen en niet (hoofdzakelijk) aan met wetgeving vergelijkbare criteria.

14. Een andere vraag is of een 'eigen' plaats, indien daarvan al sprake is, op enigerlei manier wettelijk geregeld moet worden en, zo ja, of het daarvoor nu al tijd is. Voorstelbaar is een groeimodel waarbij afgewacht wordt hoe de verdere ontwikkelingen zullen zijn ten aanzien van de hierboven genoemde punten, mede in het licht van de herziening van het IIA en, meer in het algemeen, de brede discussie over governance in Europa en over alternatieve wetgeving in Nederland, voor zover van belang voor het privaatrecht.

# Bijlage A

# Begripsomschrijvingen

Van de begrippen die wij in dit preadvies hanteren — zelfregulering, coregulering en gedragscodes — zijn veel verschillende definities (en benamingen) in omloop, variërend van ruim tot beperkt. Geen van deze definities is algemeen geaccepteerd, mede omdat de invulling van deze begrippen per land en wetgevingstraditie van dat land verschilt.[1] In deze paragraaf bespreken we kort, zonder pretentie van volledigheid, wat wij onder de verschillende begrippen verstaan.

*a. Zelfregulering*

Wij kiezen ervoor om bij het formuleren van onze begripsomschrijving van zelfregulering aansluiting te zoeken bij de vier kernelementen van zelfregulering zoals onderscheiden door Giesen (die zelf overigens van alternatieve regelgeving spreekt).[2]

*(1) Zelfregulering vs. overheidsregulering*

Het eerste kenmerk dat Giesen onderscheidt is dat zelfregulering steeds als iets wezenlijk anders dan overheidsregulering wordt beschouwd: het betreft niet-statelijke regels of, anders gezegd, regels van private oorsprong.[3] Van Driel spreekt in dit kader over 'recht in eigen kring'.[4] Het is echter de vraag of zelfregulering steeds tegenover overheidsregulering geplaatst kan worden. Voor sommigen is het ontbreken van elke vorm van overheidsinvloed een voorwaarde om van zelfregulering te spreken. Anderen trekken de grens daar waar de overheid de aanzet tot het opstellen van de regels geeft.[5] Weer anderen geven aan dat er tussen zelfregulering en overheidsregulering een glijdende schaal van meer naar minder overheidsinvloed zit.[6] Dit leidt tot verschillende classificaties van zelfregulering.[7]

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1. Giesen 2007b, p. 8-9. Vgl. ook Verdoodt 2007, p. 13-15. Zie voor een overzicht van enkele van de in omloop zijnde definities van zelfregulering bijvoorbeeld Giesen 2007b, p. 8, Black 2001, p. 114-122 en Verdoodt 2007, p. 3-6. Over coregulering zie bijvoorbeeld Verbruggen 2009, p. 425 en (in de mediasector) Hans Bredow Institut & EMR, *Study on Co-Regulation Measures in the Media Sector*, juni 2006, p. 18-27 (te downloaden via www.ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf, laatst geraadpleegd 16 september 2013).
2. Giesen 2007b, p. 10-13, met uitvoerige verdere literatuurverwijzingen. Vgl. Menting 2011, p. 10-13.
3. Giesen 2007b, p. 10. Zie onder andere ook Polak 1986, p. 217, Van Driel 1989, p. 2 en p. 12 en Schiek 2007, p. 444-445 die spreekt over 'private actor rule-making'. Black 2001, p. 113 stelt dat 'whatever self-regulation is, it is not state regulation'. Vgl. ook Page 1986, p. 144: 'Negatively, self-regulation may be defined as not public governmental regulation'.
4. Van Driel 1989, p. 2.
5. Zie Verdoodt 2007, p. 14-15 met verdere verwijzingen.
6. Onder andere Huyse & Parmentier 1990, p. 259-269, Ogus 1995, p. 99-100, Gunningham & Rees 1997, p. 365-366, Sinclair 1997, p. 530, Baarsma e.a. 2004, p. 7-8, Bartle & Vass 2007, p. 887 e.v., Verdoodt 2007, p. 16 en Verbruggen 2009, p. 428.
7. Zie bijvoorbeeld Black 1996 en 2001, Geelhoed 1993, en Eijlander & Voermans 1999, p. 71-74.

*(2) Privaatrechtelijk verschijnsel*
In het verlengde van het eerste kenmerk wordt zelfregulering veelal geduid als een privaatrechtelijk verschijnsel. Dat is het tweede kenmerk dat Giesen onderscheidt. Het betekent volgens hem dat er naast de traditionele, publieke wetgevers nu ook private wetgevers staan die hun private verhouding zelf reguleren, zonder dat daar per se overheidsinterventie aan te pas hoeft te komen.[8] Waar dit voorheen gebeurde door middel van contracten (individuele regels), reguleren private partijen hun onderlinge verhoudingen nu ook door middel van algemene private regels.[9] Zelfregulering is daarmee uiteindelijk particuliere regelgeving.[10]

*(3) Collectiviteit*
Een derde kenmerk waar Giesen op wijst betreft de volgens hem collectieve aard van zelfregulering. Het gaat om het collectief reguleren van gedrag door een groep van, bijvoorbeeld, ondernemingen en (branche)organisaties.[11] Hiermee wordt tevens aangegeven dat zelfregulering gekenmerkt wordt door algemeenheid: het betreft geen regels over een individueel geval. Contracten vallen er dus niet onder.[12] Verdoodt wijst er echter op dat het uitsluiten van individuele zelfregulering, zelfregulering door een enkele onderneming, voor de praktijk belangrijke initiatieven zou miskennen. Ook deze initiatieven kunnen volgens haar een zelfregulerend karakter hebben. Zelfregulering veronderstelt daarbij echter wel een externe component.[13]

*(4) Zelfregulering*
Het laatste element dat Giesen onderscheidt raakt aan de vraag naar de 'zelf' van zelfregulering. Wezenlijk is dat degene die reguleert ook degene is die gereguleerd wordt. Giesen vat dit kenmerk ruim op: onder zelfregulering vallen volgens hem zowel regels opgesteld door deze personen of organisaties (collectief) waarmee zij zichzelf en degene die zij representeren reguleren, als de regels waarmee zij anderen (derden) reguleren. De essentie ligt daarbij in het feit dat in het laatste geval de regelgever eerst en vooral zichzelf reguleert.[14] Anderen trekken echter een grens daar waar de regels derden raken. Zo spreken Cafaggi en Snyder niet langer van zelfregulering wanneer de regelgevers (ook) anderen dan zichzelf reguleren.[15]

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8. Giesen 2007b, p. 7 en p. 10-11 en Geelhoed 1993, p. 49. Dit neemt niet weg dat (sommige vormen van) zelfregulering, bijvoorbeeld in het milieurecht, juist ook publiekrechtelijke thema's en belangen kunnen bestrijken, aldus Giesen 2007b, p. 10.
9. Giesen 2007b, p. 11 en Lindahl 2006, p. 40. Vgl. ook Snyder 2003 die een onderscheid maakt tussen 'publicly and privately made law' en Vranken 2005, p. 95-96.
10. Van Driel 1989, p. 1-2, die zelfregulering karakteriseert als 'een verzamelbegrip van particuliere regelgeving'.
11. Giesen 2007b, p. 11. Vgl. ook Black 1996, p. 27 ('[T]he essence of self-regulation is a form of modern government'), Page 1986, p. 144-145, Scott 2006, p. 132 en Ogus & Carbonara 2011, p. 229.Vgl. vanuit rechtsfilosofisch perspectief ook Lindahl 2006, p. 43.
12. Nu daar zowel het collectieve element als 'de algemeenheid' ontbreekt, aldus Giesen 2007b, p. 11.
13. Verdoodt 2007, p. 17: 'Zij veronderstelt een zekere openheid en engagement naar de buitenwereld toe, met name doordat zij regels of mechanismen instelt die de verhoudingen met de cliënt, consument of — in het kader van een ruimere maatschappelijke — burger, beïnvloeden'. Vgl. over het onderscheid tussen collectieve en individuele zelfregulering ook Black 2001, p. 116-118.
14. Giesen 2007b, p. 12. Vgl. ook Scott 2006, p. 133.
15. Cafaggi spreekt in dat geval over 'participatory private regulation'. Samen met 'self-regulation' valt dit onder de noemer 'private regulation' (Cafaggi 2006, p. 18-19). Snyder kwalificeert dergelijke regelgeving als 'private lawmaking' (Snyder 2003, p. 387-388 en p. 446-448).

Hoewel deze kenmerken en invulling die daaraan is gegeven door Giesen op zichzelf helder zijn, roepen ze op enkele punten vragen op. Enkelen hiervan hebben we kort aangestipt. Met het oog op deze ruimte voor debat hanteren wij hier een ruime definitie van zelfregulering. De vier kenmerken van Giesen zien wij daarbij het meest neutraal terugkomen in de definitie van Van Driel. Zij omschrijft zelfregulering als: 'Niet-statelijke regels die al dan niet in samenwerking met anderen worden vastgesteld door degenen voor wie de regels bestemd zijn respectievelijk hun vertegenwoordigers, en waarbij toezicht op de naleving mede door deze groepen wordt uitgeoefend'.[16] Wat deze definitie echter mist, is het feit dat private regelgevers vaak ook zelf (maar niet noodzakelijk) de handhaving en uitvoering van de regels in handen hebben.[17] Dit zien we bijvoorbeeld wel terug in de (ruimere) definitie van Baarsma e.a.: 'Maatschappelijke partijen nemen in bepaalde mate zelf verantwoordelijkheid voor het opstellen en/of uitvoeren en/of handhaven van regels, indien nodig binnen een wettelijk kader'.[18] Als we deze elementen combineren met de definitie van Van Driel, ontstaat de volgende door ons te hanteren omschrijving van zelfregulering:

*Niet-statelijke regels die al dan niet in samenwerking met anderen worden vastgesteld door degenen voor wie de regels bestemd zijn, respectievelijk hun vertegenwoordigers, waarbij het uitvoeren en/of handhaven van en/of het houden van toezicht op deze regels mede door deze groep wordt uitgeoefend.*

*b. Coregulering*

Kernelement van het begrip 'coregulering' is de betrokkenheid van zowel publieke als private actoren in een of meer fasen van het reguleringsproces, waarin zij de 'regelgevende macht' delen (en samenwerken). Over het algemeen wordt het delen van deze regelgevende macht bezien in de context van het normstellende gedeelte van het reguleringsproces.[19] Het gaat dan bijvoorbeeld om het stellen van regels door private partijen binnen de kaders en criteria die de overheid daarvoor heeft uitgezet in wet- of regelgeving.[20] Private en publieke actoren kunnen echter ook met betrekking tot handhaving en geschilbeslechting de regelgevende macht delen.[21] In een dergelijke ruime begripsopvatting kan coregulering gedefinieerd worden als 'a regulation method that includes the participation of both private and public actors in the regulation of specific interests and objectives'.[22] Wanneer coregulering wordt beperkt tot het normstellende gedeelte van het reguleringsproces, zoals dat

16. Van Driel 1989, p. 2.
17. Vgl. Giesen 2007b, p. 8, in wiens definitie dit wel terugkomt. Zie hierover ook Verdoodt 2007, p. 15-16, Scott 2006, p. 132-133 en Eijlander 1993a, p. 181-182.
18. Baarsma e.a. 2003, p. 13.
19. Eijlander 2005, p. 3, Cafaggi 2006, p. 21 en p. 27-29, en Verbruggen 2009, p. 425 en p. 429.
20. Vgl. de definitie van coregulering van de Europese Commissie in het Institutioneel akkoord beter wetgeven (*PbEU* 2003, C321/21): '[H]et mechanisme waarbij een communautair wetsbesluit de verwezenlijking van de door de wetgevingsautoriteit omschreven doelstellingen overlaat aan de erkende betrokken partijen op dit gebied (met name economische subjecten, sociale partners, niet-gouvernementele organisaties en verenigingen)' (overweging 18).
21. Verbruggen 2009, p. 429 en Cafaggi 2006, p. 21. De definitie van de Europese Commissie is daarom volgens Verbruggen te beperkt, nu coregulering daarin (enkel) als een implementatiemechanisme wordt beschouwd (Verbruggen 2009, p. 428-430). Zie over het begrip 'coregulering' in Europees wetgevingsbeleid ook Best 2008, Eijlander 2005 en, uitgebreider, Svilpaite 2007a.
22. Verbruggen 2009, p. 425.

over het algemeen gebeurt, kunnen we het begrip kortweg definiëren als 'zelfregulering binnen een wettelijk kader'.[23] Hierbij kunnen drie algemene kenmerken worden onderscheiden: 1) de rol van de wetgever is complementair aan die van de private actoren en beperkt zich tot het stellen van (materieelrechtelijke of procedurele) randvoorwaarden; 2) de private actoren hebben aanzienlijke vrijheid om dit wettelijk kader nader uit te werken/te implementeren; 3) de overheid speelt een belangrijke rol bij het houden van toezicht op de resultaten van de (zelf-)regulering door de private actoren. De wijze waarop en de mate waarin de overheid randvoorwaarden stelt kunnen verschillen.[24]
De verhouding van coregulering tot zelfregulering is niet eenduidig: coregulering wordt soms als specifieke vorm van zelfregulering weggezet en soms als een compromis tussen zelfregulering en overheidsregulering.[25] Dit zien we bijvoorbeeld terug in het verschil in de terminologie die in het Europese en Nederlandse wetgevingsbeleid wordt gehanteerd. Waar het Nederlandse wetgevingsbeleid spreekt over wettelijk geconditioneerde en gestructureerde zelfregulering zou vanuit een Europees perspectief eerder gesproken worden over coregulering.[26]
In dit preadvies zullen we alleen spreken van zelfregulering en dat omvat, tenzij anders aangegeven, ook coregulering. De bovenstaande definitie van zelfregulering is daarbij zodanig ruim geformuleerd dat deze hiervoor ook ruimte biedt: de kenmerken van coregulering die hierboven zijn genoemd komen terug in de definitie.

*c. Gedragscode*

Gedragscodes bieden partijen de mogelijkheid om afspraken te maken over bepaalde gedragsregels, waarbij er grote vrijheid is om te bepalen waar deze afspraken precies betrekking op hebben. Ze geven bepaalde gedragsregels aan. Gedragscodes worden zowel op bedrijfsniveau (bedrijfscodes) als op branche- en beroepsniveau opgesteld. Hun inhoud varieert van ethische normen en waarden tot concrete normen voor bijvoorbeeld bepaalde producten of diensten. Wij zullen de volgende definitie hanteren:

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23. Vgl. Eijlander 1993b, p. 136 over wettelijk geconditioneerde zelfregulering. Hij merkt daarbij op dat '[w]ettelijk geconditioneerde zelfregulering in tal van gedaanten voorkomt in onze wetgeving. Nogal eens wordt in eerste instantie en primair de mogelijkheid geboden om tot zelfregulering te komen, waarbij de mogelijkheid van overheidsregulering als "stok achter de deur" aanwezig blijft. Het adagium luidt dan: zelfregulering primair, overheidsregulering subsidiair' (Eijlander 1993b, p. 136. Vgl. ook Eijlander 1993a, p. 228-232).
24. Eijlander 1993a, p. 228-232 en Eijlander 1997, p. 50-52 (beide over wettelijk geconditioneerde zelfregulering) en Van Heesen-Laclé & Meuwese 2007, p. 119-120.
25. Verdoodt 2007, p. 3.
26. Zie over dit verschil Eijlander 2005, p. 7 '[W]e may conclude that the meaning of the concept of co-regulation in the Dutch national context differs from that in the European context. Co-regulation within the EU means that the framework of the rules is laid down in legislative acts of the European Union. Co-regulation is an implementing mechanism of these general rules. In fact, this is what we call "conditioned self-regulation" at the national level. In the case of co-regulation, the central legislature determines what implementing measures can be left to the parties in the field or sector'. Vgl. ook Van Heesen-Laclé & Meuwese 2009, p. 119: '[n]owadays a clear desire on the part of the Dutch Government to implement forms of co-regulation (often still called "self-regulation") can be discerned […]. At the other end of the spectrum we find "co-regulation", which is sometimes literally translated into Dutch as "*coregulering*" although the more accurate Dutch expression is "*wettelijk geconditioneerde zelfregulering*" […]'.Zie nader over wettelijk geconditioneerde zelfregulering bijvoorbeeld Eijlander 1993a, p. 228-232 en Dorbeck-Jung 1993.

*Afspraken (onderling afgestemde bepalingen) tussen de direct betrokkenen waarmee waarden, normen en regels worden vastgesteld die aangeven hoe de direct betrokkenen (die zich aan de code binden) zich moeten gedragen jegens belanghebbenden, waarbij uitvoeren en/of handhaven mede door deze direct betrokkenen worden uitgeoefend.*[27]

Deze definitie ziet op de inhoud van gedragscodes. Het is dus niet steeds de benaming 'gedragscode' die de doorslag geeft voor de kwalificatie van een instrument als gedragscode, met name niet omdat er vele benamingen in omloop zijn die hetzelfde verschijnsel aanduiden (erecode, ethische code, gedragsregels, code of conduct, rules of conduct, code of ethics, code of practice, …). Voorwaarde is wel dat het steeds gaat om het voorschrijven van gedrag.[28] Gedragsgerichte instrumenten met wezenlijk andere benamingen, zoals een protocol of een convenant vallen echter buiten de definitie.[29]
Het feit dat wij ons tot gedragscodes als vorm van zelf- en coregulering beperken, betekent dat wij soft law buiten beschouwing laten.[30]

27. Vgl. Menting 2011, p. 13-14 en de definitie van gedragscodes uit artikel 2 onderdeel f Richtlijn Oneerlijke handelspraktijken (Richtlijn 2005/29/EG, *PbEU* 2005, L 149/22): '[E]en overeenkomst of een aantal niet bij wettelijke of bestuursrechtelijke bepalingen van een lidstaat voorgeschreven regels waarin wordt vastgesteld hoe handelaren die zich aan de code binden, zich moeten gedragen met betrekking tot een of meer bepaalde handelspraktijken of bedrijfssectoren'.
28. Vgl. Baarsma e.a. 2003, p. 28.
29. Zie over het onderscheid tussen gedragscodes en andere zogenaamde 'gedragsgerichte instrumenten' Baarsma e.a. 2003, p. 28-29. In hun rapport merken zij op: 'De verdere invulling van de instrumenten in dit cluster staat de opstellers volledig vrij. […] De naam van het instrument noch het soort speelt daarbij een rol. De benaming van instrumenten is namelijk (mede) bepaald door historisch gegroeide tradities in bepaalde sector(en). Het lijkt aannemelijk dat strategische overwegingen een rol hebben gespeeld bij de keuze voor instrumenten als erecode en herenakkoord: door te verwijzen naar begrippen als "eer" en "heren" wordt impliciet gesuggereerd dat wie zich er niet aan houdt oneervol/oneerlijk handelt, en zich niet gedraagt zoals dat een heer betaamt. Het zegt echter niets over de inhoud van de afspraken die worden gemaakt. Ook het soort code dat men gebruikt, zegt niets over de inhoud ervan. Zo hanteren de NVM en de VBO, twee verenigingen voor makelaars en vastgoeddeskundigen, nagenoeg dezelfde gedragsregels, maar noemt de ene vereniging het een erecode en de ander een gedragscode. Het gaat in deze gevallen dus meer om de naam die je op het instrument plakt en niet zozeer om het instrument zelf' (Baarsma e.a. 2003, p. 28-29).
30. Zie over de verhouding tussen soft law en zelfregulering Senden 2005, p. 24-27.

# Bijlage B

# Methodologie empirisch functieonderzoek

Het empirisch onderzoek naar de functies van Europese en Nederlandse gedragscodes, opgesteld op brancheniveau, heeft plaatsgevonden aan de hand van een analyseschema, specifiek ontwikkeld voor het achterhalen van de functies van gedragscodes.[1] Dit schema bestaat uit zeven algemene kernelementen: 'algemeen', 'aanleiding', 'doel', 'normen', 'handhaving', 'gedragscode, wetgever en wetgeving' en 'toegankelijkheid'. Deze hoofdelementen zijn opgedeeld in een aantal subelementen. De subelementen zijn daarbij gekoppeld aan verschillende vragen die van belang worden geacht voor het bepalen van de functies. Dit heeft geresulteerd in het volgende schema:

**Analyseschema voor functiebepaling[2]**

| Element | | Vragen |
|---|---|---|
| **Algemeen** | | |
| *Opsteller(s)* | 1. | Door wie/welke partijen is de gedragscode opgesteld? |
| *Normadressaten* | 2. | Tot wie is de gedragscode gericht? |
| *Toepassingsbereik* | 3. | Wat is het toepassingsbereik van de gedragscode? |
| **Aanleiding** | 4. | Wat was de aanleiding voor het opstellen (en, indien van toepassing, herzien) van de gedragscode? |
| **Doel** | 5. | Wat is het doel van de gedragscode? |
| **Normen** | | |
| *Type* | 6. | Wat voor type normen zijn er in de gedragscode opgenomen?<br>a. Inhoudelijke, concrete normen, en/of<br>b. Morele/ethische of aspiratieve normen |
| *Karakter* | 7. | Wat is het karakter van de normen (specifiek of algemeen)? |
| *Bindende kracht* | 8. | Hebben de normen bindende kracht? |

1. Zie voor onderzoek dat op soortgelijke wijze de inhoud gedragscodes onderzoekt bijvoorbeeld Van Tulder & Kolk 2001, Price & Verhulst 2005, Tambini, Leonardi & Marsden 2008 en Van der Zeijden & Van der Horst 2008.
2. Dat schema was reeds ontwikkeld in het kader van een eerder, verkennend onderzoek naar de functies van gedragscodes (zie nader Menting 2011, met name p. 22-29). Voor het empirisch onderzoek in de dissertatie is het bestaande schema op enkele punten herzien. Het zelfopgestelde conceptkader is daarna nog vergeleken met soortgelijke analyseschema's in de literatuur en waar nodig aangevuld (gekeken is naar de analyseschema's die De Groot-Van Leeuwen & De Groot 1998, Van Tulder en Kolk 2001 (p. 273-274), Tambini, Leonardi & Marsden 2008 (p. 59-62 die voortbouwen op Price & Verhulst 2005, p. 44-66) en Van der Zeijden & Van der Horst 2008 (p. 63-65) hebben ontwikkeld voor de empirische bestudering van (de inhoud van) gedragscodes).

| | | |
|---|---|---|
| **Handhaving** | | |
| *Algemeen* | 9. | Bevat de gedragscode bepalingen met betrekking tot naleving en handhaving? |
| *Toezichthouder* | 10. | Is er een toezichthoudende instantie, en zo ja, is deze onafhankelijk? |
| *Geschilbeslechting* | 11. | Zijn er geschilbeslechtingsmechanismen? |
| *Sancties* | 12. | Kunnen er sancties worden opgelegd in geval van niet-naleving van de gedragscode? |
| | 13. | Kan het opvolgen van deze sancties worden afgedwongen? |
| **Gedragscode, wetgever en wetgeving** | | |
| *Code – wetgever* | 14. | Is de Europese en/of Nederlandse overheid op enigerlei wijze betrokken geweest bij het opstellen en ontwikkelen van de gedragscode (interactie wetgever — private actoren)? |
| *Code – wetgeving* | 15. | Is er sprake van een relatie/interactie tussen de gedragscode en Europese en/of Nederlandse wet- en regelgeving en zo ja, wat is de aard van deze relatie? |
| **Toegankelijkheid** | 16. | Bevat de gedragscode een toelichting, zijn er bepalingen voor evaluatie en herziening, wordt de gedragscode regelmatig geëvalueerd/herzien (en waarom) en is de gedragscode ook overigens goed toegankelijk voor derden? |

Aan de hand van dit analyseschema zijn de functies van de gedragscodes bepaald. De antwoorden op de vragen uit het schema moeten in samenhang worden bezien. Dat wil zeggen dat de antwoorden gezamenlijk tot de functiebepaling leiden.
Er is een louter *tekstuele* analyse verricht: steeds is alleen de tekst van de gedragscodes bestudeerd, waar nodig aangevuld met aan de gedragscode gerelateerde publiek toegankelijke schriftelijke informatie. De inhoud van de gedragscodes is dus steeds het uitgangspunt geweest bij het hanteren van het analyseschema. De verschillende elementen uit het analyseschema zijn hierop toegespitst: zij kunnen worden beoordeeld aan de hand van de tekst van de gedragscode zelf en eventuele aanvullende schriftelijke informatie. Dit heeft als belangrijk voordeel dat op een intensieve maar desondanks toch relatief simpele manier een groot aantal gedragscodes kan worden bestudeerd. Er kan hiermee een bre(e)d(er) overzicht van de functies worden verkregen. Keerzijde is dat hiermee nog geen inzicht wordt verkregen in het daadwerkelijke gebruik van de gedragscodes door de opstellers respectievelijk de normadressaten. Dat zal alsnog in de dissertatie gebeuren. Daarin zal ook voor enkele gedragscodes een diepgaande functieanalyse plaatsvinden om te controleren of de tekstuele analyse voldoende betrouwbaar is.

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Hoofdstuk 2

# Assessing Effectiveness of International Private Regulation in the CSR Arena

Prof. mr. Martijn Scheltema

## 2.1 Introduction

One might look at the effectiveness of international[1] private regulation many angles. These turn on the method of assessing effectiveness. This method might involve a legal perspective. However, one may acknowledge the importance of other scientific disciplines to assess the effectiveness of international private regulation too. In this respect an economic, sociological or psychological/behavioral avenue might be explored.[2] Obviously, the more avenues demonstrate effectiveness, the more effective private regulation is deemed to be. Moreover, an integrated approach is required to thoroughly assess effectiveness of international private regulation.

However, the notion of effectiveness is unspecified. One might use this notion in addition to the legal or sociological avenue or as a synonym for impact assessment (which adopts insights from the economic and sociological approach). I define effectiveness, in line with my call for an integrated approach, as an overarching notion involving legal, economic, sociological, and psychological/behavioral avenues. Therefore, this contribution outlines a methodology which adopts all these approaches and uses insights from all these disciplines to find ex ante indicators predicting the effectiveness of international private regulation and to find instruments to measure the effectiveness thereof ex post in comparison with other international private regulation.[3] Because international private regulation is omnipresent in international arenas and might differ along the lines of these arenas, this contribution is going to focus on international private regulation in the Corporate Social Responsibility (CSR) arena.[4]

By and large, international private regulation might be defined as a set of private norms which have been established, sometimes in collaboration with others, by those who are bound by these rules, their representatives or an overarching body,

1. International private regulation is also referred to as transnational private regulation to make clear it is not inter-state regulation. However, the term transnational is also used to point at inter-state regulation. Therefore, the term transnational does not offer greater clarification. Still it is important to note that international private regulation is not inter-state regulation, but either regulation set by private entities or non-binding rules/principles emanating from governmental entities.
2. These four avenues are explained in paragraph 2.2.2.
3. Therefore, this methodology might be less fit to assess the effectiveness of local initiatives. Furthermore, comparing the effectiveness of international private regulation might be more viable at this stage than establishing an overarching global framework involving requirements for this type of regulation because relevant stakeholders do not (yet) agree on these requirements throughout the global CSR arena. However, eventually overarching global standards (throughout the CSR arena) might be derived by comparing these initiatives.
4. Hence, the methodology is best equipped to assess the effectiveness of international private regulation which covers (one or (preferably) more of the) CSR topics (human rights, environment, labor conditions, prevention of corruption and evasion of taxes).

and these norms being enforced.[5] International private regulation might also be defined as a framework in which societal actors to a certain extent accept responsibility for establishing and/or applying and/or enforcing such rules, if applicable, within a legislative or legal framework.[6] The key actors in such regimes include both civil society or non-governmental organizations (NGOs) and enterprises.[7] They might even include governmental actors. Although private regulation in many instances has a self-binding effect, it affects third parties as well, in many cases even intentionally.[8] International private regulatory regimes are international (or transnational) in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties. International or transnational private regulation differs from traditional domestic forms of private regulation because of its broader scope and it being less specific in many cases.[9]

## 2.2 Assessing effectiveness of international private regulation

### 2.2.1 The need for assessing effectiveness

The search for the outline of a methodology to assess effectiveness of international private regulation in comparison with other international private regulation begs the question whether a need exists for assessing effectiveness. It will probably not be a surprise that in my opinion this is the case. However, this is not self-evident. International private regulation has many functions, for example a signaling function. Is it a bad thing that this type of private regulation is rather ineffective in terms of changing the performance of, for example, focussing companies on human rights and environmental issues? Apart from the problems this type of regulation might generate in terms of competition, restricting trade and public procurement issues (which, as will be discussed below, are part of the effectiveness assessment), in my view progress has to be made in the environmental (e.g. climate change), human rights and more broadly speaking in the whole CSR arena. Therefore, initiatives which have a signaling function without contributing to any change in that respect might be considered less effective in comparison with initiatives which do contribute to this.

The need for assessment of the effectiveness of international private regulation might be illustrated from different perspectives. For example, private initiatives might learn from each other which measures or norms are most effective. Furthermore, a multinational enterprise considering implementing certain international private regulations might be interested in assessing whether implementing (yet another) private initiative is beneficial. If a tool exists to assess the (economic) effectiveness of specific international private regulation, this also might be an, or even the, incentive for enterprises to implement this regulation. Research has revealed that key factors which led business to support FSC, a CSR initiative on sustainable wood, were based on pragmatic evaluations related to the possibility of

5. Overmars 2011, p. 16.
6. Giesen 2007, pp. 74-78 and especially 77. However, other definitions are conceivable, but as I focus on effectiveness I am not going to elaborate on this definition.
7. Scott, Cafaggi and Senden 2011, p. 3.
8. Cf. Ogus and Carbonara 2011, pp. 228-230.
9. Curtin and Senden 2011, p. 164.

either increased market access or the protection of market share and not through normative evaluations relating to participation, transparency and so on.[10] Furthermore, enterprises might be interested to learn which type of private regulation to implement. For example, it might be beneficial to use the contractual model through a supply chain, but also to engage in a multi-stakeholder initiative or to establish an internal code of conduct. An enterprise (or an industry as a whole) might need tools to assess whether the contractual model, the multi-stakeholder initiative or the code of conduct delivers best results. Assessing effectiveness of these options is indispensable in making an educated guess. However, to date (global operating) businesses do not seem highly interested in effectiveness assessments, mainly because they consider international private regulation to reflect the measures they have already taken. International private regulation does therefore (in their view) not bring about real changes in the day-to-day business (which could be assessed). That said, it is important to note that many private regulatory regimes exist in the CSR arena and it becomes increasingly difficult for businesses to choose between these regimes.[11]

Furthermore, effectiveness may vary among the stakeholders involved. For example, self-regulation may be quite prosperous for the manufacturers or the extracting industry involved, but the contrary may be true for their buyers or the local communities which are affected by their manufacturing processes or their (mining) activities. Therefore, assessment of the effectiveness of international private regulation calls for scrutinizing the effects on all stakeholders.[12]

Public regulators considering the promulgation of new legislation might benefit from assessment of the effectiveness of international private regulation too. If this assessment reveals that it achieves their objectives, private regulation might become a viable solution to fulfill public policy goals.[13] International private regulation

10. Casey and Scott 2011, p. 91.
11. See Alvarez and Van Hagen 2012, p. 21, who refer to ISEAL research which shows that the respondents indeed experience difficulties. Some authors point at the binding nature of international private regulation, which in their view excludes the possibility to choose. See e.g. Giesen 2007, pp. 93-106, who discerns several ways in which private regulation might be binding: public regulation in which either is referred to private regulation or which involves open norms complemented by private regulation, or an agreement. However, on (international) CSR issues such public legislation is less frequent. Therefore, before private regulation becomes binding on an enterprise on the international level, it often has a choice whether it accepts a specific regime.
12. This assessment includes the effects on the final beneficiaries. Cf. Cafaggi 2011, p. 32.
13. Cafaggi and Renda 2012, p. 26; Schouten 2013, p. 68. Cf. the United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013); the Annexes to the Impact Assessment Guidelines of the European Commission of 2009, pp. 24 and 27, to be found at http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf (accessed November 13, 2013). However, the aim of enterprises involved in the setting of private regulation might also be to keep governments at an arm's length and to prevent public regulation. Cf. Utting 2001, pp. 108 and 109. For them too it is important to achieve the objectives strived for by governmental organizations in order to minimize the risk of public regulation. Assessment of the effectiveness of international private regulation might assist in realizing this. However, the threat of public regulation to incentivize private regulation (self-regulation) seems not always helpful, especially if (i) sufficient public resources exist to monitor and regulate, (ii) these resources are not employed to incentivize private regulation and (iii) consensus exists amongst the public regulator and the regulated entities about the norms or standards but not on the ways to achieve compliance. See Short 2013, p. 24. See furthermore on the complications which might be caused by the interaction of public and private regulation (e.g watering down standards and non-acceptance of public standards beyond their territorial reach) in connection with bio fuels Schouten 2013, pp. 114-125.

might even fulfill (national) public policy objectives beyond the legal sphere of a national state. The public legislator might also be interested in the effectiveness of (private) enforcement of international private regulation to assess whether (additional) public enforcement is required.[14] If the assessment reveals that the private regulation malfunctions and does not reach the government objectives, this might stimulate the promulgation of public legislation.[15] For example, the legislator might want to assess whether (certain) eco-labels[16] have a real impact on (the improvement of) the environment and do not unnecessarily hamper trade and, if no measurable impact could be assessed and/or trade is unnecessarily hampered, which type of public regulation has to be promulgated to enhance trade and lessen the environmental impact of the eco-labeled products. In this respect it is important to note that eco-labels perform best if the legislative environmental standards are not too high.[17] The legislator might consider supporting effective eco-labels too.[18] This might be achieved through tax relief, subsidies, recognition of certified standards (in connection with the assessment of whether certain sustainability standards have been met), technical assistance or training.[19] The public legislator might eventually even require proof of effectiveness of international private regulation in order to refrain from promulgating public legislation. For example, the European Commission calls for clear commitments from all concerned stakeholders in the CSR arena, with (i) performance indicators, (ii) a framework which provides for objective monitoring mechanisms, (iii) performance review, (iv) the possibility of improving commitments as required and (v) including an effective accountability mechanism for dealing with complaints regarding non-compliance.[20] If the stakeholders involved are unable to establish effective (international) private regulation in this arena, it seems likely the European Commission will use (legislative) instruments. Furthermore, eco-labels might for example lead to additional pollution because paying for an eco-label might alleviate guilt and induce consumers to pollute

14. Balleisen and Eisner even contend that such assessment is necessary to prevent insufficient regulatory oversight which might result from international private regulation. See Balleisen and Eisner 2009, p. 127.
15. Overmars 2011, p. 18. Therefore Cafaggi and Renda contend that the public regulator should not leave the assessment of international private regulation to private players. See Cafaggi and Renda 2012, p. 25. See also the Annexes to the Impact Assessment Guidelines of the European Commission of 2009, p. 24, to be found at http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf (accessed November 13, 2013).
16. Eco-labels involve inter alia words, symbols and marks indicating the compliance with certain environmental (or social) standards which compliance has been certified. See e.g. Gandara 2013, p. 22 ff.
17. Gandara 2013, pp. 127 and 348. However, in my view this should not be an incentive to lower regulatory standards, but to assess whether an eco-label might be able to support or satisfy governmental objectives.
18. For example by remedying the effects of companies using frivolous or false environmental claims and thus jeopardizing the real eco-label market. See e.g. Gandara 2013, pp. 133-142. However, tax related measures seem unnecessary costly. See Gandara 2013, pp. 158 and 159. In this respect it is of interest to note that the European Commission has developed its own (voluntary) eco-label. See www.ecolabel.eu (accessed August 7, 2013).
19. See e.g. United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, p. 45, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013).
20. See Communication from the Commission on a renewed EU strategy 2011-14 for Corporate Social Responsibility of October 25, 2011, COM(2011)681, p. 10, to be found at ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf (accessed April 20, 2013).

even more.[21] However, no systematic monitoring of international private regulation by public regulators exists, not least because of the (often) global nature of international private regulation. Monitoring by national or regional governmental bodies does not seem very helpful in such circumstances. Although global scrutiny of international private regulation by international public organizations is obviously preferable, this does not prevent regional or national public bodies from an appraisal of an international private regulatory regime (preferably through public regulatory cooperation).[22] This appraisal might be connected with the issues mentioned previously, but also with the legitimacy of certain international private regulation in the sense that the public body might want to assess whether (important) stakeholders have been allowed to provide their views on the provisioned international private regulation or have even been a co-regulator.

Furthermore, the plethora of CSR labels causes difficulties in (public) procurement.[23] This might be a complicating factor because the use of, for example, eco-labels in public procurement is considered to be a driver for the uptake of these eco-labels (which the government might favor) in markets.[24] If a government or an enterprise prescribes a specific CSR label, an applicant might contend that another label it adheres to performs as well as the label prescribed and also meets the requirements of the procurator. Governments and enterprises have few tools to assess this contention.[25] However, this plethora of labels is not necessarily a problem in a broader context. Different standards may serve a purpose in different fields, issues, regions or type of companies (for example smallholders and distributors). They might be complementary.[26] That said, if certain initiatives involve comparable objectives in comparable arenas, the question of effectiveness arises. This is also true regarding initiatives in different arenas as they might overlap and interfere with possible ensuing lack of effectiveness. Furthermore, international private regulation, especially when intended to create a level playing field between competitors, might cause market disruption. To a certain extent this might be useful in supporting CSR, but of course clear lines are needed. International private regulation should therefore (effectively) meet the CSR policy requirements, but should not unneces-

21. The United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, p. 27, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013); Gandara 2013, p. 200.
22. Cafaggi and Renda 2012, p. 25.
23. See on this plethora in general the United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 2: initiatives, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013); the United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 34-38, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013) and Kolk and Van Tulder 2005, pp. 6 and 7. However, they suggest that companies in general do not experience problems with this. See Kolk and Van Tulder 2005, p. 17. Cf. on the problems connected with public procurement and sustainability Parlevliet 2012, pp. 792-802.
24. Alvarez and Van Hagen 2012, p. 11.
25. EU regulation prohibits the prescription of a specific label and prescribes the use of certain criteria with which the labels must comply. According to EU regulations the procurer has to determine whether these criteria have been met. In the Netherlands the 'CO2 Prestatieladder' has been developed to assist business (and government) in assessing the carbon footprint of a tendering company. See www.skao.nl (accessed April 20, 2013).
26. See e.g. United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 15-17 and 35, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013).

sarily disrupt markets or hamper (sustainable) trade.[27] For example, international private regulation might pose a (factual) trade barrier, which may lead to complaints to the WTO or GATT.[28] The more (ineffective) international private regulation exists, the greater the risk of (unnecessary) market disruption or restrict trade. Private regulation might have other adverse effects as well. Members of a certain scheme might stick to suboptimal agreements and focal points with no incentive to change (lock-in effects).[29] Furthermore, covered changes might be induced by the prevalence of some interests over others and self-indulgence in the evaluation of private regulatory bodies might occur, especially when governance arrangements involve self-evaluation.[30] Notwithstanding this, effective private regulation might favor investment and might enhance trade if it is adhered to on a global level.

NGOs might also benefit from assessing the effectiveness of international private regulation. If an NGO, for example, assesses whether an enterprise has taken adequate measures to prevent environmental damage, it is relevant whether this enterprise has implemented specific international private regulation. If it has, the enterprise might promote its (professed) adequate measures. However, if the private regulation proves to be rather ineffective, the implementation thereof is a poor indicator of whether adequate measures actually have been taken. The implementation of specific private regulation does not support the enterprise's claim and this is obviously of relevance to the NGO. Besides this, NGOs considering setting new international private regulation in a certain arena might benefit from the assessment of whether effective private regulation already exists.

Beside the aforementioned issues, private entities which set international private regulation in many instances lack the rulemaking experience public regulators have.[31] The cause of this, *inter alia*, is the absence of restrictions on setting private regulation: anyone may be a rule-maker. This results in too much international private regulation in certain areas and sometimes of poor quality. Poorly drafted private regulation causes legal uncertainty and unnecessary cost.[32] This need for proper rule setting and best practices has for example been noted by the ISEAL Alliance, which organization has set the Code of ISEAL Good Practice. This codifies best practice for the design and implementation of social and environmental standards initiatives.[33]

27. Cf. Cafaggi and Renda 2012, pp. 8, 15, 26 and 27. See in connection with standardization Neerhof 2013, pp. 174-177.
28. It might be contended that a protectionist non-tariff barrier to trade is imposed. See Utting 2001, p. 97; Gandara 2013, pp. 19, 21 and 305-336 (description of the Mexican-U.S. Tuna Conflict). Cf. the WTO Technical Barriers to Trade (TBT) Agreement and especially annex 3 (in which best practices for standard setting are promulgated) to be found at www.wto.org (accessed March 27, 2013).
29. Cafaggi and Renda 2012, p. 17.
30. Cafaggi and Renda 2012, p. 17.
31. Cf. Giesen 2007, pp. 144 and 147-150 who proposes the establishment of directions on private regulation by governments.
32. See on the costs Kaplow 2011, p. 19.
33. This code is to be found at www.isealalliance.org/online-community/resources/iseal-standard-setting-code (accessed April 20, 2013). It is applicable to environmental and social standards for products or related processes and production methods (section 3.3). See on this e.g. Cafaggi and Renda 2012, p. 20. Cf. the Principles for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013).

Therefore, the effectiveness of international private regulation may be taken even less for granted than the effectiveness of public regulation. It is therefore important to assess the effectiveness of international private regulation.[34]
Finally, the plurality of actors, norms and rationales in the still growing transnational sphere of CSR may cause multiple public and private regulators to compete for business.[35] In this competition, especially between private regulatory regimes, assessing the effectiveness of international private regulation might prove to be a useful tool to choose certain regimes over others and to dismantle less effective international private regulation.

### 2.2.2 Different ways to assess effectiveness

The effectiveness of private regulation in the CSR area might, as has been touched upon in the introduction, be assessed in different ways. It might be assessed through a legal, but also through an economic, sociological or psychological/behavioral avenue.[36] The legal avenue focuses on (the objectives of) the private regulation itself (is it clear enough and does it provide additional value to existing (private) regulation), whether it provides 'conflict of law' rules in connection with other (private) regulation, enforcement of private regulation and conflict resolution. Therefore, this avenue does not analyze the substantive private norms, but provides for 'meta-rules' on the formation and enforcement of such regulation and the resolution of conflicts in connection with these norms. The economic avenue focuses on the actual impact of private regulation in terms of economic benefits/growth, but also considers social, consumer and environmental disadvantages and possible market disruption or restricting trade. The sociological approach is connected with acceptance (legitimacy) of private regulation and focuses on the way private regulation is communicated, the way in which it is implemented, whether proper procedures are used to engage relevant stakeholders and how the decision-making process is shaped. The psychological/behavioral approach analyzes the effects (if any) of private regulation on behavior.
In many instances, the more of those avenues that are fulfilled, the more likely it is that the international private regulation is effective. Moreover, these avenues are intertwined.[37] For example, engaging stakeholders in a regulatory scheme by representation and by organizing accountability might enhance acceptance as well as legitimacy (important aspects of the sociological approach) but might increase transaction and compliance costs (important from an economic point of view) and might hamper enforcement (an important aspect of the legal approach). Further-

34. This is recognized by the joint ISEAL and FAO initiative Sustainability Assessment of Food and Agriculture systems (SAFA guidelines). To be found at www.fao.org (accessed April 20, 2013). See on this initiative e.g. Cafaggi and Renda 2012, pp. 23-25.
35. Cf. Meidinger 2008, p. 518 and in respect of competition between private and public regulation Meuwese and Popelier 2011, p. 458. The competition for members can increase the standards. However, competition might also lead to watered-down standards. See in connection with bio fuels Schouten 2013, pp. 114-126. However, if several organizations establish regimes, control might emerge from both cooperation and competition. See Scott, Cafaggi and Senden 2011, p. 15.
36. However, other approaches are proposed as well. See e.g. Cafaggi and Renda 2012, p. 13 who contend that effectiveness measures ex ante the proportionality between means and ends and ex post the positive or negative impact of the regulatory measure over the different constituencies including regulated parties and beneficiaries.
37. Also Cafaggi and Renda 2012, p. 14.

more, (economic) impact assessment tends to neglect the (sociological) incentives to comply with a private regulatory framework and the possibility of effective enforcement.[38] However, as has been discussed in the foregoing, research has revealed that key factors which led business to support FSC were based on pragmatic (economic) evaluations related to the possibility of either increased market access or the protection of market share rather than through normative evaluations relating to participation, transparency and so on.[39] Thus (economic) effectiveness seems to be a more compelling driver for implementing international private regulation, than (just) acceptance of this regulation. That said, effectiveness is scarcely assessed taking a legal as well as an economic, sociological and psychological avenue.[40] An example of this is the MSI evaluation tool for multi-stakeholder initiatives in the human rights arena, a highly sophisticated evaluation tool with over 400 indicators, which analyzes effectiveness from a human rights perspective using insights from legal and sociologic disciplines but not from the economic and psychological avenues.[41]

Despite this, all these disciplines are needed to assess the effectiveness of international private regulation.[42] This might be supported by the fact that eco-labels which are part of the ISEAL Alliance (which provides meta-rules on international private agricultural standards including elements of the legal, economic and sociological approach) are best represented in the global markets.[43] This underlines the importance of scrutinizing international private regulation using the aforementioned approaches (because ISEAL takes such an integrated approach). In connection with this, effectiveness is preferably assessed by independent bodies because the private initiatives themselves might overstate their effectiveness.[44]

Effectiveness assessment in this sense should be applied to private rule-setting (*ex ante* approach) as well as to the analysis of the effectiveness of existing international private regulation (*ex post* approach). In the rulemaking process (*ex ante* approach) all avenues are important: the legal with respect to the clarity of the rules and their objectives, conflict of laws issues, added value, enforcement and conflict resolution; the sociological with respect to foreseeable acceptance of norms and stakeholder engagement, the macro-economic (if applicable) with respect to possible consumer detriment or environmental impact, labor issues, market disruption and restricting trade; and the psychological with respect to behavioral issues in connection with effective behavioral steering. As to the effectiveness of existing international private regulation (*ex post* approach) the legal avenue is of importance, especially in connection with enforcement and conflict resolution as well as the economic (impact assessment). The sociological avenue operates as a correctional factor in that if

38. Cf. in connection with public regulation Renda 2011, p. 97.
39. Casey and Scott 2011, p. 91.
40. Cf. Cafaggi and Renda 2012, p. 14. However, from a methodological perspective it has to be assessed whether insights from other disciplines might be used in a legal context. See Verheij, Giesen and Van Boom 2008, p. 604. I indicate in below instances in which research acquired from other disciplines may be of importance in a legal context.
41. The MSI evaluation tool is developed by MSIntegrity, IHRC and the Human Rights Program at Harvard Law school. See for more information and the evaluation tool www.msi-integrity.org accessed August 7, 2013).
42. This integrated approach also is promoted in civilology. See Giesen 2011, p. 1074. Cf. Verheij, Giesen and Van Boom 2008, pp. 610 and 611.
43. Gandara 2013, pp. 225 and 270.
44. Cf. Cafaggi and Renda 2012, pp. 17 and 18.

norms are not accepted by relevant stakeholders, enforcement, conflict resolution and positive impact of a private regulatory framework might be hampered.

### 2.2.3 Different effectiveness indicators for different types of regulation as well as for governments and industry?

International private regulation is quite common in the CSR arena and it is questionable whether a single methodology might be established to assess effectiveness, because private regulation differs and covers a lot of topics, fields, functions and types of enterprises, takes different angles (from reporting (for example on environmental and social impact as well as on topics connected to possible bribery) to agreements on security and round tables) and involves different stakeholders as well as regions.[45] That said, a single methodology seems preferable and also conceivable. Although the variation in international private regulation in the CSR arena seems tremendous, it by and large boils down to three types: (i) government incentivized/established multi-stakeholder initiatives (OECD guidelines for multinational enterprises, Global Compact, EU eco-label), (ii) privately (NGO or business) established multi-stakeholder initiatives (e.g. round tables in food chains, FSC, agreements between enterprises on CSR issues) and (iii) initiatives within an enterprise (corporate governance code). It makes sense to assess effectiveness of multi-stakeholders initiatives using the same methodology, irrespective of their governmental or private roots. It seems helpful to compare the effectiveness of these types, *inter alia* to assess whether increased government involvement contributes to effectiveness. Moreover, the effectiveness of the third type should be compared with the other types too, because this type of private regulation is deemed rather ineffective. This contention might prove false if a comparison is made with the other types. Therefore, a single methodology (using context-independent indicators/impact assessment as much as possible) is preferable and should be the starting point for further research.

As has been discussed in the foregoing, enterprises (or an industry) as well as governmental bodies might have an interest in the assessment of the effectiveness of international private regulation. The question arises as to whether different effectiveness indicators should be used among governments (or governmental bodies) and enterprises.[46] One should preferably use the same indicators/type of assessment. Although governmental bodies and enterprises clearly use the outcomes of effectiveness determination for their own purposes, they might have a common interest. For example, if a government determines whether or not certain legislation in the CSR arena will be promulgated or determines whether enterprises (or an industry) meet certain CSR requirements, it might be interested in assessing whether existing international private regulation achieves its public policy objectives. It might even ask a certain enterprise or industry to 'prove' the effectiveness of the existing international private regulation. If the indicators differ depending on the assessment made by the enterprise (or industry) and the government, the enterprises have to make different assessments. This seems unnecessarily complicated and costly. Besides this, different assessments might lead to different outcomes.

45. See on the importance of this regional context Alvarez and Van Hagen 2012, p. 10.
46. Cafaggi and Renda seem to adhere to different indicators. See Cafaggi and Renda 2012, pp. 25-28.

From this, lengthy discussions between governments and enterprises (or an industry) may arise about the effectiveness of international private regulation. Besides this, the question arises as to which of the various types of assessment other stakeholders (such as NGOs) should conduct. This complicates the dual effectiveness assessment even further. Obviously, if a methodology for the assessment of the effectiveness could be found which demonstrates effectiveness from different points of view, the results thereof seem more viable than those generated by two (or even three) different types of assessment which might be less conclusive or even contradictory. Therefore, the same (type of) indicators/assessment seems preferable.

### 2.2.4 Assessment intertwined with assessments of public regulation?

Assessment of the effectiveness of international private regulation might benefit from insights derived from, for example, impact assessment of public regulation, which will be discussed in paragraph 2.4. By and large insights from evaluation of public regulation might be helpful in assessing the effectiveness of international private regulation. This does not, however, imply that one should stick to the methodology developed for public regulation. First of all, several methodologies are developed for the assessment of (the effectiveness of) public regulation and many of them are contested. So finding the most helpful methodology is not easy. But, more importantly, international private regulation only resembles public regulation to a certain extent depending on the type of international private regulation at hand.[47] Therefore, several (effectiveness) issues are specific to international private regulation. For example, the legitimacy of this type of regulation cannot be based on the democratic principles lying behind public regulation and hence other ways of legitimacy have to be found. Furthermore, conflict of law rules and added value are salient issues in connection with international private regulation, but scarcely used in the effectiveness analysis of public regulation. Also, the economic effects of public regulation are often only analyzed at the macro level, while international private regulation, as discussed below, might be also analyzed at the meso and micro level. That said, several insights into the methodology proposed for the assessment of international private regulation are derived from the assessments of (the effectiveness of) public regulation.

In the following paragraphs I will discuss the different (*ex ante* and *ex post*) approaches. I will start with the rule-setting process and will then focus on the effectiveness of existing (international) private regulation. In the concluding paragraph I will integrate these avenues.[48]

47. For example, the OECD Guidelines for Multinational Enterprises have a closer resemblance to public regulation than, for example, supply chain contracts through which a CSR policy is implemented.
48. International private regulation is deployed in many different areas outside CSR and its effectiveness may vary among these areas. See e.g. Barbara Baarsma, who has found 22 private regulation instruments for many different situations in the Netherlands and offers regulators factsheets to decide whether private regulation suits their purposes. See www.seo.nl/pagina/article/zelf-doen-inventarisatie-van-de-zelfreguleringinstrumenten (accessed April 29, 2013). See e.g. on data protection Moerel 2011.

## 2.3 The rule-setting process (*ex ante* approach)

### 2.3.1 Legal approach

From a legal point of view the (*ex ante*) effectiveness of international private regulation is primarily connected with its ability to materialize the objectives this regulation aspires to realize.[49] These objectives might stem from spontaneous or (government) policy-induced private regulation.[50] However, unlike public regulation, it is often hard to assess whether these objectives have been achieved, because it is unclear which specific (and assessable) objectives have been set. As for public regulation, this is often clarified in the explanatory documents supporting the regulation. International private regulation often lacks such explanatory documents. As a result, the objectives of private regulation remain somewhat in the dark. For example, if private regulation aims at contributing to a better environment or human rights compatibility in doing business, it is difficult to assess whether these objectives have been achieved. Which environmental improvement suffices, and to which extent does the human rights situation have to improve? Therefore, it is important to clarify the specific and assessable objectives international private regulation aims at.[51] Unless such objectives have been expressly articulated it is rather difficult to assess whether international private regulation is effective in the sense it achieves the objectives it aspires to realize.[52] In this respect it is important that the private regulation and its supporting documents are publicized (and transparent).[53] In connection with this, it is important to create a transparent norm setting process and sufficient autonomy of the private rule maker.[54] For instance, divergence of interests between the regulators and the regulated might lead the members of the rule-setting body to prefer (less desirable) short-term actions (with no clear (long-term) objectives) that maximize their likelihood of being re-appointed.[55]

However, this is not always true. If international private regulation is set to achieve specific public policy objectives, it might be possible to assess whether these ex-

49. Cafaggi and Renda 2012, p. 15.
50. Cafaggi and Renda 2012, p. 12.
51. Cf. regarding standards sections 5.1.1, 6.1.1 and 6.2.1 of the ISEAL Code of Good Practice. Private regulation should, according to section 6.2.1, involve principles, criteria, indicators and verifiers. The indicators should not only indicate what they measure, but also how the indicators are measured and where the line is drawn between what is acceptable and what is not (verifiers). See also the MSI evaluation tool, p. 2. See also Principle 1.4 for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013).
52. Cf. Balleisen and Eisner, who contend such public policy goals should involve roughly measurable benchmarks. See Balleisen and Eisner 2009, p. 136.
53. Cf. section 5.10 of the ISEAL Code of Good Practice which provides for publication of the standards and the availability of supporting documents. See also the MSI evaluation tool, p. 37. In this respect the question might arise whether the private regulation and its supporting documentation should be publicized in multiple languages. In my opinion this is not necessary per se because of problems of interpretation if the norms are translated in different languages and the question arises as to which the authentic language is. However, translations might be necessary for proper stakeholder engagement. See the MSI evaluation tool, p. 3.
54. Balleisen and Eisner 2009, pp. 131, 134 and 135.
55. Cafaggi and Renda 2012, p. 17.

ogenous objectives have been achieved.[56] This being the case, the international private regulation itself does not necessarily have to specify such objectives. A (legal) effectiveness criterion is therefore whether international private regulation expresses specific and assessable objectives (which might be exogenous public policy objectives) and if so, whether they have been achieved. In this respect international private regulation should be consistent with (international) public regulation or standards.[57] However, this does not mean it should be consistent with all national laws, because drawing up such international private regulation is virtually impossible, not least because those national laws might be contradictory.[58]
Stemming from this, the private rule maker has to assess whether (effective) private regulation in his area exists which achieves the (public policy) objectives his regulatory framework is aiming at and in what (additional) respect it might contribute to the achievement of these objectives.[59] If international private regulation exists which effectively achieves the objectives aimed at by his regulatory framework, he should refrain from rulemaking, because this would only unnecessary complicate the legal framework in its arena. Besides this, an effective private regulatory framework involves 'conflict of law' rules regarding cases in which this framework collides with other public or private regulation.[60] It then states how it should be assessed, which rules prevail, and why.
After the drafting process, the work is not yet done. It is important that the norms are evaluated (and if necessary reviewed) on a regular basis, making use of past experiences with the norms, challenges of the norms by members or stakeholders and taking into account grievances from stakeholders.[61] This process should be conducted in the same manner as the drafting process.
Furthermore, in the rule-setting process, the rule makers have to consider whether any possibilities for enforcement exist and whether the regulatory regime provides

56. Cf. regarding certification Dimitropoulos 2012, p. 244.
57. Cf. Principle 1.5 for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013) and e.g. on International Framework Agreements on labor standards Herrnstadt 2007, pp. 196-201.
58. In case international private regulation might not be consistent with certain national laws effective alternatives should be implemented regarding such countries. See e.g. Utting 2001, p. 86.
59. See section 6.4.1 of the ISEAL Code of Good Practice; the MSI evaluation tool, p. 36. Cf. sections 5.1.1, 6.1.1 and 6.2.1 of the ISEAL Code of Good Practice. The public regulator might wish to assess whether certain public policy goals are met as well. Cafaggi and Renda propose a joint assessment by the public and private regulator. See Cafaggi and Renda 2012, p. 29.
60. Cf. on the necessity and emergence of a new form of 'intersystemic conflict laws' Fischer-Lescano and Teubner 2004, p. 1018. Section 6.5 of the ISEAL Code of Good Practice deals with the situation in which international standards have to be adapted to local standards. Furthermore, section 6.6.1 requires the duty to inform other standard-setting organizations that have developed related or similar international standards or a proposal to develop a new standard or revise an existing standard. It should also encourage the participation of this other standard-setting organization. These 'conflict of law' rules might stem from the private rule maker, but also from governments.
61. See e.g. the MSI evaluation tool, pp. 5 and 39-41 (which requires review of internal governance, overall effectiveness and awareness of affected population as well); Principles 2.1 and 2.3 for better co- and self-regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013). Section 5.11 of the ISEAL Code of Good Practice which demands for regular (five-year) review and revision of standards to assess whether they meet their stated objectives. For this, it is important that the rulemaking body is accessible for external parties and organizes regular meetings with stakeholders (if necessary at different locations). See the MSI evaluation tool, pp. 5 and 6.

an effective conflict resolution mechanism. These two elements will be discussed in the *ex post* approach (which will be focused on below).[62]
Besides this, more precise commands will generally result in better behavior.[63] Therefore the degree of precision has to be optimized.[64] In this respect it is important whether the international private regulation (i) involves clear norms/standards[65] which are interpreted and applied consistently, (ii) states if exceptions to the general rule exist and, if so, under which circumstances they apply, (iii) to whom the rules apply (e.g. only the companies themselves or suppliers and financing entities too) and (iv) refers to applicable (international) norms and treaties (e.g. in the area of human rights or the environment).[66] Besides this, the specificity relates to the topics the international private regulation is intended to cover: does it indeed involve specific rules on all these topics (for example mentioned in international treaties on human rights, environment or in national regulations).[67] In order to achieve specificity, existence of sufficient bureaucratic capacity and (legal) knowledge on the part of the regulator is required.[68] Moreover, effective international private regulation requires sufficient bureaucratic capacity and (legal) knowledge of the private rule maker. If the private rule maker does not have this capacity or knowledge (or is not willing to invest in it) he should refrain from rulemaking.
The foregoing issues are by and large addressed by the traditional criteria applied to public legislation, which therefore might be helpful if a certain scheme is comparable to public regulation (for example the OECD guidelines, but less so supply-chain arrangements).[69] These criteria (*inter alia* derived from the better regulation framework) are: necessity, proportionality, subsidiarity, transparency, accountability,[70] accessibility, and simplicity.[71] The aforementioned SAFA guidelines translate these criteria in connection with private standards into relevance, simplicity, cost efficiency,[72] goal orientation, performance orientation, and transparency.[73]

62. However, some of the indicators mentioned below are derived from analysis of the means of enforcement and therefore might be better understood after reading paragraph 2.4.1.
63. See Kaplow 2011, pp. 19 and 20. Cf. Kolk and Van Tulder 2005, p. 9; Luppi and Parisi 2011, p. 43 ff; Overmars 2011, p. 17 (regarding codes of conduct); Utting 2001, p. 82. Cf. section 6.3.1 of the ISEAL Code of Good Practice.
64. See L. Kaplow 2011, p. 19; Luppi and Parisi 2011, pp. 43 and 46-52, who argue that the frequency of application of a law is a crucial determinant of the optimal level of specificity.
65. Certain norms/standards might need to be adapted to local conditions. See Alvarez and Van Hagen 2012, pp. 21 and 22.
66. Cf. regarding codes of conduct in the area of CSR on child labor Kolk and Van Tulder 2005, pp. 13 and 17; Vytopil 2012, pp. 67 and 68. However, regarding criterion (iv) some international norms only aim at governments and not at companies. Referral to these norms might complicate the enforceability of codes of conduct vis-à-vis companies. Furthermore, referral to the norms only of the home country of a company is less effective than referral to international norms and preferably (if applicable) also to norms of host countries. See Kolk and Van Tulder 2005, pp. 10 and 17. Cf. MSI evaluation tool, pp. 3 and 23-25.
67. Cf. Kolk and Van Tulder 2005, p. 14.
68. Balleisen and Eisner 2009, pp. 131, 134 and 135. See on sufficient capacity in general Alvarez and Van Hagen 2012, pp. 17 and 18. Cf. Principle 2.5 for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013).
69. Cf. Cafaggi and Renda 2012, p. 13.
70. This criterion has not been mentioned in the foregoing and will be addressed in the sociological approach.
71. Cafaggi and Renda 2012, p. 24.
72. This criterion will be discussed in the economic approach.
73. See e.g. Cafaggi and Renda 2012, p. 24.

The foregoing has shown that (the *ex ante*) effectiveness of international private regulation depends on its ability to reach the goals aimed at, on whether it involves conflict of law rules, on its enforceability and on effective dispute resolution.[74] Effectiveness of international private regulation may depend on the following indicators, which have been derived from the abovementioned research:[75]

i. whether international private regulation involves specific and assessable objectives and does not aim at objectives which are effectively achieved by other public or private regulation,
ii. whether it involves 'conflict of law' rules,
iii. whether it involves regular evaluation of the regulation and its functioning (and if necessary) review of the regulation,
iv. the existence of an supervisory body to which the parties to the regulatory regime are accountable (and have to provide relevant information to this body), the power of the supervisory body to pass judgment and to impose sanctions on non-complying parties,[76]
v. the existence of a supervisory body which controls access to scarce resources,[77]
vi. sufficient bureaucratic capacity and (legal) knowledge of the private rule maker,
vii. the existence of (a) serious (threat of) contractual enforcement or other means of enforcement if necessary through state legislation and/or (effective) enforcement by states,
viii. the specificity of the rules/standards set forward by the international private regulation,
ix. whether the initiative involves an effective complaint and dispute management mechanism to prevent and deal with non-compliance,[78] and
x. the possibility of certification or assessment of compliance by independent third parties whereby reporting requirements in the regulatory framework are helpful.

74. Cf. Giesen 2007, pp. 106 and 137-141.
75. These indicators are not exhaustive. More detailed research may reveal others.
76. However, Kolk and Van Tulder argue that the likelihood of compliance is higher if company codes of conduct are involved than for example codes of conduct set forward by business associations, international organizations or NGOs. See Kolk and Van Tulder 2005, p. 11. This especially stems from the codes of conduct promulgated by business organizations or international organizations being less specific and abstaining from the possibility of imposing sanctions.
77. Cf. Kopell 2010, p. 62; Oude Vrielink 2011, pp. 70-73; Scott, Cafaggi and Senden 2011, p. 7. Beside these indicators the existence of smaller groups with comparable views is considered to be important as well as a high organizational level. This however, in my view, refers to the sociological perspective which will be discussed below. Nonetheless, enforcement may be easier to realize in such circumstances.
78. Cf. regarding CSR the communication of the European Commission of October 25, 2011, COM(2011) 681, p. 10. As to CSR in an international context, non-judicial mechanisms for conflict management seem to be more effective. Furthermore, the prevention of conflicts become more important. Cf. regarding dispute management also Giesen 2007, pp. 138 and 139. Furthermore, the Global Reporting Initiative framework, which is discussed below in the economic approach and to which companies may adhere, involves an indicator which requires companies to state whether they provide a grievance mechanism regarding human rights violations and how many complaints have been received through this mechanism. From this framework (some) information could be retrieved as to whether (effective) grievance mechanisms are in place.

The aforementioned indicators may be helpful in creating effective international private regulation.

### 2.3.2 **Economic approach**

From an economic point of view it is of interest whether international private regulation potentially contributes to the economic welfare of (affected) communities and society at large as well as to the profitability of (multinational) enterprises.[79] This research encompasses different points of view. The assessment of the potential increase or decrease in economic welfare differs according to the international private regulation under consideration.[80] It makes a difference whether international private regulation on (i) biodiversity, (ii) prevention of (environmental) damage to local communities or (iii) technical standardization as to sustainability is considered. These three areas differ as to the stakeholders involved and the relevant economic issues. Furthermore, it is relevant whether the economic analysis is conducted on a micro or macro level. Assessing the existing and future economic welfare of certain stakeholders calls for a different approach than the one needed for measuring the potential increase or decrease in the economic welfare of society at large. The first assessment calls for a 'bottom up' approach assessing the possible increase or decrease in welfare of certain relevant stakeholders. The second assessment, the 'top down' approach, necessitates an evaluation of a possible increase or decrease in welfare at the level of society at large. This second assessment seems especially necessary if international private regulation might have more than negligible impact on society at large. If international private regulation only might affect certain stakeholders in a certain industry, and hence the micro level is relevant, the *ex ante* approach seems less helpful. It is not easy to assess the impact of future international private regulation on a certain stakeholder. Therefore, the micro level analysis is especially fit for the *ex post* assessment. The future economic effects of international private regulation might be analyzed best through a macro-economic approach.

As far as the macro level analysis is concerned, insights derived from an (*ex ante*) economic analysis of government regulation might be helpful to analyze the economic effects of international private regulation. Economic analysis of government regulation has become quite common in the last decade. The European Commission, for example, has established the Better Regulation Framework to analyze (*inter alia*) the economic effects of EU-regulation.[81] This framework advances an Integrated

79. See on economic analysis of the law and the need for such analysis e.g. Faure 2011, pp. 1056-1064.
80. From the classical economic approach of Coase and the Chicago School of Law and Economics, this starting point does not have merit. They contend that a market is able to reach efficient outcomes through negotiations between well-informed parties without regulation. See on this approach e.g. Faure 2011, p. 1057. To date the necessity of research of the economic effects of rules has been recognized. See Faure 2011, pp. 1057 and 1058. In this approach private regulation is an appropriate solution where bargaining, at low cost, can occur between between risk-creators and those affected. See Ogus and Carbonara 2011, p. 231.
81. This framework goes back to 2002. See e.g. Renda 2011, p. 46 ff. and the communication from the European Commission on Smart Regulation (the successor to the Better Regulation Framework) in the European Union of October 8, 2010, COM(2010)543; Alemanno 2011, p. 485 ff.; Dunlop 2011, p. 949; De Francesco, Radaelli and Troeger 2012; Meuwese and Popelier 2011, p. 455 ff. on the legal implications and the enforceability of this framework (*inter alia* through courts) as well as Meuwese 2008.

Impact Assessment Model, an *ex ante* tool for improving the quality and coherence of the policy development process of the European Commission (which *inter alia* involves an integrated approach comprehensively covering the economic, social and environmental dimensions).[82] The analysis reviews the economic impact of the selected option, mostly in terms of (i) economic growth and competitiveness, (ii) changes in compliance costs and implementation costs for public authorities, (iii) impact on the potential for innovation and technological development, (iv) changes in investment, market share and trade patterns as well as (v) increase or decreases in consumer prices.[83] The social impact includes the impact of the proposal on (a) human capital, (b) human rights, (c) prospective changes in employment levels or job quality, (d) changes affecting gender equality, social exclusion and poverty, (e) impact on health, safety, consumer rights, social capital, security, education, training and culture as well as effects on (f) the income of particular sectors, groups of consumers or workers.[84] The environmental dimension concerns positive and negative impacts associated with the changing status of the environment such as climate change, air, water and soil pollution, land-use change, biodiversity loss, and changes in public health.[85] However, the impact assessment initially focused, as the U.S. and U.K. do, on business compliance costs analysis of regulation without preliminary identification of alternative regulatory options.[86] As exact economic calculations were considered not to be the most important contributors to regulatory quality, the framework became a tool which did not focus on a (sound) economic analysis but merely summarized the interests of stakeholders and tried to find a compromise between political and policy stances advanced by different stakeholders having an interest in the rules at hand.[87] The 2002 impact assessment as described above constituted a very complex exercise, which aspired to predict all possible consequences of the endorsement of new regulation and has been costly, burdensome, highly discretionary and time-consuming.[88] Research on these extended impact assessments revealed several methodological shortcomings, including unclear descriptions of the problem, obscure ranking of objectives, a narrow range of policy options, an unbalanced coverage of different types of impact (economic, social and environmental), and inadequate arrangements for external consultation.[89] This resulted in a paradigm shift from sustainable development to competiveness and from integrated impact assessment to economic assessment in

82. See the Impact Assessment Guidelines, SEC(2009)92 of the European Commission from 15 January 2009.
83. Renda 2011, p. 56. See on best practices for regulatory impact assessment (and how to implement it in the decision-making process) also the OECD Framework for Regulatory Impact Assessment, to be found at www.oecd.org/gov/regulatory-policy/buildinganinstitutionalframeworkforregulatory-impactanalysisriaguidanceforpolicymakers.htm (accessed June 12, 2013).
84. Renda 2011, pp. 56 and 57.
85. Renda 2011, p. 57.
86. Renda 2011, pp. 47 and 49-54. It was suggested a two-stage impact assessment should be conducted, a preliminary one devoted to the analysis of alternative regulatory options and an extended impact assessment in which the detailed assessment of the benefits and costs of the preferred regulatory option is made. See Renda 2011, p. 54. This was implemented in the new impact assessment model of 2002. See Renda 2011, p. 55. See on impact assessment in different countries Radaelli, Allio, Renda and Schrefler 2010, p. 39 ff. and on U.S. impact assessment especially pp. 40-61.
87. Renda 2011, pp. 48 and 52.
88. See also Renda 2011, p. 57.
89. Renda 2011, p. 69.

2005, although this was not a mere assessment of compliance cost.[90] The guidelines still insist on a multi-criteria assessment by keeping the three pillars (economic, social and environmental) separate.[91] OECD reports have pointed out the necessity of linking impact assessment to an oversight body as a key enabler of the success of regulatory impact analysis models.[92] Following these reports the Impact Assessment board was created within the Secretariat General.[93] In 2010, the need to improve the methodology and soundness of the economic analysis was felt, as well as the need for efficient use of resources devoted to impact assessment and *ex post* evaluation in the Commission.[94] Furthermore, the assessment of alternatives has become more systematic.[95]

However, the impact assessment is not considered to be very important because it is an assessment of the European Commission which rapidly becomes obsolete when the legislation is amended during the European co-decision procedure.[96] Often the final legislation only (very) partly reflects the assessment conducted on the original proposal of the European Commission.[97] The other EU institutions such as the European Parliament and the Council still abstain from impact assessments.[98] Besides this lack of clear focus, it is unclear whether the impact assessment should abide by any specific methodology or need for quantification.[99] Many impact assessment documents do not adopt a clearly recognizable viewpoint, for example a quantitative cost-benefit analysis.[100] Another disadvantage is the confidential nature of the impact assessments: only the final versions are published.[101] Nonetheless, the Commission has managed to improve the quality of its impact assessments, although a lot seems to depend on the proposal at stake, bearing in mind that to date no other EU Member States, excluding the U.K., use such instruments.[102] At the same time, instruments seem to be gradually shifting towards other tools and in particular towards the Standard Cost Model for the measurement and reduction of administrative burdens as well as fitness checks covering entire policy domains.[103]

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90. Renda 2011, pp. 58-60. At this point the dual stage system was abandoned. See Renda 2011, p. 58.
91. Renda 2011, p. 63.
92. Cf. Fritsch, Radaelli, Schrefler and Renda 2012, p. 1.
93. Renda 2011, pp. 64-67. However some feel the need for independent oversight bodies at EU level. See Renda 2011, p. 66; Fritsch, Radaelli, Schrefler and Renda 2012, p. 1.
94. Renda 2011, p. 67.
95. Renda 2011, p. 78.
96. Renda revealed that the vast majority of impacts assessments relate to non-binding communications and policy initiatives. See Renda 2011, pp. 72 and 73.
97. Renda 2011, p. 47.
98. Renda 2011, p. 80.
99. Renda 2011, p. 81. Cf. Dunlop 2011, p. 949; Fritsch, Radaelli, Schrefler and Renda 2012, p. 3 ff.
100. Renda 2011, p. 81. However, the cost-benefit analysis has also been criticized in recent years because, just like economics in general, it neglects human behavior. See Renda 2011, pp. 102, 112 and 130-135. Nonetheless this approach has increased success in the U.S. and in other impact assessments. See Renda 2011, p. 140; Radaelli, Allio, Renda and Schrefler 2010, pp. 40-61. The criticism in Europe might be invoked by the impact assessments on non-binding regulation and therefore on a much broader set of proposals, which may lead to casting doubts on the usefulness of cost-benefit analysis. The U.S. have adopted a confined, invariable (in terms of depth and criteria) system to select proposals that should undergo an impact assessment. However, this assessment only covers secondary regulation. See Renda 2011, pp. 147 and 148; Radaelli, Allio, Renda and Schrefler 2010, pp. 40-61.
101. Fritsch, Radaelli, Schrefler and Renda 2012, pp. 1 and 2; Renda 2011, p. 48.
102. Renda 2011, p. 48. However, comparable instruments are used in other EU countries. See e.g. Radaelli, Allio, Renda and Schrefler 2010, pp. 107-126 and 146-177.
103. Renda 2011, pp. 48 and 82. Cf. Dunlop 2011, p. 949.

From this stem the recently developed Impact Assessment Guidelines of the European Commission, which are used by many EU and non-EU countries.[104] However, no conclusive evidence exists that countries that use the impact assessment grow faster than countries which do not.[105]
That said, the Impact Assessment Guidelines of the European Commission might provide some guidance as to the effects of international private regulation.[106] This seems to be taken as a starting point by ISEAL, which launched a code for assessing the impacts of Social and Environmental Standards. This code in part resembles the impact analysis of public policymakers.[107] The Standard Cost Model might also be appropriate and because it is less sophisticated it might be easier to implement.[108] This Standard Cost Model is used in other countries too, such as the U.K. and U.S., and measures the (reduction of) administrative burdens. It might provide useful insights on the economic effects of international private regulation.[109] In that respect it should be noted that international private regulation may lead to a cost transfer from states to private actors, such as enterprises.[110] Obviously, the process of establishing private regulation is more costly to industry than government legislation.[111] However, the threat of public regulation (setting new or higher standards than previously adopted by the public legislator) and the relatively small (marginal) cost of private regulation induce business to engage in international private regulatory regimes.[112] Reporting requirements involved in the private regulatory frameworks might increase the cost of business as well.[113] This problem might partly be tackled

104. Communication 'Smart regulation in the EU' of the European Commission of October 8, 2010, COM(2010)543. Cf. Staff working document, operational guidance for assessing impacts on sectoral competitiveness within the Commission Impact Assessment System, a 'Competitiveness Proofing' toolkit for use in Impact Assessments, of the European Commission of January 27, 2012, SEC(2012) 91 final. See also Cafaggi and Renda 2012, p. 1.
105. Renda 2011, p. 93.
106. The former Impact Assessment tool of the European Commission seems less adequate, because of its complexity as well as its expense, and sometimes inconclusive and confidential nature. See Renda 2011, pp. 48 and 52. Cf. Cafaggi and Renda 2012, p. 2.
107. See www.isealalliance.org/online-community/resources/iseal-impacts-code-of-good-practice (accessed April 20, 2013). See on this e.g. Cafaggi and Renda 2012, pp. 20-23. Impact assessment is also an indicator in the MSI evaluation tool. See the MSI evaluation tool, pp. 37 and 38.
108. Cf. Renda 2011, pp. 48 and 82. However, this method is criticized too because it tends to neglect human behavior. See Renda 2011, pp. 102, 112 and 130-135. Beside this, it ignores the fact that regulation might generate benefits outside the reduction of administrative burdens.
109. However, the question arises as to whether the cost of compliance with private regulation which involves a code of conduct can be monetized. Compliance with a code of conduct is often considered to be intertwined with the day-to-day business and the costs thereof are not measured separately. See e.g. Oude Vrielink 2011, p. 69.
110. Cafaggi 2011, p. 30; P. Westerman 2012, p. 726. For example, the GlobalGAP framework (on good agricultural practice) is assumed to impose disproportionate costs on farmers in developing countries. See also the communication of the European Commission COM(2009)234 of May 28, 2009 and the accompanying staff working document SEC(2009) 671. The greater the degree of precision of the norms, the greater will be the costs of formulating legal commands and applying them in adjudication and of parties interpreting them for purposes of deciding how to conform behavior to such rules. Therefore the greater the degree of precision, the greater will be the cost transfer. On the other hand, as has been discussed before, more precise commands will generally result in better behavior.
111. Cf. Overmars 2011, p. 20. Furthermore, it is contended that delegation of public rulemaking powers to a private regulatory framework can lead to adverse welfare effects, especially if monopoly power is granted to one regulatory framework. See Ogus and Carbonara 2011, pp. 241 and 242.
112. Ogus and Carbonara 2011, p. 236. Cf. Kolk and Van Tulder 2005, p. 4.
113. Westerman 2012, p. 727. However, the lack of reporting requirements brings about difficulties in enforcing this private regulatory regime. See also Westerman 2012, p. 727.

by a shift in the nature of the norms of a private regulatory framework. Instead of focusing on substantive rules only, a regime might involve rules on the way stakeholders could build a (long-term) relationship with each other.[114] Furthermore, private regulation might have network effects. The costs of participating in an international private regulatory framework decrease with the number of participants.[115] Such costs are likely to be rather high in the early stages of the formation of a new regulatory framework.[116] Enforcement of private regulation is costly too, although necessary. Without enforcement free-riding is possibly very common, where participants enjoy the benefits of the regulatory framework but disobey the rules. The costs of enforcement might discourage new members from joining the network.[117] From the outset of the regime the (future) costs of enforcement are borne by the regulatees (or the overarching body).[118] However, these costs might be reduced if an overarching body, as referred to in the foregoing paragraph, exists and if these costs are shared by many participants.[119] Hence, if a private regulatory framework is set, it is sensible to aim at involving a higher number of participants in order to reduce the enforcement costs to be paid by the individual participants.[120] In that respect the scope of the private regime is important: the more global in scope, the higher the number of potential participants.[121] Furthermore, international private regulation has an international impact and may lead to a cost transfer from Western developed economies to developing economies.[122] This may contribute to the welfare of (Western) society at large, but might have adverse effects on developing economies.

That said, the Standard Cost Model might be the predominant indicator in the *ex ante* economic avenue which could be applied in practice, although some other indicators (such as the potential number of participants in a regulatory regime and other impact assessments tools) might be relevant as well.[123]

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114. Westerman 2012, p. 728. However, a regime might not be confined to the latter rules. This might especially jeopardize the public interest if the interests of the stakeholders do not coincide with it.
115. Ogus and Carbonara 2011, p. 243. See in connection with eco-labels Gandara 2013, p. 224.
116. Cf. Ogus and Carbonara 2011, p. 231. Hence, it could be better not to promulgate yet another private regulatory framework, but to build on and improve existing frameworks. Cf. Ogus and Carbonara 2011, p. 232.
117. Ogus and Carbonara 2011, pp. 232 and 237.
118. Ogus and Carbonara 2011, p. 237.
119. Ogus and Carbonara 2011, pp. 233 and 237, who contend that the information costs for the formulation and interpretation of the standards are lower and such bodies will emerge if monitoring costs for such a body are low. Cf. in connection with eco-labels Gandara 2013, p. 112.
120. Although research has revealed that it is very tempting to engage a whole industry in a private regulatory framework, even if adequate enforcement is implemented. Cf. Ogus and Carbonara 2011, p. 237. They contend that the framework has to provide economic incentives for free-riders to participate.
121. Kolk and Van Tulder 2005, p. 10. This might be true for a code of conduct within a company if this is spread at a global level through its subsidiaries in other countries or through supply chains. The size of the company is important in that respect. Cf. Kolk and Van Tulder 2005, pp. 21 and 22.
122. Cafaggi 2011, p. 30.
123. However, one should realize that public regulation also might have consequences, for example if highly influential stakeholders manage to make politicians set rules which (are beneficial to these stakeholders but) have consequences for the competition in a certain market, which is of course inefficient from an economic point of view. It is said this happens quite often in the U.S. See e.g. regarding carbon emissions trade Woerdman and Weishaar 2012, pp. 622-629. Cf. Faure 2011, p. 1059. It might well be that international private regulation is susceptible to such influence too, and maybe even more so than government regulation.

### 2.3.3 **Sociological approach**

The (*ex ante*) effectiveness of international private regulation might be described from a sociological point of view too.[124] Important in this respect is how and when private regulation will be accepted by a certain group and why. Acceptance within a certain group might enhance compliance with regulation and thus might render private regulation (more) effective.

There is however no single answer to the question of how various norms crystallize (and thus might produce binding effects upon actors to whom they are addressed). They may be accepted through a variety of mechanisms.[125] The following factors, which relate to the institutionalization of regulatory norms, might provide some guidance. However, these parameters do not establish a very clear distinction (which might be assessed in an empirical way) between norms which have been accepted and those which have not. Relevant are (i) the extent to and the way in which a norm has been distributed and is applied, (ii) the degree of acceptance of a norm and (iii) the mode of transmission.[126] In connection with the degree of acceptance of a norm, the inclusiveness (of the norm setting process) vis-à-vis stakeholders is of the essence. This will be discussed as a separate issue under (iv).

Analysis of distribution (i) relates to the extent to and the way in which a norm is known and applied. Knowledge is not only a product of its promulgation. Training and education for those involved in applying the norm and sometimes information campaigns and notices might also play a role in such knowledge building.[127] Mass media might play a pivotal role in this process. Governments are particularly cognizant of this dimension of making norms effective.[128] However, it is important that not only the norm itself but also the background endorsing it as well as the objectives aimed at are explained in such campaigns. Purchasers, for example, need to be convinced that the standard not only enhances efficiency but also achieves the objective it pursues.[129] It is even argued that social norms by their nature imply that what ought to be done is known by the community in which norms operate.[130] Traditional (public) legislation has the disadvantage that it does not always reach the actors it is meant for.[131] As a result the Dutch government has searched for alternative ways, for example in '*Bruikbare rechtsorde*' and '*Vertrouwen in wetgeving*'.[132]

Acceptance (ii) of a norm may involve consideration of both the process through which it emerges, its content and its likely effects. Crystallization of norms is

124. See also Oude Vrielink 2011, pp. 61-78.
125. Casey and Scott 2011, p. 82; Kopell 2010, pp. 41-44; Eijsbouts 2011, pp. 17-22 (anti-bribery norms).
126. Casey and Scott 2011, pp. 78 and 82, who refer to the typology of Morris.
127. Casey and Scott 2011, p. 82. Cf. Alvarez and Van Hagen 2012, p. 24; Thaler and Sunstein 2008, pp. 54 and 55. See e.g. on International Framework Agreements on labor standards Herrnstadt 2007, pp. 201 and 202. Therefore, the MSI evaluation tool demands for a continuous learning program for relevant stakeholders. See the MSI evaluation tool, pp. 21, 22, 25-27, 32 and 33.
128. Casey and Scott 2011, p. 84.
129. Cf. on guarantees of product safety Casey and Scott 2011, pp. 91 and 92.
130. Casey and Scott 2011, p. 82.
131. Overmars 2011, p. 16.
132. *Documents of Parliament Second Chamber* (to be found at www.overheid.nl) 2003/04, 29279, no. 9; 2008/09, 31731, nos. 1 and 2. See also Overmars 2011, p. 17.

therefore heavily reliant upon the instruments which can transmit information that educates actors about not only the substantive content of rules, but also the objectives which underlie norms, the substantive regulatory process and methods by which norms can be complied with.[133] Furthermore, trust in obedience of other members and social incentives to comply are needed.[134] The acceptance of private regulation might increase if regulation is established by an industry instead of being promulgated by the government.[135] In this respect a stable group of participants and a slowly changing environment are helpful.[136] Furthermore, a tradition of and experience with private rulemaking might enhance acceptance of a new private regulatory regime.[137] Therefore, private regulation may be successfully established only if the stakeholders are willing to collaborate and to address relevant issues in an industry.[138] Besides this it is helpful if an industry has a shared vision on and responsibility towards societal issues.[139] In this respect the relevance of norms, such as standards, is deemed to be important for the acceptance thereof.[140] In terms of commitment, it might be of importance whether the private regulation fits within the strategic choices and dilemmas faced by the companies and their managers, partly determined by norms that emerge within markets.[141] These norms are classically set through the interaction of many buyers and sellers.[142] The success of a standard is largely determined by its take-up within a particular market through, for instance, its (voluntary) adoption both in production processes and the specification within supply chains.[143] Besides this, entities are more willing to accept norms if they are in their own interest.[144]

Acceptance of a norm is intertwined with the legitimacy of those norms.[145] Linkage to electoral politics is a central mechanism of legitimating *public* regulation.[146] Le-

133. Bomhoff and Meuwese 2011, p. 159; Casey and Scott 2011, p. 82.
134. Overmars 2011, p. 21. For compliance an independent body might be helpful. See Overmars 2011, p. 21.
135. Overmars 2011, p. 21.
136. Alvarez and Van Hagen 2012, p. 27; Oude Vrielink 2011, p. 72.
137. Oude Vrielink 2011, p. 72. Cf. Alvarez and Van Hagen 2012, p. ix.
138. Oude Vrielink 2011, p. 72; Overmars 2011, p. 20. Principle 3 for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013), adds that participants have to commit real effort to succeed.
139. Oude Vrielink 2011, p. 72; Overmars 2011, p. 20. Overmars argues for an intermediate organization to assist in this and contends that such an organization is lacking regarding the Dutch corporate governance code. See Overmars 2011, pp. 20 and 26.
140. Report of the expert panel for the review of the European standarization system, pp. 9, 19, 21, 29 and 32, accessible through http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/policy-review/express/index_en.htm (accessed August 7, 2013).
141. Cf. Oude Vrielink 2011, p. 72. See on codes of conduct Kolk and Van Tulder 2005, p. 20.
142. For example the rating mechanism of eBay incentivizes compliance and permits sellers who build up strong ratings to sell successfully. See Casey and Scott 2011, p. 81.
143. Casey and Scott 2011, p. 81; Overmars 2011, p. 19 (on prevention of child labor in the garment and toys industry). Corporate governance systems in different countries play a role as to willingness of companies to implement codes of conduct (in the CSR area) too. See Kolk and Van Tulder 2005, pp. 8 and 9. This might for example also result in closer relationships between buyers and sellers in a supply chain. See Alvarez and Van Hagen 2012, pp. 26 and 27.
144. Oude Vrielink 2011, p. 72; Schouten 2013, p. 71.
145. Casey and Scott 2011, p. 86; Schouten 2013, p. 61. Cf. Alvarez and Van Hagen 2012, pp. ix, 19 and 20. Sometimes this kind of legitimacy is referred to as authority as an opposite of legitimacy (of governments) in the legal sense. See e.g. Kopell 2010, p. 56. See on private norms connected with construction Neerhof 2013, pp. 158-173 and 187-196.
146. Cf. Casey and Scott 2011, p. 86.

gitimacy of public regulation is assessed by reference to certain predetermined standards and criteria.[147] These criteria include the assessment whether the regulatory norms are (i) constitutional (for example fair procedures, due process, consistency, coherence, proportionality, and the existence of oversight from constitutionally established bodies such as national courts, legislatures, or executives and international organizations) and (ii) democratic (the extent and effectiveness of participation, transparency, accountability, and deliberation in the norm-formation process).[148] Sometimes criteria for assessing legitimacy are also found in (iii) functionality and being performance based (degree of expert involvement and effectiveness and efficiency of the norm in achieving the objectives which they pursue) and (iv) being value and objective-based (fair trade, good agricultural practices, market efficiencies, and sustainable development).[149] Obviously, international private regulation does not meet these requirements of legitimacy in the traditional sense. It rarely takes the form of formal and informal delegation of rulemaking by public entities. It uses a broad range of regulatory devices that may be of a rather soft legal nature, such as codes, but also of a hard nature, such as contracts.[150] However, private regulation may operate as a complement to public rules to specify and tailor them to specific markets.[151] In this respect (public) legislation lends legitimacy (in the traditional sense) to international private regulation.[152] Therefore, the abovementioned criteria (i) and (ii) might be complied with where private regulation consolidates in combination with strong public institutions operating with public regulation.[153] However, it is also possible that private regulation precedes the creation of public regimes if, in order to bridge regulatory gaps, private organizations design new markets and new institutions to be later supplanted by hybrid regimes.[154] Furthermore, it is argued a wide range of activities which might once have been thought of as private should be regarded as public in character and therefore amenable to (future) public law controls either at domestic or global level.[155] This also provides some (future) legitimacy in the traditional sense.

Obviously, legitimacy of international private regulation beyond domestic legislation, or in absence of such domestic regulation, is not derived from state legisla-

147. Casey and Scott 2011, p. 87. See on legitimacy also Kopell 2010, pp. 45-48.
148. See e.g. Casey and Scott 2011, p. 87.
149. Casey and Scott 2011, p. 87.
150. Curtin and Senden 2011, p. 164.
151. Cafaggi 2011, pp. 42 and 43. Cf. on this (sometimes complicated) interaction in connection with bio fuels Schouten 2013, pp. 106, 107 and 112-125. For example, in countries with weak governance structures or corruption issues international private regulation might enhance compliance. Cf. Schouten 2013, p. 139.
152. Cafaggi 2011, pp. 42 and 47; Akkermans 2011, pp. 511 and 512. However, cf. Schouten 2013, pp. 125, 126, 136 and 137, who contends public regulation might also water down private standards in connection with bio fuels. Some authors even contend that the prerogative of state regulation is challenged by private regulation and becomes increasingly intertwined with private regulation. See Akkermans 2011, pp. 512, 513 and 514. Furthermore, international private regulation may contribute to the strengthening of the legitimacy of public regimes as well. For example national governments make use of transnational corporate capacity by enrolling airlines in immigration control, and banks and (legal) practitioners in monitoring and reporting money laundering. See Cafaggi 2011, p. 41; Scott, Cafaggi and Senden 2011, p. 18. Cf. Overmars 2011, p. 29.
153. Cf. Cafaggi 2011, pp. 24, 47 and 48; Schouten 2013, pp. 60 and 81 ff.
154. Cafaggi 2011, p. 24.
155. Scott, Cafaggi and Senden 2011, p. 15.

tion.[156] However, the linkage to electoral politics is quite distant on a global level if an international body like the UN is assessed. Its decision-making process is quite diffuse and based solely on a rather indirect linkage to electoral politics. Therefore, it is difficult to adopt global regulation/legislation which has legitimacy in the traditional sense.[157] Besides this, international private regulation is not always comparable with public legislation, as has been discussed previously. Private regulation might have less impact than public legislation and on smaller groups, for example, as it is deployed in supply chains.[158]

Does this mean that legitimacy is of no importance as far as international private regulation is concerned? Scott, Caffagi and Senden contend a more pluralist conception of constitutionalism should be adopted which gives greater recognition to the diversity of institutional structures.[159] The alternative forms of legitimacy might also better reflect the current social situation in which social media gain importance in the policy making of multinational enterprises. Hence, other mechanisms may be considered to bridge the legitimacy gap as private regulation is proposed, including drafting proper procedures and potential judicial accountability.[160] Notwithstanding this, support for international private regulation from governments might enhance acceptance, although support from Western countries might be considered to be a protectionist measure in some instances by (inhabitants of) non-Western countries.[161]

However, striving for alternative forms of legitimacy is problematic in supply-chain regulatory regimes, for example tied to CSR. In supply chains a purchaser requires adoption of the applicable standards and engages in monitoring and enforcement either directly or through contracting third party assurance organizations.[162] Bilateral contracts within supply chains present significant problems for the management of legitimacy in terms both of substantive norms and processes and identifying the level at which such issues are managed.[163] In a worst case scenario the international private regulation adopted in a supply-chain contract is likely to be experienced coercively by suppliers. This is especially true if the norms are prescribed by multinational enterprises vis-à-vis smaller and medium-sized corporations. Furthermore, for example, (Western) international human rights and environmental principles might be suspected in other (non-Western) countries of being part of alleged protectionist measures vis-à-vis its own national industry. Besides this, third party monitoring increases complexity and diffuses the responsibility for legitimacy.

156. However, international private regulation might have some electoral elements which partly resemble legitimation of public norms. Within private regulation regulatees may choose their regulators. For example, consumers may have choices as to which self-regulatory regime they want to be protected by. See Scott, Cafaggi and Senden 2011, p. 17.
157. Exempt from global treaties which are binding in all states. However, the number of treaties meeting this requirement is very limited.
158. In such smaller communities other forms of legitimation are conceivable. Cf. Hampstead and Freeman 1985, p. 411.
159. Scott, Cafaggi and Senden 2011, p. 2. Cf. Cafaggi 2011, p. 43; Pauwelyn, Wessel and Wouters 2012, pp. 511-519; Schouten 2013, pp. 57 ff. and 109.
160. Scott, Cafaggi and Senden 2011, p. 1; Schouten 2013, pp. 82, 83, 106-110, 128-132, and 134-137.
161. Cf. on the role of governments Alvarez and Van Hagen 2012, pp. 17 and 18. Cf. in connection with global agri-food chains Schouten 2013, pp. 67 and 68.
162. Casey and Scott 2011, p. 93.
163. Casey and Scott 2011, p. 93. See e.g. for an initiative on sustainable trade in supply chains the IDH sustainable trade initiative, to be found at www.idhsustainabletrade.com (accessed April 20, 2013).

However, third parties may be part of a legitimation strategy not only vis-à-vis suppliers but also in respect of ultimate consumers. To the extent that issues of consumer confidence are significant, there may be strong incentives to make use of third party assurance.[164]
That said, it is not unreasonable to assume that the combination of direct participation of market actors and the inclusion of both NGOs and governments has the potential to combine advantages for acceptance as compared with inter-governmental regimes.[165] Furthermore, government support might enhance acceptance.[166] From the importance of acceptance of international private regulation it could be inferred that an initiative is more effective as the level of acceptance increases and that the lack of legitimacy of international private regulation in the traditional sense might be partially compensated for by acceptance (in a sociological sense). If the norms are accepted amongst the regulatees and other stakeholders, this proves at least a small degree of legitimacy.[167]

As to the mode of transmission of norms (iii), some modes are more effective at inducing acceptance than others. For example, supply-chain contracts are often used to import norms developed in other contexts which are less then fully institutionalized.[168] The standards set by the FSC were adopted by major retailers in their supply-chain contracts because of market pressure to show strong environmental performance.[169] This is transparent to the parties and has been subject to well-developed mechanisms of monitoring and enforcement.[170] In such circumstances knowledge and acceptance of a norm is part of the process of entering into a contract.[171] The dimension of socialization and reinforcement then occurs largely through market processes.[172] Hence, if a private regulatory regime applies more effective modes of transmission this indicates more effectiveness from a sociological point of view.

As to the inclusiveness of the norm setting process (iv) (which is closely tied to acceptance), it is important that the relevant stakeholders are involved in the production of the rules of the private regulatory framework. In this respect, rules on stakeholder engagement in public legislation might be helpful. An interesting example is provided by Dutch law. Section 25 of the Dutch Privacy Act grants the Dutch Privacy Authority the power to take an administrative decision on the compatibility with the Privacy Act of a certain code of conduct (on privacy) set forth by a certain industry.[173] Section 25 of the Dutch Privacy Act requires the Privacy

164. Casey and Scott 2011, p. 94.
165. Scott, Cafaggi and Senden 2011, p. 19.
166. Cf. in connection with global agri-food chains Schouten 2013, pp. 67 and 68.
167. Cf. Hampstead and Freeman 1985, p. 411.
168. Casey and Scott 2011, p. 85. Cf. Oude Vrielink 2011, p. 72.
169. Casey and Scott 2011, p. 85.
170. This for example takes place through third party certification. These mechanisms often encompass a high degree of institutionalization. See Casey and Scott 2011, p. 85.
171. Casey and Scott 2011, p. 85. The more vertically (one entity controls multiple processes along the chian) and horizontally (fewer entities at each stage) integrated a chain is, the more effective the transmission appears to be. Cf. in connection with global agri-food chains Schouten 2013, pp. 46 and 47.
172. Casey and Scott 2011, p. 86.
173. Which according to section 25 subsection 3 DPA has to demonstrate its representativeness.

Authority to enable relevant stakeholders to comment on this code of conduct before it reaches its decision.[174] This procedure enhances the acceptance of the code of conduct. Furthermore, stakeholders have the opportunity to comment on intended secondary regulation in the United States. These proceedings might enhance acceptance as well. If such stakeholder engagement measures are put in place, this might be effective in terms of acceptance of certain international private regulation.[175] By and large international private regulation is more effective in sociological terms if relevant stakeholders are involved in the rulemaking process in such a manner that they may contribute effectively to the norm-setting process.[176] This is revealed by a survey carried out by ISEAL in 2007 which has shown that inclusiveness, participation, and fair representation is pivotal in connection with the credibility of standards.[177] Non-inclusiveness might induce (excluded) stakeholders to (strongly) oppose international private regulation.[178] Inclusiveness vis-à-vis relevant stakeholders provides insight into the preferences of others, the varieties of perspectives on the problem the regime addresses and provides potential for rethinking not only the rules and instruments of the regime but also its objectives.[179] If only one (group of) stakeholder(s) is represented in the governing body, this decreases the acceptance of such mechanism for others.[180] Therefore, the multi-stakeholder model seems more effective because it aspires to engage the relevant stakeholders in the rulemaking process and is therefore able to embody all interests.[181] However,

174. See also in connection with standardization in the EU section 4 subsection 3 Regulation 1025/2012 EU which requires a notice and comment procedure regarding draft standards. See e.g. Neerhof 2013, pp. 159-161.
175. However, Scott, Cafaggi and Senden content that the legitimacy of monitoring and enforcing functions is amenable to being addressed not only through participation, but also through institutionalization both of process and norms for scrutiny. See Scott, Cafaggi and Senden 2011, p. 15.
176. Cf. the MSI evaluation tool, pp. 8-11; Schouten 2013, pp. 84 and 85. Cf. on standardization the Report of the expert panel for the review of the European standarization system, pp. 9, 19, 21, 29 and 32. See also Directive 98/34/EC and General Guidelines for the cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association of March 28, 2003 (2003/C 91/04). In the report it is proposed to change Directive 98/34/EC in line with the provisions of the Service Directive 2006/123/EC. See Report, p. 32. In this respect the Report (on pp. 9 and 23) also refers to the ISO code of ethics (to ensure impartiality) and the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards. See for these codes www.iso.org/iso/codeethics_2004-en.pdf and www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (accessed April 20, 2013). In (technical) standardization the regulator is supposed to be independent from the industry and its legitimacy is based on expertise. See Cafaggi 2011, p. 35. Moreover, independence from members of an initiative seems important for this in general. This poses *inter alia* limits to funding by members to an initiative and allocation of resources. See e.g. MSI evaluation tool, pp. 6 and 7.
177. Casey and Scott 2011, p. 89. Cf. regarding round table initiatives in global agri-food chains Schouten 2013, pp. 36-38. This might be a specific risk in long supply chains with multiple actors. Cf. Alvarez and Van Hagen 2012, p. 11.
178. See in connection with global agri-food chains Schouten 2013, pp. 43-45.
179. Scott, Cafaggi and Senden 2011, p. 18.
180. Cf. Utting 2001, p. 103 ff.
181. Cf. Kopell 2010, p. 57; Overmars 2011, p. 20; Scott, Cafaggi and Senden 2011, p. 6; Pauwelyn, Wessel and Wouters 2012, pp. 521-526; Utting 2001, p. 103 ff. See e.g. on International Framework Agreements on labor standards Herrnstadt 2007, p. 187 ff. Also on building standards Neerhof 2013, pp. 158-173. This is also common in respect of traditional rulemaking. Often (EU) legislators consult stakeholders if regulation is envisaged to involve the stakeholders in the process. See e.g. on EU-legislation The White paper on European Governance, http://eurlex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf; The European Commission: Governance statement of the European Union, 4. Openess and Transparency: The guiding principles; The European Commission: 'General principles and minimum standards for consultation of interested parties by the Commission' http://ec.europa.eu/civil_society/consultation_standards/index_en.htm#_Toc46744739.

this might not be true in all circumstances. For example, market failures associated with the excessive depletion of natural resources or climate change may be effectively addressed through action by the same market actors whose conduct has caused the problem.[182]

As to the way in which relevant stakeholders should be involved, four features of rulemaking might be of importance: (i) formality (how precisely is the rulemaking process stipulated in organization documents, either formal or informal?), (ii) decision calculus (what is the nature of deliberations regarding proposed rules, either technical or political?), (iii) decision rule (how is the decision to approve a new rule made: majoritan, supermajoritan, special powers, consensus?) and (iv) inclusiveness (how open is the rulemaking process to participation by non-members, either self-contained or participatory?).[183]

That said, engaging relevant stakeholders is rather complicated.[184] For example, in the global setting it is troublesome to find the relevant stakeholders, because the relevant community is ambiguous and contested.[185] (Global) administrative procedural requirements might be included (which might even be assessed by third parties).[186] This is especially true in assessing the relevant stakeholders and engaging them,[187] assessing the (different) interests of these stakeholders and providing these stakeholders at the right time with adequate information in such a manner that they are able to understand it. For example, inviting (representatives of) indigenous people from a country in Latin America to attend a rule-setting conference of multinational corporations at a venue in the United States which is difficult to reach and providing them with extensive information a day in advance through a web portal which they have no access to (because they do not have Internet access)

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This has also resulted in Principles for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013). Cf. in relation with this topic especially Principles 1.1 and 1.2.

182. Scott, Cafaggi and Senden 2011, p. 7; Kolk and Van Tulder 2005, p. 23.

183. Kopell 2010, p. 145. See also the MSI evaluation tool, pp. 11-13; section 5.2 of the ISEAL Code of Good Practice which demands for providing public information on the decision-making procedures of standard-setting processes. Section 5.5.1 prescribes that participation in the standards consultation in principle should be open to all interested parties and that the decision-making reflects a balance of interests among interested parties. Cf. also the MSI evaluation tool, p. 37. Section 5.5.3 prescribes that if decision-making is limited to members, the membership criteria and application procedures shall be transparent and non-discriminatory. Section 5.9 aims at consensus but provides for alternative decision-making procedures if this is not possible. It prescribes that decision-making procedures should be established and documented which make it impossible for one group to dominate or to be dominated in the decision-making process. Cf. regarding (practical difficulties in) global agri-food chains Schouten 2013, pp. 64-67 and 85-87, who refers to a methodology to assess the quality of deliberation (Discourse Quality Index).

184. See e.g. Cafaggi 2011, p. 38; Cafaggi and Renda 2012, p. 6; Utting 2001, pp. 62, 63, 103-105. Cf. also Scott, Cafaggi and Senden 2011, p. 10. See on this e.g. the AA1000 stakeholder engagement standard to be found at www.accountability.org/standards/aa1000ses/index.html (accessed April 29, 2013). Cf. the MSI evaluation tool, pp. 8-11.

185. Alvarez and Van Hagen 2012, p. 20; Kopell 2010, p. 69. The ISEAL Code of Good Practice provides for an opportunity for interested parties to comment on the public summary for a proposed standard and its terms of reference in section 5.2.2.

186. Kingsbury, Krisch and Stewart, pp. 16, 17 and 58; Curtin and Senden 2011, p. 179. See on these procedural requirements e.g. Casesse, Carotti, Casini, Macchia, MacDonald and Savino 2008, p. 133 ff. It might be feasible to start with a smaller group of stakeholders to build trust and to expand this group afterwards. See in connection with global agri-food chains Schouten 2013, p. 46.

187. It might be conceivable to introduce threshold criteria in terms of being affected. Cf. Corthaut, Demeyere, Hachez and Wouters 2012, p. 316.

and in English, a language they do not understand, is rather ineffective. Effective stakeholder engagement involves (i) a proper procedure in which the relevant stakeholders are identified and engaged in the rule-setting process (with sufficient resources), preferably through engagement rules (with comparable administrative procedures), (ii) an assessment of their interests, (iii) a procedure in which adequate and timely information (on the rule-setting process and its substantive norms) is provided in such a manner that the relevant stakeholders are able to access and understand it and (iv) sufficient documentation of the process and reporting to the stakeholders.[188] NGOs might play a role in capacity building of local communities especially in non-Western countries.[189] These communities should not feel bound by decisions made by (Western) outsiders (only). As to criterion (i) for example, diversity (in terms of gender and background) has to be safeguarded and no relevant stakeholder should be marginalized.[190] Furthermore, if the stakeholders are quite diverse, several selection processes might be necessary as well as different bodies of engagement for different stakeholders. Besides this, the degree of participation might be variable.[191] There is no need to put too much emphasis on membership.[192]

Several examples show the importance of stakeholder engagement in connection with the effectiveness of international private regulation. For example, the Marine Stewardship Council (MSC), established by the World Wildlife Fund and Unilever in 1996, was initially criticized due to perceived industry capture and lack of transparency and participation in its standard-setting procedures. The MSC became a fully independent non-profit organization in 1998 and undertook a comprehensive governance reform to enhance participation, representation, and transparency.[193] The Forest Stewardship Council (FSC) has been one of the most active private regulation regimes in the institutionalization of processes aspiring to increase its legit-

188. Cf. sections 5.2, 5.3, 5.5, 5.6 and 5.7 of the ISEAL Code of Good Practice. Sections 5.2 and 5.3 involve a stakeholder mapping exercise which includes defining which interest sectors are relevant and why and what means of communications will best reach them. Furthermore, key stakeholders should proactively be approached and the standard-setting body should establish participation goals. According to section 5.5.2 relevant stakeholders are those who have an expertise relevant to the subject matter of the standard, those who are affected by the standard and those that could influence the standard. Materially affected stakeholders should make up a meaningful segment of the participants. Furthermore, section 5.6 prescribes a public consultation phase of 60 days in two rounds (if new standards are set or existing standards are substantially modified). Section 5.7 prescribes that interested parties shall be provided with meaningful opportunities to contribute and if a balanced group of stakeholders participate all interested parties should have an equal opportunity to be part of that group. Furthermore, the standard-setting organization should identify parties who will be directly affected and not adequately represented and proactively seek their contributions (section 5.7.2). If necessary funding or other means to facilitate participation (especially for disadvantaged groups directly affected by the standards) should be provided by the standard-setting body (section 5.7.3). Cf. Principles 1.2 and 2.5 for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013). Cf. also on stakeholder engagement in the extractive industry: Shift, Discussion Paper on Stakeholder engagement in the extractive industry under the OECD Guidelines for Multinational Enterprises, June 2013 (especially referring to Chapter II.14 of these guidelines), to be found at www.shiftproject.org (accessed September 11, 2013). Cf. regarding understanding the information Casesse, Carotti, Casini, Macchia, MacDonald and Savino 2008, p. 138. For example highly technical language might be less understandable.
189. Utting 2001, pp. 105-107.
190. Cf. e.g. the MSI evaluation tool, pp. 8-11.
191. Casesse, Carotti, Casini, Macchia, MacDonald and Savino 2008, p. 17.
192. Maher 2011, p. 135.
193. Casey and Scott 2011, p. 90.

imacy relating to responsible forest management.[194] It has institutionalized an elaborate governance structure which is based upon participation, democracy, and equality. It has established a tripartite governance structure composed of social, environmental, and economic chambers which have equal voting rights. In each chamber there are north and south sub chambers with equal voting rights regardless of the number of members. In order for a decision to be made there is a requirement that two-thirds vote, which necessitates agreement not only between social, environmental, and economic interests, but also between north and south interests.[195] Concluding this section it might be argued that the more relevant stakeholders are effectively engaged in the rulemaking process, the more effective an initiative deems to be.

From the above it could be inferred from a sociological perspective that the effectiveness of international private regulation is intertwined with:

i. the degree of knowledge and application;
ii. acceptance thereof, which *inter alia* depends on:
    *a.* a stable group of stakeholders,
    *b.* a willingness to collaborate and to address relevant issues,
    *c.* a shared vision on relevant issues,
    *d.* the degree to which the actions of a governing body, if any, are aligned with this shared vision,
    *e.* a tradition of and experience with private rulemaking,
    *f.* the way the regulation fits within the strategic choices and dilemmas faced by the regulatees,
    *g.* the existence of an own interest in the regulation,
    *h.* a slowly changing environment,
    *i.* support from governments;
iii. the mode of transmission; and
iv. inclusiveness vis-à-vis stakeholders and effective stakeholder engagement.[196]

The social perspective could be used *ex ante* to predict whether a favorable environment exists for a private regulatory framework to be accepted. Obviously, acceptance itself cannot be assessed *ex ante*. Furthermore, it is relevant to include the most effective ways of communication and transmission of the framework in the rule-setting process and the promulgation of the framework. The same goes for the inclusiveness of the rule-setting process vis-à-vis relevant stakeholders.

194. Casey and Scott 2011, p. 90.
195. Casey and Scott 2011, p. 90; Schouten 2013, p. 65. Sometimes outside the CSR area, for example in GLOBALGAP a private regulation regime in the sphere of food safety and quality, processes are initiated to enhance participation in its standard-setting by notice and comment procedures, but the board is still composed of retailer and producer representatives. See Casey and Scott 2011, p. 90.
196. This indicator refers to the legitimacy of the process, discussed in paragraph 2.2.4 above, as well.

### 2.3.4 **Psychological approach**

The psychological approach aspires to assess (*ex ante*) whether envisioned international private regulation influences human behavior effectively.[197] However, legal (either private or public) rules are not the predominant steering mechanisms which guide an actor's behavior in many situations. For example, social norms which emanate from communities govern much human behavior too.[198] If a range of (either private or public) norms is designed to govern an actor's conduct, this does not automatically mean these norms actually govern that actor's behavior.[199] Empirical research has shown that in particular contexts, both contractual and regulatory, legal rules are not relied upon to steer the conduct of a social actor, despite the fact these legal rules are applicable to a specific action of a certain social actor, for instance through contractual agreements or legislation.[200] For example, contracting parties frequently do not rely on the law or lawyers in resolving disputes over breaches.[201] In such cases, social norms may guide the specific conduct of the actor.[202] Therefore, it is important to enhance as much as possible the crystallization of international private regulation in such a manner that it actually governs behavior.

Another problem is that research has raised serious questions about the rationality of many judgments and decisions that people make.[203] For example, people tend to overestimate the predictability of past events, with the advantage of hindsight.[204] Furthermore, people tend to go along with the status quo or default option.[205] Therefore, if public officials think that one policy produces better outcomes, they can influence the outcome by choosing it as a default.[206] Following the default option might stem from a choice/information overload. Research suggests that past a certain point, if provided with more choice and information, humans either walk away from markets, choose the default option or choose randomly.[207] For example, in connection with eco-labels consumers might attempt to simplify rather (complex)

197. In this respect especially insights derived from cognitive psychology (which deals with the human decision-making process) are relevant and less so those derived from social psychology (the interaction between people and the way this influences decision making). See further on psychology and law e.g. Giesen 2011, pp. 1065-1074 and Giesen 2005. The psychological approach is also concerned with the issue of whether decision making may also be influenced by (proper) measures other than regulation.
198. Casey and Scott 2011, p. 79.
199. Casey and Scott 2011, p. 81.
200. Casey and Scott 2011, p. 81. Cf. regarding eco-labels Gandara 2013, pp. 185-189.
201. Casey and Scott 2011, p. 86.
202. Casey and Scott 2011, p. 82.
203. Thaler and Sunstein 2008, p. 7.
204. Guthrie, Rachlinsky and Wistrich 2007, pp. 123-126; Guthrie, Rachlinsky and Wistrich 2002, pp. 47 and 48. Even judges are affected by this bias. See Guthrie, Rachlinsky and Wistrich 2007, pp. 123-126; Guthrie, Rachlinsky and Wistrich 2002, pp. 47 and 48.
205. Van der Heijden 2011, pp. 431-433; Thaler and Sunstein 2008, pp. 8 and 34.
206. Johnson and Goldstein 2003, p. 1338; Thaler and Sunstein 2008, pp. 8 and 86. For example, countries in which people have to opt out of donating organs have a higher rate of donors compared to countries in which people have to opt in.
207. Renda 2011, p. 110; Rassin 2008, pp. 69-73. See on eco-labels Gandara 2013, pp. 190-192. This might explain the popularity of websites which assist people in making choices (for example in the area of (health-care) insurance, consumer goods and financial products).

environmental information and aggregate other people's opinions.[208] They might expect eco-labeled foods to taste better because the environmental benefit is not observable.[209] Furthermore, a consumer tends to accept information which is in line with previous knowledge.[210] Consumers might also overestimate the environmental improvement of an eco-labeled product or consider brands or companies using eco-labels as entirely green.[211] Even their expectations about a product's (environmental) quality makes a product better or worse. If their impression is positive, negative information will be ignored.[212] A higher price enhances the credibility of the product too.[213] Because eco-labels are oriented towards providing (certain) environmental information consumers might tend to overestimate the effects of these environmental problems in favor of less exposed environmental problems.[214] Besides this, a problem has to be individualized or separated into smaller manageable parts: if it becomes too broad, such as climate change, an individual contribution is rather small. Therefore, people are likely to neglect it emotionally.[215] If an informational deficit results in neglecting the information altogether, international private regulation might not function. For example, eco-labels are informational tools aiming at nudging consumers to buy environmentally friendly products. Hence, neglecting the information provided by them (as well as distrusting such information or being unaware of it) renders them ineffective.[216] Furthermore, eco-labels should preserve a good reputation and avoid negative emotions (of consumers) in order to attract attention.[217] In this respect competition between (too many) eco-labels might result in confusion, especially if false eco-labels or frivolous environmental claims exist as well.[218]

Furthermore, we are loss averse, so that losing something makes people twice as miserable as gaining the same thing makes them happy.[219] Thus the personal severity, the perceived severity of negative consequence or outcome which could result from assuming no behavioral action and the salience of a certain topic to an individual, influences decision making.[220] Besides this, inconsistency between attitudes (preferences, beliefs, or norms) may result in an uncomfortable state

208. Gandara 2013, pp. 129, 193 and 194.
209. Gandara 2013, p. 129.
210. See on eco-labels Gandara 2013, p. 194.
211. Gandara 2013, pp. 129, 162 and 205. Obviously, this conclusion is false. If a company qualifies for a low carbon label this does not include performance in other areas such as water and waste management. See also Gandara 2013, p. 207.
212. Gandara 2013, pp. 130 and 131.
213. Gandara 2013, p. 132. Cf. On price premiums United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 30-33, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013).
214. Gandara 2013, p. 181. Cf. United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, p. 35, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013).
215. Gandara 2013, p. 183.
216. Gandara 2013, pp. 200-202.
217. Gandara 2013, p. 203. In this respect they should also review their supply chain. The eco-friendlier it is (if made public), the better their reputation. See Gandara 2013, pp. 208 and 209.
218. Gandara 2013, pp. 205, 206, 209, 268 and 269.
219. Guthrie, Rachlinsky and Wistrich 2002, pp. 46 and 47; Thaler and Sunstein 2008, p. 33; Giesen 2011, p. 1069; Pape 2011, p. 173.
220. Pape 2011, p. 104; Van Gestel 2013, p. 27.

(cognitive dissonance) which an individual tries to resolve.[221] Eco-labels might assist in this because they enable an individual to change his behavior (through buying an eco-labeled product) and align it with his moral (environmental) preferences.[222] Besides this, we are influenced by the rules other people consider as a norm.[223]

From the above it becomes clear that individuals exhibit bounded rationality, which means that their mental resources are limited and depart from the expected utility theory. People make choices sometimes which are not in their long-term (financial) interest or are even harmful to them.[224] These biases might also lead to shifting their focus towards measurable and immediate benefits, rather than long-term social welfare.[225] Therefore, in designing private regulation one should take into account that human decision making is not infallible.[226] One could toy with designing regulation which involves no choice. However, sometimes the most equitable system is where a choice is required.[227] Furthermore, many (more or less) open norms contain an element of choice. But with highly complex choices this may not be a good idea as has been previously revealed; it might not even be feasible.[228] Good private regulation also helps people to select options that will make them better off, for example by providing information.[229] One way of doing this is to make the information about various options more comprehensible.[230] As choices become more numerous and/or vary in more dimensions, people are more likely to adopt simplifying strategies.[231] Then the choice architecture has to provide structure.[232] It should provide feedback too.[233] Furthermore, incentives might be used, but it is important to give the right incentives to the right people, and make them aware of the incentive.[234] Besides this, many people will take whatever option requires the least effort or the path of least resistance.[235] Therefore, a rule is required that determines what happens to the decision maker if he does nothing.[236]

221. Gandara 2013, p. 198.
222. Gandara 2013, p. 199.
223. Van Gestel 2013, p. 27.
224. See e.g. Van der Heijden 2011, pp. 431-433; Thaler and Sunstein 2008, pp. 8 and 34; Giesen 2011, p. 1069; Renda 2011, p. 112.
225. Cafaggi and Renda 2012, p. 17.
226. Thaler and Sunstein 2008, p. 87. See on public regulation Jonkers 2013, p. 6; Van Gestel 2013, pp. 23 and 24.
227. Thaler and Sunstein 2008, p. 86.
228. Thaler and Sunstein 2008, p. 87.
229. Cf. Renda 2011, pp. 158 and 159; Thaler and Sunstein 2008, p. 92; Van Boom, Giesen and Verheij 2008, pp. 25-27. Van Boom, Giesen and Verhey discuss the difficulty in providing adequate information too.
230. Thaler and Sunstein 2008, p. 92.
231. Thaler and Sunstein 2008, p. 95.
232. Thaler and Sunstein 2008, p. 95.
233. Thaler and Sunstein 2008, p. 90. See e.g. on feedback with eBay, which provides a judgment system of sellers Buskens 2011, pp. 29-34.
234. Thaler and Sunstein 2008, pp. 97 and 98.
235. Thaler and Sunstein 2008, p. 83.
236. Renda 2011, p. 158; Thaler and Sunstein 2008, p. 83. However, choosing a default option might in itself pose (for example ethical) questions and might raise legitimacy issues. See Van Gestel 2013, pp. 33-35. Notwithstanding this, the private regulator has to consider what happens if no choice is made.

The question arises as to whether these insights also pertain to decision making by companies, for example on market regulation or environmental protection.[237] Obviously, individuals within a company might be hampered by the biases described previously, for example if international private regulation prescribes a risk assessment. In making such an assessment this individual within the company might be hampered by hindsight advantages or the fact that humans tend to be risk averse.[238] However, this conclusion does not answer the question of whether the organizational design of a company influences decision making. In order to answer that question, a shift in perspective is necessary. The focus shifts from individual decision making to group behavior.[239] Research has revealed that organizational design of enterprises does indeed influence group behavior.[240] Different types of organizations make different types of decisions and errors. A variety of different organizational structures may be classified into hierarchies and polyarchies for the purposes of modeling, taking a decision-making rule as a criterion. Under the hierarchy, a project to be passed should first be accepted by one level of managers and after their positive evaluation it should get the approval of the other levels of managers. So it requires the approval of all the managers. In contrast, a polyarchy allows a project to be passed if it is accepted at least by one manager. A polyarchy accepts a larger number of projects because managers can accept them independently of each other. Assuming that different projects are divided into good and bad ones, Sah and Stiglitz showed that hierarchies and polyarchies are prone to different kinds of errors. Hierarchies reject good projects more often than polyarchies, while polyarchies accept more bad projects than hierarchies.[241] Alternatively, a model may be based on the comparison of different organizational structures, similar to the structures used in the models of Franckx and De Vries[242] or Besanko, Regibeau and Rockett.[243] Their models are used to analyze the product-based organizational structure and the functional structure in relation to accident prevention. This approach may, however, be useful to analyze decision making incentivized by international private regulation too. International private regulation should, for example, fit market conditions in a certain industry or country. The market conditions may be influenced by the way the majority of enterprises is organized. The product-basedorganizational structure implies that a division of an organization into departments is made along the lines of the products manufactured. Thus, the first department is responsible for all functions related to the product A, the second department to the product B and so on. By contrast, the functionalorganizational structure is based on a type of activity. The typical activities include, for instance, production, marketing, research and development, human resources, and internal audit. This division principle encourages the managers of the product-based structure to practice a complex approach to their broad tasks and assumes more

237. Renda 2011, p. 160.
238. Despite this, risk might be missed as well. See for an clear example Balleisen and Eisner 2009, p. 128.
239. In this respect insights derived from social psychology (the interaction between people and the way this influences decision making) are especially important, whereas cognitive psychology, which has been discussed previously, is concerned with individual decision making.
240. Cf. Kroeze 2008, pp. 424-452.
241. Sah and Stiglitz 1985, p. 293; Wu 2006, p. 108.
242. Franckx and De Vries 2004, pp. 1-38.
243. Besanko, Regibeau and Rockett 2005, pp. 437-467.

autonomy at a department level, whereas the functional structure makes the managers rather narrow professionals in their specific functional field and more centralized guiding is provided across different product lines. Therefore, effective international private regulation has to take into account the (prevailing) organizational model of the regulated organizations.

In designing international private regulation, the aforementioned insights should be taken into account.[244] From an (*ex ante*) psychological perspective international private regulation has the best chance to be effective if:

i. takes into account that human decision making is not flawless and expects failures,
ii. structures complex choices, *inter alia* by:
    *a.* restricting the number of choices,
    *b.* providing information which assists people in making proper decisions, and
    *c.* demanding transparency as to the consequences of a choice,
iii. involves a default option which is beneficial to the majority of regulatees,
iv. if business is involved, takes into account the organizational model of the regulatees,
v. enhances crystallization so as to govern behavior.

Instead of promulgating new private regulation, policymakers might consider establishing nudges which direct people in the desired direction. A nudge is a choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. However, the question arises as to whether nudging is evidence-based because empirical research does not always deliver unequivocal results and the research is often based on experiments with a small number of people.[245] That said, it is contended that regulation might neither be the right instrument to change behavior, for example because it is necessarily not tailor-made, because of the distance between a regulator and an individual and because the help of intermediaries (for example companies) is necessary to influence behavior.[246] In such circumstances a nudge might be more effective, provided that this intervention is easy and cheap to avoid.[247] Rare, difficult choices with delayed effects are particularly good candidates for nudges according to Thaler and Sunstein, for example in situations lacking direct feedback or where feedback did not work.[248]

The psychological avenue might thus provide an *ex ante* tool to assess the effectiveness of international private regulation, alongside to the legal, economic and sociological avenues.

244. Cf. Thaler and Sunstein, who promulgate that the aforementioned features can easily be enlisted by private and public nudgers. See Thaler and Sunstein 2008, p. 71.
245. Van Gestel 2013, pp. 31 and 32.
246. Jonkers 2013, pp. 15 and 16.
247. Thaler and Sunstein 2008, p. 6.
248. Thaler and Sunstein 2008, p. 75.

## 2.4 Assessing effectiveness of existing international private regulation (*ex post* approach)

### 2.4.1 Legal approach

After discussing the *ex ante* indicators which are helpful in the rule-setting process, I now turn to the effectiveness of existing international private regulation. In this respect, the legal and economic avenues are especially important, combined with a more limited role for the sociological avenue. From a legal point of view, the effectiveness of (existing) international private regulation is, *inter alia*, questioned because it is deemed to be less enforceable than public regulation. This is supposedly caused by the lack of public instruments to enforce private regulation. Furthermore, as is previously shown, other indicators are important in assessing effectiveness of existing international private regulation, such as an effective conflict resolution mechanism.

However, research has not confirmed the assumption that private enforcement is less effective in The Netherlands. Research has been conducted in connection with effectiveness of private and public enforcement regarding regulation on consumer protection against unfair trade practices (sections 6:193a-j of the Dutch Civil Code).[249] For example, misleading product information is considered to be an unfair trade practice (section 6:193c subsection 1(b) and section 6:193d subsection 3 Dutch Civil Code). These rules in the Dutch Civil Code are enforced by public instruments, such as fines. This (public) enforcement was evaluated in 2007 and 2008, but this evaluation did not confirm public enforcement as being more effective than private enforcement.[250] That said, enforcement by states is deemed to be necessary if violations of norms have a low probability of detection. Then more severe (public) sanctions are needed in order to compensate for this low probability. Furthermore, a public entity may have an informational advantage over private supervisors.[251] However, this does not mean that enforcement should be a prerogative of states. The capacity to steer transnational actors may arguably be even greater for intergovernmental actors than it is for national governments.[252] This is mainly caused by the fact that no global overarching (public) supervisor (with instruments to enforce) exists. Therefore alternative mechanisms to enforce international private regulation have to be considered.

Analysis of enforcement of a private norm is concerned with the rewards and punishment associated with following the norm, the mechanisms and extent of enforcement, the source of authority, and the degree of internalization.[253] Research has not shown the frequent use of enforcement processes connected to international private regulation involving the stringent application of regulatory rules. Instead a wide range of approaches, often involving education and advice to those found

249. This legislation implements Directive 2005/23/EG of the European Parliament and the European Council on unfair trade practices of May 11, 2005, *PbEU* 2005, L 149.
250. See Mout-Vos 2010, p. 258. The author contends public enforcement cannot be ignored in order to impose punitive sanctions (p. 265).
251. See on effectiveness of public versus private enforcement in general e.g. Emaus and Keirse 2011, p. 502.
252. Scott, Cafaggi and Senden 2011, p. 8.
253. Casey and Scott 2011, p. 83.

in breach are utilized ahead of more stringent approaches, warnings, penalties, and license revocations.[254] Studies have even been conducted combining the empirical evidence of the practice of escalating sanctions with game-theory arguments as to how and when such escalation should occur.[255] The application of the enforcement pyramid is intended to ensure that regulatees who are fundamentally oriented towards legal compliance receive appropriate advice to enable them to achieve this objective.[256] On the other hand, the credible threat of escalation encourages the subjects who only comply when this is consistent with financial incentives to comply at the lowest level of the pyramid, because non-compliance would be more costly.[257] When social norms are persistently breached there is the potential for an escalating set of sanctions against the deviant, starting with social sanctions (negative word of mouth) and which eventually may reach a formal legal claim.[258] It is likely that social norms frequently underpin the operation of parties to a private regulatory regime, however often because of the possibility/threat of reinforcement through market sanctions and/or the possibility of legal sanctions for significant or harmful deviation from such norms.[259] If the threat of (effective) enforcement exists, it may therefore not be necessary to make use of the whole pyramid. Besides this, it has to be noted that enforcement is not only tied to sanctions and costs arising from imposing these, but also to other means such as providing information on the regime and education.

International private regulation is often considered to have a high sense of freedom to opt in or out of a certain sphere.[260] Parties who wish to join the regulatory bodies participating in the regime are free to do so. Therefore private enforcement is considered to be less effective. This is, however, not necessarily so. Once entities have implemented a private regulatory regime, they are (legally) bound by it and violation of the rules might be subject to (legal) sanctions, for example imposed by an overarching body or arising from contractual provisions.[261] The more severe the (threat of) possible sanctions might get, the more effective the private regime is.[262] Furthermore, incentives may exist to participate. Participation in a private regime and compliance with its standards might be a condition for access to this or other regimes which provide market opportunities for the regulated entities. Some standards even are de facto compulsory for market actors, whether promulgated

254. Casey and Scott 2011, p. 83.
255. Casey and Scott 2011, p. 83.
256. Nevertheless imposing sanctions is not necessary in many instances. Business disputes often are settled without the use of (judicial) enforcement mechanisms. See e.g. Van Erp 2008, pp. 168-170 and 175.
257. Casey and Scott 2011, p. 83. Nonetheless, especially regarding punitive sanctions, public legislation is deemed to be essential. A need for such enforcement mechanisms may exist if the possibilities for detection of violations of the private regime are limited.
258. Casey and Scott 2011, p. 84.
259. Casey and Scott 2011, p. 84; Overmars 2011, p. 17. Cf. on International Framework Agreements on labor standards Herrnstadt 2007, pp. 202-207.
260. Balleisen and Eisner 2009, p. 131; Curtin and Senden 2011, p. 168.
261. See e.g. Giesen 2007, pp. 93-106, who discerns three grounds for the binding nature of private regulatory regimes. These are (national) legislation, agreement, and open norms in (national) legislation. See on sanctions by an overarching body e.g. the MSI evaluation tool, pp. 33-36.
262. Cf. regarding codes of conduct in the CSR area Kolk and Van Tulder 2005, p. 10. They contend that codes promulgated by business associations perform weakly in the CSR area *inter alia* in this respect. See Kolk and Van Tulder 2005, p. 11. Cf. regarding construction Neerhof 2013, pp. 63 and 64.

by individual actors (for example Microsoft or ICANN[263]) or by standardization bodies (like ISO).[264] The foregoing standards promulgated by individual actors, either individual companies or overarching bodies, have in common that they provide access to scarce resources. This enhances the possibility of setting forth private regimes and enforcing these regimes.[265] Another example is connected with the IFC guidelines. If a company does not comply with these standards, it experiences much greater difficulty in raising capital.[266]
Furthermore, the enforceability of international private regulation is connected with the specificity of it, which has been previously shown. More precise commands will generally result in better behavior.[267]

Market incentives may exist to develop and follow standards too, while the market punishes those who do not follow them.[268] Pressure to comply with private norms may be exerted by consumers, NGOs, investors, or stock markets.[269] Incentives might also exist within a company. For example, a company listed on the stock exchange might increase the bonuses of its board members if it raises its position in the sustainability index. That said, it is important an overarching body exists which has the power to inform the public on the implementation of and compliance with the transnational private regulation by its members.[270] Sometimes private regulation addresses reputational issues,[271] because of many items (on the Internet

263. Kopell 2010, p. 52.
264. Cf. Maher 2011, pp. 135 and 136. However, this raises the question whether such a regime violates (public) regulation on competition. If companies create a level playing field with each other in order to enhance CSR-compliance, one might favor such a regime because it contributes to social welfare, unlike most actions which restrict competition. Unfortunately, to date (European) competition law does not seem to provide an exemption for such regimes. If such an exemption is deemed feasible, public supervision might be desirable to assess whether these regimes restrict competition in a proportional manner. Reference could be made to section 25 of the Dutch data protection law, which creates the power for the Dutch Data Protection Agency to decide whether codes of conduct on data protection meet the requirements set forth by the law. Competition authorities might be attributed a comparable power to assess whether private regulation on CSR does not unnecessarily restrict competition. Cf. in this respect (the proposed) section 2 of the policy of the Dutch Department of Economic Affairs which provides for guidelines to the Competition Authority as to which cases an exemption to section 6 subsection 3 of the Dutch Competition Act (which prohibits acts which restrict competition) should be granted in connection with substainable business.
265. Cf. Kopell 2010, p. 62; Oude Vrielink 2011, pp. 70-73; Scott, Cafaggi and Senden 2011, p. 7.
266. See outside the CSR area on the accounting standards of the ISAB Kopell 2010, p. 63. In the EU these rules are of a binding nature because they are prescribed by section 3 of Regulation 1606/2002 (*PbEG* 2002, L 243). See for a Dutch case involving these standards HR 24 April 2009, *NJ* 2009/345 m.nt. Van Schilfgaarde (*AFM/Spyker*). Cf. in connection with the specifications of building products in the EU set by a private body and which have to be accepted by the EU Member States because of (sections 3, 8, 27 and annex I) Regulation 305/2011 EU. See on this also Neerhof 2013, pp. 21-34. See furthermore on certification required by government regulation Neerhof 2013, pp. 43-68.
267. See Kaplow 2011, pp. 19 and 20. Cf. Kolk and Van Tulder 2005, p. 9; Luppi and Parisi 2011, p. 43 ff.; Overmars 2011, p. 17 (regarding codes of conduct); Utting 2001, p. 82. Cf. section 6.3.1 of the ISEAL Code of Good Practice.
268. Scott, Cafaggi and Senden 2011, p. 7.
269. Scott, Cafaggi and Senden 2011, p. 10; Kolk and Van Tulder 2005, p. 21; Kopell 2010, p. 61; Utting 2001, pp. 90 and 111 and 112. Kopell gives some examples of NGOs being quite successful in such private enforcement.
270. E.g. the MSI evaluation tool, pp. 20 and 21.
271. Cf. Balleisen and Eisner 2009, pp. 131-133; Van Erp 2008, pp. 165-167; Ogus and Carbonara 2011, pp. 244 and 245; Scott, Cafaggi and Senden 2011, p. 7. Reputational damage raises the cost of non-compliance with the private regulatory framework. See Ogus and Carbonara 2011, pp. 244 and 245. In The Netherlands naming and shaming is considered to be one of the possibilities regarding

or in newspapers) on, for example, violation of CSR standards or codes of conduct.[272] This seems necessary in such cases because the problem of enforcing CSR standards appears to be that unless strong pressure is exercised by, for example, consumers, some significantly sized retailers might not have sufficient incentive to monitor and enforce violations.[273] Without the exercise of pressure, companies with weak records might gravitate toward undemanding programs to enhance their reputation without changing their practices. This might drive companies seeking to make credible efforts out of these non-demanding regimes. On the other hand demanding (more effective) initiatives tends to attract companies with stronger performance records, but might not be implemented by weaker companies.[274] In some sectors this problem is partially solved by NGOs, because they find ways to address these problems, for example regarding human rights or the environment.[275] If market incentives are a driver for compliance, the norms of a private regime often are reflected in contractual arrangements and reinforced through participation in markets.[276] Contractual arrangements might even be used to enforce international private regulation without the existence of market incentives. Nonetheless many enterprises comply with CSR standards voluntarily and do not need such incentives. This is important because the more enterprises accept this regulation and comply voluntarily, the less enforcement is necessary. Conflict, and thus the need for enforcement, is most likely when (i) the distribution of interests among the stakeholders to be governed is heterogeneous,[277] (ii) a governing body does not have coercive tools at its disposal and (iii) this governing body lacks control over a valuable resource.[278]

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repeated or severe violations of the corporate governance code. See the letter of the Minister of Economic Affairs to the Second Chamber of January 30, 2012, p. 5 and Addink 2012, p. 267.

272. Cf. Enneking 2012, pp. 398-401 and 439, who discusses the possibility of codes of conduct becoming trade practice too.
273. Cafaggi 2011, p. 38.
274. Balleisen and Eisner 2009, pp. 132 and 133.
275. Scott, Cafaggi and Senden 2011, p. 8.
276. Casey and Scott 2011, p. 83. For example the Equator Principles, which have been adopted by the Equator Principles Financial Institutions, are relied upon in project financing and advisory activities (if the total project capital costs exceed USD 10 million). These Principles, *inter alia*, require the use of the social screening criteria and environmental, health and safety guidelines of the International Finance Corporation (IFC) and prescribe a risk assessment by the borrower, a grievance mechanism as well as independent monitoring and reporting (Principles 1, 2, 6 and 9). The Principles also involve an annual reporting requirement of the financing entity regarding the implementing process and its experiences (Principle 10). See www.equator-principles.com (accessed April 20, 2013), www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012 (accessed April 20, 2013) and www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps (accessed April 20, 2013). In such instances the crystallization of social norms within particular professional or commercial groupings is often involved. A shared responsibility towards societal issues is needed. For this an intermediate organization may be necessary, which the IFC regards as its Sustainability Framework. See in general Overmars 2011, p. 20. Alongside this, smaller groups of companies and a high organizational rate seem to be beneficial. However, in my view the latter requirements are more closely connected with acceptance from a sociological point of view, which I discuss later on in this contribution. Nonetheless, if these requirements are met, enforcement of a private regime might improve.
277. Cf. Ogus and Carbonara 2011, p. 234.
278. Kopell 2010, p. 62.

Furthermore, certification or monitoring (by a third party) is a common tool to assess whether entities act in compliance with a certain (international) standard.[279] Certification is partly connected to reporting requirements. It generally involves (i) establishment of standards, (ii) certification assessment for compliance with the standards, (iii) a certification seal or label, (iv) accreditation of the certifier by the certification body and (v) compliance monitoring.[280] If a private regulatory regime involves reporting requirements it is easier to assess for third parties whether regulatees comply with this regulatory framework.[281] Certification seems a very useful instrument to enforce compliance with standards.[282] It is frequently used in connection with eco-labels.[283] Eco-labels have different forms, such as words, logos and brand names. They are used for communicating certain environmental (and other social) claims (which may be used only if certain (environmental or social) standards have been complied with and compliance with them has been certified).[284] However, the effectiveness of certification may be a little disappointing in practice. In many countries severe competition exists between certification bodies, thus putting pressure on the reliability of the certification process.[285] Furthermore, the authority supervising the certification bodies is funded by these bodies and is

279. Cf. Balleisen and Eisner 2009, p. 136; Ogus and Carbonara 2011, p. 245; Gandara 2013, p. 152. Cf. e.g. section 4 subsection 3 Regulation 995/2010 EU (EU Timber Regulation) which aims at the global prevention of (illegal) deforestation and demands monitoring of the due diligence in supply chains. In connection with this third party monitoring (e.g. by FSC) is explicitly mentioned as an option in that section (and discussed in section 4 Regulation 607/2012 EU as to the requirements the
monitoring has to meet and Regulation 363/2012 EU involving procedural rules on recognition of third party monitoring bodies). See on this e.g. Tubbing 2013, pp. 331, 332, 334 and 335. Cf. also in connection with standards in global agri-food chains Schouten 2013, pp. 41-43.

280. See in connection with eco-labels Gandara 2013, pp. 51 and 52. See on certification in general e.g. Dimitropoulos 2012, p. 224 ff., who contends (international) certificates should be recognized throughout the world (at pp. 237 and 246) and national governments should supervise the certification process (at p. 241).

281. Cf. Westerman 2012, p. 727. Cf. in connection with traceability of products through a supply chain in order to assess conformity with a standard United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 52-54, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013).

282. It might become even more effective if certification is used to prove that requirements set by public regulation are met. Cf. in connection with bio fuels Schouten 2013, pp. 116 and 117.

283. Gandara 2013, p. 22 ff. Some of these labels not only include environmental issues but social matters as well. Certification (in connection with eco-labels) provides the proof consumers need about the environmental attributes of the product or services. This is necessary because eco-labels are credence goods which do not reflect the products physical or other identifiable characteristics. See Gandara 2013, pp. 260 and 261.

284. Many eco-labels have an overarching body (being the 'owner' of the eco-label in which stakeholders might be represented) as well as authorized or subordinated certification bodies. See e.g. Gandara 2013, p. 25. Eco-labels by and large are (or should be) certification marks and have three purposes (i) to achieve operational improvements in social and environmental arenas, (ii) to provide credible assurance regarding sustainability to consumers and (iii) to increase the demand by modifying purchasing decisions and behavior by communicating sustainability performance to consumers at the point of purchase. See Gandara 2013, pp. 26, 61 and 106-112.

285. See on certification e.g. Dimitropoulos 2012, p. 224 ff., who contends (international) certificates should be recognized throughout the world (at pp. 237 and 246) and national governments should supervise the certification process (at p. 241). See in connection with eco-labels Gandara 2013, p. 224. See on effectiveness criteria regarding certification in the construction arena, which *inter alia* should depend on the risks connected with a certain building Neerhof 2013, pp. 61-63 and 70. See on possible liability of certifying bodies Verbruggen 2013b, pp. 329-337.

therefore not as independent as it could be.[286] Besides this, certification is costly and procedural aspects (review of documentation) might prevail over assessing actual improvement of quality in an organization or changes in, for example, its environmental impact.[287] Furthermore, (employees of) certifying bodies might lack sufficient knowledge and certification criteria might be unspecified or unclear.[288] Other forms of third party monitoring are conceivable too.[289] To be effective, this monitoring should preferably encompass monitoring by skilled and independent third parties.[290] Monitoring is connected to the accountability of enterprises which have adopted certain international private regulation to an overarching body.[291] Accountability in general may be defined as a relationship between an actor and a forum (i) in which the actor has an obligation (ii) to explain and justify (iii) his or her conduct (iv), the forum can pose questions (v) and pass judgment (vi), and the actor may face consequences (vii).[292] The forum can be an individual (minister, journalist) or an agency (parliament, court, audit office, NGO).[293] Regarding international private regulation the identification of the accountability relationship is difficult because of the many actors and different backgrounds and interests.[294] This problem is especially salient in the transnational context with regulatory regimes of a diffuse, hybrid public-private nature which include many different (public and private) often organizationally disconnected actors at various moments in time.[295] Another example is a supply-chain contract.[296] Furthermore, the question might be to whom an actor should be accountable: should this be a governmental

286. See on norms for these supervising authorities in the EU Regulation 765/2008 EU and Neerhof 2013, p. 123 ff.
287. Cf. on the cost of certification Utting 2001, p. 93. It should be noted that certification is not provided for in connection with the ISO standard on CSR, the ISO 26000 standard. Cf. on the predominance of documentary review Boiral 2012, p. 646. See on effectiveness of certification in connection with global agri-food standards Schouten 2013, pp. 132 and 133.
288. Alvarez and Van Hagen 2012, pp. 25 and 26.
289. Kolk and Van Tulder distinguish between second party (e.g. trade associations) and third party (external professionals paid by the company) assessment. They argue that second party assessment is less effective than third party assessment. See Kolk and Van Tulder 2005, p. 10. In my opinion this is not necessarily the case depending on the way these assessments are designed. Furthermore, see on internal and external monitoring of International Framework Agreements on labor standards Herrnstadt 2007, pp. 202-204. Apart from this type of monitoring, monitoring of the transnational regime itself (by an independent evaluator) is conceivable. See the MSI evaluation tool.
290. See also the MSI evaluation tool, pp. 15-18. However, retrieving the relevant information is problematic, for example because business might not want to share certain information. See e.g. Utting 2001, p. 63. Effectiveness of international private regulation therefore might gain relevance if it involves transparency obligations. See e.g. the MSI evaluation tool, pp. 19 and 20.
291. Cf. Balleisen and Eisner 2009, pp. 131 and 137 who contend such body should be a public entity with vigorous enforcement programs.
292. Curtin and Senden 2011, p. 181. See in connection with international private regulation Balleisen and Eisner 2009, pp. 137 and 142; Curtin and Senden 2011, p. 185. Balleisen and Eisner contend that the level of accountability should equal the level of accountability public regulation imposes. See Balleisen and Eisner 2009, pp. 145 and 146. See in general on accountability Bovens 2006, pp. 447 and 450.
293. Curtin and Senden 2011, p. 182. The relationship between the actor and the forum does not necessarily need to have a principal-agent character. See Curtin and Senden 2011, p. 182.
294. Curtin and Senden 2011, p. 182. Cf. Corthaut, Demeyere, Hachez and Wouters 2012, p. 314.
295. Cf. Corthaut, Demeyere, Hachez and Wouters 2012, pp. 313-322.
296. Curtin and Senden 2011, p. 182; Utting 2001, p. 83. See in connection with traceability of products through a supply chain in order to assess conformity with a standard, United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 52-54, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013); Alvarez and Van Hagen 2012, pp. 11 and 12.

or overarching private body, or (another type of) an NGO.[297] Many (effective) private regulatory regimes therefore have multiple accountability relationships.[298] However, sometimes actors focus their accountability on one set of stakeholders at the expense of others.[299] Therefore a need exists for balanced accountability not only towards the powerful stakeholders.[300]
Notwithstanding the foregoing, if independent third parties are involved in assessing compliance (and preferably impose sanctions in case of non-compliance), this indicates more effectiveness vis-à-vis private regulatory regimes which lack such third party assessment.[301] In this respect it is important that the third parties are allowed to share information about the regulatees with the (overarching) body the regulatees are accountable to, in order to pass judgment on the behavior of the regulatees.

Public intervention might also change the regime from voluntary to compulsory.[302] Public intervention is, *inter alia*, deemed to be necessary to address the free-rider issue. Free-riders benefit from international private regulation without adopting or implementing it. One of the ways in which they might benefit is the enforcement of international private regulation in a certain market against entities which have adopted this regulation but violate it.[303] Because of the existence of the international private regulation which is enforced (publicly), for example consumers might (erroneously) trust all market participants to have adopted this regulation.
Public intervention has many faces. International private regulation might have been adopted as international soft law initially, but redeployed by international organizations and implemented through hard law at the regional (EU) or state level, through contract, tort, and/or company law.[304] If the private regulation is implemented through contract and/or tort law, domestic courts recognize privately produced standards as part of customary public or private (international) law.[305] Con-

297. Balleisen and Eisner 2009, p. 137; Curtin and Senden 2011, p. 183.
298. Curtin and Senden 2011, p. 183. This type of accountability is not deemed effective by Balleisen and Eisner 2009, p. 137. Furthermore, obligations to account are not comparable to political accountability, but they exist in private regulatory regimes, sometimes however only of a voluntary or moral nature. See Curtin and Senden 2011, p. 184.
299. Curtin and Senden 2011, p. 187.
300. Curtin and Senden 2011, p. 187.
301. Cf. section 6.2.2 of the ISEAL Code of Good Practice; Principle 2.2 for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013). Cf. also Balleisen and Eisner 2009, p. 131; Kolk and Van Tulder 2005, p. 10; Herrnstadt 2007, pp. 202-204; Utting 2001, pp. 82 and 88 ff.
302. Balleisen and Eisner 2009, p. 131; Cafaggi 2011, p. 22. Cf. on the necessity for public intervention Alvarez and Van Hagen 2012, pp. 16 and 17. Cf. on certification Dimitropoulos 2012, pp. 227 and 229-232, who contends international policy objectives might be realized through national recognition of certificates (at pp. 239 and 240), and on construction Neerhof 2013, p. 64. Public intervention might also take more 'soft' modes as support for private regulation e.g. through incentivizing companies to engage in it. This might enhance effectiveness as well. See Hsueh and Prakash 2012.
303. Ogus and Carbonara 2011, p. 231.
304. See in connection with foreign direct liability Enneking 2012, pp. 439, 474 ff., 506-512, 519-521 and 560 ff.; Jesse 2013, pp. 30-66. See also Enneking, Giesen, Van der Heijden, Lambooy, Lennarts and Visser 2011, p. 541 ff. Cf. Casey and Scott 2011, p. 85; Curtin and Senden 2011, p. 168. See also the example of the ISAB in Europe. In the Netherlands section 2:8 of the Civil Code, which deals with good faith and fair dealing in company law, is applied to incorporate the corporate governance code into norms which are enforceable through national courts. See e.g. Willems 2012, p. 305. Cf. Pauwelyn, Wessel and Wouters 2012, p. 509.
305. Cafaggi 2011, p. 22; Enneking 2012, pp. 439 and 474 ff., 506-512, 519-521 and 560 ff.

tractual mechanisms, for example, are deployed in supply chains (for example through purchase or license agreements) or in financial arrangements in which a purchaser or financial entity requires adoption of the applicable standards and engages in monitoring and enforcement either directly or through contracting third party assurance organizations.[306] Furthermore, legislation on unfair trade practices or unsupported claims may play a role in this. For example, if a company promotes a certain product referring to an eco-label while it in fact does not meet the requirements of that label, this might be considered as an unfair trade practice.[307] The U.S., U.K., New Zealand and Australia have endorsed (public) guidelines on environmental claims, enforced by the (public) trade or environmental authorities.[308] If an environmental claim is made (based on an eco-label) the public authority might ask for sufficient (documentary) evidence to support this claim.[309] In specific cases, legislation on misrepresentation might also be of use to redress false environmental claims (made by eco-labels).[310] Other forms of public supervision are conceivable as well.[311] Furthermore, legislation might impose a due diligence obligation on a supply chain.[312] However, (contractual) enforcement through national courts is often costly. Litigation in national courts might depend on the willingness of domestic citizens to take action, courts to recognize such actions and governments to set a framework which enables such actions.[313] Because of the international nature of litigation in national courts tied to international private regulation these proceedings might result in time-consuming and costly proceedings in many different jurisdictions, bringing about the risk of multiple (and even contradicting) decisions. Furthermore, the question may arise as to whether national courts are equipped to deal with difficult international matters in the CSR arena.[314] Enforcement is rather complicated too in such circumstances. Coordination among national courts enforcing the same regime is required in order to avoid too much

306. Casey and Scott 2011, p. 93. See e.g. for initiatives in supply chains the IDH sustainable trade initiative, to be found at www.idhsustainabletrade.com (accessed April 20, 2013) and on labor standards the Ethical Trading Initiative (ETI), to be found at www.ethicaltrade.org (accessed April 20, 2013). See furthermore on International Framework Agreements on labor standards Herrnstadt 2007, pp. 194-196. See on codes of conduct on the abandonment of child labor Vytopil 2012, pp. 68-70. See in general on supply chain initiatives and their problems Cafaggi and Renda 2012, pp. 18-20. In the case of investments (or lending agreements) third party rating agencies are engaged by investors to assess whether these (privately set rules) are implemented and adhered to by entities invested in (or lenders). These rating agencies make this assessment irrespective of the public or private nature of the regulation.
307. See e.g. section 6:193g Dutch Civil Code (based on the European unfair trade practices directive) which considers such an advertisement to be an unfair trade practice.
308. Gandara 2013, pp. 215 and 216. The guidelines resemble the ISO 14021 standard on environmental claims. See Gandara 2013, pp. 214 and 215. Absolute or wide-ranging claims such as 'environmentally friendly' or '100% recyclable' are considered to be deceptive per se. See Gandara 2013, p. 216.
309. Gandara 2013, pp. 216 and 338. However, she contends that the current regulation is insufficient to deter greenwashing. See Gandara 2013, pp. 343 and 348.
310. Gandara 2013, p. 226.
311. For example, the Dutch Financial Markets Authority supervises whether the annual reports of companies listed on the Dutch Stock Exchange involve the main elements of CSR issues that are relevant to the company in accordance with Principle II.1.2.d of the Dutch Corporate Governance Code. See for this code http://commissiecorporategovernance.nl/ (accessed November 13, 2013).
312. See e.g. section 4 subsection 2 Regulation 995/2010 EU (EU Timber Regulation) which aims at the global prevention of (illegal) deforestation. See on this regulation e.g. Tubbing 2013, p. 328 ff.
313. See e.g. Enneking 2012, pp. 487, 490-504, 510, 574 ff. and 595; Enneking, Giesen, Van der Heijden, Lambooy, Lennarts and Visser 2011, p. 556 (regarding CSR). See on eco-labels Gandara 2013, p. 300.
314. Enneking 2012, p. 620, who proposes future solutions at p. 642.

differentiation.[315] This, for example, could be established by applying a duty of loyal cooperation which exists in the domain of public institutions, but such a system is obviously difficult to enforce.[316]

Other forms of public intervention exist as well, involving both governmental and non-state actors, and also multi-level intervention involving national, European and international levels.[317] In these systems engagement of stakeholders in the promulgation of self-regulatory codes is encouraged and Member States of the EU are required to penalize through legislation the abuse by business of self-regulatory codes.[318]

Some of the requirements of CSR are, for example, embodied in national corporate law regimes.[319] Oversight and enforcement is, however, left to the companies themselves.[320] Ethical committees independent of the management have been put in place and also shareholders are involved in steering companies towards compliance with key corporate governance norms. The increasing importance of private regulation has promoted important changes in the corporate governance structure of multinational enterprises to promote responsiveness towards stakeholders affected by the activity of the corporation.[321] Also governments have increasingly sought to assert at least limited enforcement capacity over companies' compliance with privately promulgated corporate governance norms. Such rules might, however, give rise to a 'tick the box' mentality. Some enterprises tend to follow the rules in a rather formal way instead of really internalizing them. Furthermore, it could be beneficial for individual suppliers to make use of the increase in trust in the industry without underwriting the code.[322] Besides this, a code of conduct may create a false impression with consumers that the government oversees the industry and enforces the code.[323]

Another hybrid system is connected to trademark law. Especially in some Anglo-American countries, such as the U.K. and Australia, certification marks might be registered. For example, some eco-labels have been registered as such.[324] The proprietor of a certification mark is an overarching standard-setting body.[325] The mark has to be granted to every applicant who meets the standards of the eco-label and is certified.[326] The proprietor is not allowed to use the mark for its own goods and/or services and an environmental supervisory governmental body assesses whether the implemented standards contribute to environmental improvements (unlike

315. Cafaggi 2011, p. 49. Cf. for actions for violation of human rights and environmental damage against multinational enterprises Enneking, Giesen, Van der Heijden, Lambooy, Lennarts and Visser 2011, p. 542 ff.
316. Cafaggi 2011, p. 49.
317. Scott, Cafaggi and Senden 2011, p. 8. See for example in connection with certification Neerhof 2013, p. 17 ff.
318. Enneking 2012, pp. 455-459; Scott, Cafaggi and Senden 2011, pp. 8 and 9. See e.g. Unfair Commercial Practices Directive 2005/29/EC and especially Recital 20 and Art. 6(2)(b).
319. Scott, Cafaggi and Senden 2011, p. 9.
320. Scott, Cafaggi and Senden 2011, p. 10.
321. Scott, Cafaggi and Senden 2011, p. 10.
322. Overmars 2011, p. 18.
323. Overmars 2011, p. 18.
324. Gandara 2013, p. 230.
325. See e.g. Gandara 2013, pp. 82-84.
326. See on these marks (and the reason why other trademarks are ineffective) e.g. Gandara 2013, pp. 216-221, 239-254 and 339-343. See for collective marks in the Netherlands e.g. section 2.34 BVIE.

collective marks and geographical indications). If a company promotes a product referring to such an eco-label but has not been granted permission to use the certification mark, all usual means to redress the infringement of a trademark might be invoked by the proprietor of the certification mark. The same applies if a company is granted the use of the certification mark but fails to meet its standards or is no longer certified, the permission to use the mark then may be revoked.

The aforementioned hybrid regimes typically comprise both hard and soft law instruments where a public dimension to corporate activities is recognized.[327] Conventional private law devices have been transformed to perform regulatory functions at the global level.[328] This model has been extended in ways which are promising for hybrid governance regimes to recognize the potential for third party enforcement. Business, trade associations and NGOs get involved in enforcement using powers delegated by legislative bodies or rights assigned to them under contracts.[329] This is however limited because businesses tend to adopt standards voluntarily and they are in a sense judged by the market in terms of their compliance. However, the importance of assessing compliance is recognized in many regimes and it is not unusual to find contractual requirements on business to engage in third party certification of compliance.[330]

However, if governments are engaged in enforcement of international private regulation because of the existence of hybrid systems, this does not necessarily indicate greater effectiveness of the private regulation. For example, because of (re-)elections, government officials might have a short-term perspective instead of the long-term vision required for (effective) sustainable solutions. Furthermore, corruption might hamper effective enforcement by a government.

Beside these issues of a more practical nature, if both private and public sanctions are imposed at the same time, the issue of accumulation of sanctions arises.[331] It is questionable whether these both ways of enforcement may be used at the same time. It stands to reason that they could reinforce each other, but this may not be desirable in all circumstances. Unlike public sanctions which are imposed at the same time, where public bodies are often legally bound to coordinate their actions and accumulation is governed by law, coordination between private and public enforcement is more problematic, not only because the supervising public and private bodies may not be aware of the actions taken by the other body, but also because legal barriers to the exchange of information might exist.

Another aspect of effectiveness is an effective complaint mechanism and effective resolution of disputes if they arise.[332] If disputes cannot be solved effectively, (ad-

327. Scott, Cafaggi and Senden, pp. 292-302.
328. Scott, Cafaggi and Senden, p. 10.
329. Scott, Cafaggi and Senden, 2011, p. 11. These enterprises might for example use privately set standards. See e.g. Neerhof 2011, pp. 307-318; Neerhof 2013, p. 17 ff.
330. Scott, Cafaggi and Senden 2011, p. 12. More conventional bilateral monitoring and enforcement may also apply, but this is usually carried out on a national or sub-national level.
331. See also Giesen 2007, p. 141.
332. This is true for the international private regime itself as well as for its members (the private regime should require them to have their own grievance mechanism). Cf. the MSI evaluation tool, pp. 27-31. Cf. regarding the standard-setting process itself section 4.4 of the ISEAL Code of Good Practice. See e.g. concerning private building norms Neerhof 2013, p. 61. Cf. also Principle 2.4 for better co- and self regulation, to be found at https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice (accessed November 13, 2013).

equate) enforcement is difficult, if not impossible.[333] Moreover, ineffective conflict resolution might result in unnecessary cost.[334] Effective dispute resolution is not confined to judicial mechanisms, such as litigation in national courts or arbitration. On the contrary, a growing interest in non-judicial conflict management mechanisms exists in the CSR arena. In other areas governments are engaged in improving their conflict resolution mechanisms by making use of non-judicial mechanisms too.[335] As to conflict resolution in the human rights arena, Ruggie in (the third pillar of) his framework has emphasized the need to improve the patchwork of current non-judicial mechanisms.[336] He and others (in his research team) have advised that litigation might be rather ineffective, for example because applicable (legal) norms are unclear, because of jurisdictional issues and because it might encompass parallel litigation in many jurisdictions.[337] Litigation in many national courts has, as mentioned before, adverse effects: it is slow, costly, not always predictable, and might cause legal uncertainty. Apart from jurisdictional issues, it might involve litigation and enforcement in several countries, the difficult process of assessing applicable norms (if possible at all) and difficulties in gathering sufficient evidence. Furthermore, enforcement of awards or settlements stemming from litigation is problematic. Not only in the human rights area might litigation in national courts be unproductive: this might also be true in other CSR areas, for example in connection with the environment. Different environmental challenges exist in different countries, public rules differ, different stakeholders are involved in different industries, and no global public supervisor exists. Hence, enterprises might have to be geared towards non-judicial dispute resolution and prevention mechanisms to resolve CSR issues, for example regarding the compliance with international private regulation in this arena, instead of instigating or engaging in (parallel) litigation in several jurisdictions. It is important in this respect to assist enterprises, (representatives of) local communities, NGOs, and other international bodies, such as the World Bank, to find their way through the existing non judicial mechanisms. Currently, many stakeholders experience difficulty in finding the proper and effective mechanisms. However, the necessity of non-judicial mechanisms does not unravel their effectiveness. Besides this, in some instances the need for judicial mechanisms still is felt, for example to enforce governmental regulation (either involving open norms or of another nature) which involves or refers to private regulation in the CSR arena, if (some) stakeholders are not willing to engage in non-judicial mechanisms and in connection with gross human rights violations. However, by and large, such judicial mechanisms cannot be implemented in inter-

333. See e.g. Utting 2001, pp. 63 ff., 110, 111 and 113-115. It is important to note that the aforementioned certification marks may only be registered if they have an dispute settlement procedure regarding the certification of the goods and/or services. See Gandara 2013, p. 248. Furthermore, see on International Framework Agreements on labor standards Herrnstadt 2007, pp. 204-207.
334. Cf. Davis and Franks 2011, p. 2 ff.
335. See e.g. the Dutch initiative '*Prettig contact met de overheid*' (friendly communication with the government) and the brochure '*bezwaarwijzer*' (dealing effectively with complaints) of the Dutch national ombudsman.
336. The UN 'Protect, Respect and Remedy' Framework of John Ruggie, to be found at http://shift-project.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf (accessed April 20, 2013). See on this framework e.g. Eijsbouts 2012, pp. 812-822.
337. Kovick and Rees 2011.

national private regulation as they are, apart from arbitration,[338] government prerogatives.

As to the effectiveness of judicial mechanisms the notion of effective remedy is a well-known and reasonably developed concept in connection with international human rights law, which is included in many regional and international human rights treaties (such as Article 2(3) ICCPR and Article 13 ECHR). This might apply more generally in the CSR arena. Broadly speaking, it involves access to an impartial decision-maker or mechanism with the power to hear and investigate complaints and, where appropriate, to provide reparation. In this respect it is important to distinguish between the procedural aspects involving 'access to justice' (which refers to the effectiveness of the remedial mechanisms in place and whether victims have both the opportunity and ability to access them), and the substantive 'reparation', which means the type or quantum of relief afforded.

Other aspects of the right to a remedy have evolved out of international humanitarian law requirements regarding, for instance, the recording and passing on of information about the wounded, sick, and the dead. In addition, human rights cases concerning amongst other things enforced disappearances have stressed the importance of the victim's right to information about the violation, particularly where the claimant is not the direct victim but another affected individual closely linked to him, for example, a member of his family.[339] Similar views have been expressed by a number of global and regional human rights treaty bodies. With respect to the United Nations treaty bodies, some common strands can be identified in their approach to state obligations to provide access to remedy for human rights abuses, whether committed by public or private actors.[340] They have emphasized the importance of both procedural elements: (i) conducting prompt, thorough, and fair investigations, (ii) providing access to prompt, effective, and independent remedial mechanisms, established through judicial, administrative, legislative, and other appropriate means.[341] Furthermore, outcome-oriented elements are deemed to be important such as (iii) imposing appropriate sanctions, including criminalizing conduct and pursuing prosecutions where abuses amount to international crimes, (iv) providing a range of forms of appropriate reparation, such as compensation, restitution, rehabilitation, and changes in relevant laws.[342] The concept of effective remedy has been strongly influenced by the law of state responsibility and, as a general rule, follows its emphasis on compensatory justice, which means putting the victim back in (or as close to) the position he would have been in but for the

338. And other possibilities for third (non-government related) parties to pass judgment. An arbitral clause might be involved in a model or supply chain agreement. Therefore, judicial mechanisms might be set forth by international private regulation in such circumstances.

339. Promotion of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum to the Ruggie Framework of May 15, 2009, A/HRC/11/13/Add.1, p. 6. Cf. Guiding Principle 26.

340. Promotion of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum to the Ruggie Framework of May 15, 2009, A/HRC/11/13/Add.1, p. 2.

341. Promotion of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum to the Ruggie Framework of May 15, 2009, A/HRC/11/13/Add.1, p. 3.

342. Promotion of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum to the Ruggie Framework of May 15, 2009, A/HRC/11/13/Add.1, p. 3.

violation. Appropriate reparation in each case will turn on the right at issue and nature of the violation.[343]

The obvious question arises as to whether this concept of effective remedy might be transposed wholesale to *non-judicial* grievance mechanisms (either related to human rights violations or to other CSR disputes) without further consideration. A number of considerations suggest not. Judicial mechanisms within any jurisdiction will offer similar processes, or at least processes that are highly aligned with each other. With regard to human rights violations, they are intended: to provide reparation for victims insofar as the human rights in question are reflected in applicable law; to create a level of deterrence to others who may commit similar violations; and — at least in the case of criminal proceedings — to provide wider justice and protections for society. This reflects the broader role of judicial mechanisms in ensuring the rule of law.

Non-judicial mechanisms can vary widely in their location, form, and process, including:[344]

i. mechanisms at the company or project level to which impacted individuals and groups (for example, workers, communities, etc.) can bring complaints;[345]
ii. mechanisms linked to industry and multi-stakeholder initiatives (for example, the Fair Labor Association, Ethical Trading Initiative, Social Accountability International, International Council of Toy Industries, Voluntary Principles on Security and Human Rights, Global Framework Agreements);
iii. national mechanisms based in government (for example, National Contact Points of OECD Member States, consumer complaints bodies);
iv. national mechanisms that are state-supported but independent of government (for example, ombudsman offices, labor dispute resolution offices, national human rights institutions); and
v. regional and international mechanisms (for example, ILO-based mechanisms, the Compliance Advisor/Ombudsman (CAO) of the World Bank Group).

As this shows, although some non-judicial grievance mechanisms lack any state involvement, others are administered by the state or a state agency and — to the extent they are effective — contribute to the implementation of the state duty to protect against human rights abuses. In addition, some non-judicial mechanisms, both state-based and non-state-based involve investigatory and quasi-adjudicative processes that involve reaching findings or conclusions and recommendations. These mechanisms come closer to resembling judicial (state-based) mechanisms through this quasi-adjudicative function, than do those mechanisms that are premised primarily on seeking dialogue-based solutions.[346]

This suggests that some of the criteria or definitions for effective remedy in relation to judicial mechanisms may be applicable in the case of non-judicial mechanisms. Others would clearly not be, such as criminal punishment or sanctions. Moreover,

343. Promotion of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum to the Ruggie Framework of May 15, 2009, A/HRC/11/13/Add.1, p. 2; Van Genugten, Van Gestel, Groenhuijsen and Letschert 2009, pp. 1-79 and from the perspective of state responsibility and private-public interaction: Van Genugten and Jägers 2011, pp. 253-278.
344. See e.g. Rees and Vermijs 2008; Linder, Lukas and Steinkellner 2013.
345. See for an extensive analysis of these mechanisms Wilson and Blackmore 2013.
346. However, it should be noted that some of the mechanisms might perform both functions, i.e. dialogue based and quasi-adjudicative (e.g. the CAO/World Bank ombudsman and the NCPs).

the necessity for enforcement of the outcomes of judicial mechanisms does not exist in connection with all non-judicial grievance mechanisms and enforceability is sometimes not even strived for. Furthermore, some state-based non-judicial mechanisms are voluntary in the sense that stakeholders cannot be forced to make use or take part in the mechanism or to be bound by its outcomes without their consent, unlike judicial mechanisms which by their nature might provide redress against the will of a perpetrator.[347]

As to the effectiveness of non-judicial mechanisms, two approaches might be considered: the effectiveness of the mechanisms themselves (or their procedure) or the effectiveness of their outcomes. As to the effectiveness of non-judicial mechanisms themselves (and their procedure) extensive research has been conducted.[348] Guiding Principle 31 of the Ruggie Framework deals with this topic and states:[349]

In order to ensure their effectiveness, non-judicial grievance mechanisms, both state-based and non-state-based, should be:

*a.* legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

*b.* accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

*c.* predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

*d.* equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

*e.* transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

*f.* rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

*g.* A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

*h.* based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

347. However, some non-judicial mechanisms, like national human rights institutions' mechanisms, or mechanisms relevant to some industries that are run by parts of government and might provide redress which resembles judicial mechanisms.

348. See Rees 2008a; Rees 2008b and e.g. recently Onuoha and Barendrecht 2012, pp. 17 and 20-22; Scheltema 2012b, pp. 393-397.

349. The UN 'Protect, Respect and Remedy' Framework of John Ruggie, to be found at http://shift-project.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf. See also the MSI evaluation tool, p. 14.

The commentary to this Principle reveals that a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it, and are able to use it. The abovementioned criteria provide a benchmark for designing, revising, or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect in the process. In my opinion this is also true regarding other non-judicial mechanisms in the CSR arena. If these requirements are met, some proof of effectiveness of the mechanism itself is provided. However, assessing whether these requirements have been met is complex. For example, should the requirement of transparency involve the publication of the documents relied upon in the non-judicial process? Obviously, these documents should be made available to the parties in the non-judicial process, but not necessarily to other stakeholders. Furthermore, effectiveness of non-judicial dispute prevention and resolution mechanisms is connected with ongoing dispute resolution if new complaints/disputes arise.[350]

As to the effectiveness of the outcome of non-judicial mechanisms, the question arises as to whether it is possible to determine overarching (common) elements of effectiveness of non-judicial mechanisms or only for certain types of mechanisms.[351] In this respect one should bear in mind that a large variety of different (possible) remedy outcomes of non-judicial mechanisms are conceivable. The outcomes might, for example, range from a final statement of an NCP, to strengthening of the human rights policy and due diligence process of a company, continuous dialogue between a company and a local community, a Stop Order from the government, improvements in care and income generating projects to support alternative livelihoods, monetary redress and a general memorandum of understanding.[352] In my opinion non-judicial remedial outcomes need to have certain features in order to qualify as effective. Therefore, it becomes necessary to describe what these features are, including whether they necessarily objective (for example alignment with national law), necessarily subjective (for example based on the perspective of those impacted) or maybe a mixture of both. In my opinion elements or indicators of effectiveness are:

i. the consistency of an outcome with national and international human rights laws and regulations;
ii. the rights-compatibility of an outcome (see Guiding Principle 31(f));

350. This ongoing dispute resolution might involve judicial mechanisms such as arbitration.
351. This section on effectiveness of outcomes of non-judicial mechanisms is based on research conducted by the author on effectiveness of remedy outcomes of non-judicial mechanisms on behalf of ACCESS (see www.ACCESSfacility.org) and the United Nations Working Group on Human Rights.
352. See for examples of outcomes: www.regjeringen.no/en/sub/styrer-rad-utvalg/ncp_norway/news/report_intex.html?id=664912 (accessed April 4, 2013); www.regjeringen.no/upload/UD/Vedlegg/ncp/intex_final.pdf (accessed April 4, 2013); www.oecdwatch.org/cases/Case_220 (accessed April 4, 2013); http://baseswiki.org/w/images/en/a/a2/Malawi_Case_(full_details).pdf (accessed April 4, 2013); www.fairlabor.org/report/estofel-sa-factory-guatemala (accessed April 4, 2013); http://cbuilding.org/sites/cbi.drupalconnect.com/files/Corporate%20and%20Community% 20Engagement%20in% 20the%20Niger%20Delta_Lessons%20Learned.pdf (accessed April 4, 2013). Furthermore see e.g. Cata Backer 2009, pp. 16-25 on two NCP cases; Linder, Lukas and Steinkellner 2013, and for an extensive case analysis of company based non-judicial mechanisms Wilson and Blackmore 2013.

iii. whether an outcome falls within a certain predefined range of options (such as compensation; restitution, guarantees of non-repetition and providing relevant information);
iv. whether business and/or local communities (and/or their representatives) involved in a case perceive a certain outcome or set of outcomes as effective;
v. whether states classify certain outcomes as effective or support them as outcomes of a non-judicial grievance mechanism;
vi. whether companies increase their efforts to respect human rights because of the existence of such mechanisms;
vii. whether the outcome of a certain mechanism restores a particular individual to the enjoyment of his human rights;
viii. whether the outcome of a certain mechanism improves the human rights, environmental or social situation and whether it helps prevent or reduce future grievances and harms;
ix. whether the outcome of a certain mechanism is implemented in practice and is enforceable (the enforcement of the outcome of non-judicial mechanisms might be realized through state mechanisms (for example through enforcing an agreement which has resulted from a non-judicial mechanism)[353] or through arbitration after an agreement has been reached (if agreed upon)[354]); and
x. whether the outcome of a certain mechanism is aligned with the (possible) outcomes of other non-judicial and judicial mechanisms which stakeholders are engaged in and/or can contribute to effective remedy in combination with the outcomes of other processes.

This list of elements that might define the effectiveness of outcomes reflects a mix of objective and subjective considerations. Arguably, the more of them that are fulfilled, the more likely it is that the remedial outcome will be generally deemed to be effective.

The foregoing has shown that (the *ex post*) effectiveness of international private regulation (such as the indicators mentioned in paragraph 2.3.1) depends *inter alia* on its enforceability and on effective dispute resolution.[355] Effectiveness of international private regulation may depend on the following indicators, which have been derived from the abovementioned research:[356]

i. whether international private regulation involves specific and assessable objectives (and if so, whether they have been achieved) and does not aim at objectives which are effectively achieved by other public or private regulation;
ii. whether it involves 'conflict of law' rules;

353. For example the Mediation Directive has been promulgated in the European Union (Directive 2008/52/EU, *PbEU* 2008, L 136/3). This Directive is applicable to cross-border conflicts (as mentioned in section 2), in which at least one party (in human rights related conflicts this is by and large a company) has its seat in the EU. Especially section 6 subsection 1 of the Directive is important. It imposes a duty on EU Member States to render agreements resulting from mediation/facilitation enforceable if parties consent to this and as far as the result is not contradictory to national law.
354. See on this Scheltema 2012c. Because of (section V of) the New York treaty on commercial arbitration (which many developing countries also have adopted) the enforcement of arbitral awards is easier than foreign judgments in Member States because (section V of) the treaty prevents Member States from imposing other barriers on enforcement than are adopted for national arbitral awards.
355. Cf. Giesen 2007, pp. 106 and 137-141.
356. These indicators are not exhaustive. More detailed research may reveal others.

iii. the regular evaluation of the regulation and its functioning, and (if necessary) review of the regulation;
iv. the existence of a supervisory body to which the parties to the regulatory regime are accountable (and have to provide relevant information to this body), the power of the supervisory body to pass judgment and to impose sanctions on non-complying parties;[357]
v. the existence of a supervisory body which controls access to scarce resources;[358]
vi. the existence of (a) serious (threat of) contractual enforcement or other means of enforcement or endorsement of the private regulation if necessary through state legislation and/or (effective) enforcement by states;[359]
vii. the specificity of the rules/standards put forward by the international private regulation;
viii. the existence of an effective complaint and dispute management mechanism to prevent and deal with non-compliance;[360]
ix. the possibility of certification or assessment of compliance by independent third parties whereby reporting requirements in the regulatory framework are helpful; and
x. susceptibility of a certain business to negative (social) media attention and active NGOs or other organizations monitoring this business if at least a moderate chance of detection exists.[361]

These are the predominant indicators. However, in the *ex post* approach the clarity of the rules and a 'conflict of laws' provision as well as the answer to the question as to whether the international private regulation is able to reach its objectives might be of importance.

357. However, Kolk and Van Tulder argue that the likelihood of compliance is higher where company codes of conduct are involved than for example codes of conduct set forward by business associations, international organizations or NGOs. See Kolk and Van Tulder 2005, p. 11. This especially stems from the codes of conduct promulgated by business organizations or international organizations being less specific and abstaining from the possibility of imposing sanctions.
358. Cf. Kopell 2010, p. 62; Oude Vrielink 2011, pp. 70-73; Scott, Cafaggi and Senden 2011, p. 7. Besides these indicators, the existence of smaller groups with comparable views is considered to be of importance as well as a high organizational level. This however, in my view, refers to the sociological perspective which is going to be discussed below. Nonetheless enforcement may be easier to realize in such circumstances.
359. However, public enforcement in a fall back option in connection with certification is only effective if certain requirements are met. See Verbruggen 2013a.
360. Cf. regarding CSR the communication of the European Commission of October 25, 2011, COM(2011) 681, p. 10. As to CSR in an international context non-judicial mechanisms for conflict management seem to be more effective. Furthermore the prevention of conflicts become more important. Cf. regarding dispute management also Giesen 2007, pp. 138 and 139. Furthermore, the Global Reporting Initiative framework, which is discussed below in the economic approach and to which companies may adhere, involves an indicator which requires companies to state whether they provide a grievance mechanism regarding human rights violations and how many complaints have been received through this mechanism. From this framework (some) information could be retrieved as to whether (effective) grievance mechanisms are in place.
361. For example, with many (single issue) eco-labels this chance of detection of non-compliance is deemed low. See Gandara 2013, p. 37. Conversely, companies with strong brands seem more susceptible to negative (media) attention. Cf. regarding global agri-food chains Schouten 2013, pp. 47 and 48.

### 2.4.2 **Economic approach (impact assessment)**

From an economic point of view it is of interest to learn whether existing international private regulation contributes to the economic welfare of (affected) communities and society at large as well as to the profitability of (multinational) enterprises.[362] This economic assessment is also referred to as impact assessment. This research encompasses different points of view. The assessment of the increase or decrease in economic welfare differs with the international private regulation under consideration.[363] It makes a difference whether international private regulation on (i) biodiversity, (ii) prevention of (environmental) damage to local communities, or (iii) technical standardization regarding environmental issues is considered. These three areas differ as to the stakeholders involved and the relevant economic issues. Furthermore it is, as has been explained previously, relevant whether the economic analysis is conducted on a macro or micro level.
On the macro level one may, for example, consider the economic effects of international private regulation on economic growth. This kind of research is conducted regarding private standard setting or standardization in France, the U.K., and Germany.[364]

However, it is contended that international private regulation might not be beneficial to consumers.[365] If the quality imposed by an overarching body exceeds consumers' preferences, the excessive cost will then be borne by consumers.[366] However, an increase in price (paid by consumers) might be legitimized by externalities.[367] For example, it is contended that an increase in price of products with an eco-label attracts more producers (who comply with the certified standards and presumably makes consumers who are concerned about the environment more willing to buy such products) and thus might benefit the environment.[368]
Other types of consumer detriment are conceivable as well. Privately set standards might, especially if the standard-setting industry has bargaining power, induce more lenient public regulation (if adopted) which might have external consequences for consumers.[369] Furthermore, if sanctions are imposed on one of the regulatees

362. See on economic analysis of the law and the need for such analysis e.g. Faure 2011, pp. 1056-1064.
363. From the classic economic approach of Coase and the Chicago School of Law and Economics this starting point does not have merit. They contend that a market is able to reach efficient outcomes through negotiations between well-informed parties without regulation. See on this approach e.g. Faure 2011, p. 1057. To date the necessity of research of the economic effects of rules has been recognized. See Faure 2011, pp. 1057 and 1058. In this approach, private regulation is an appropriate solution where bargaining, at low cost, can occur between between risk creators and those affected. See Ogus and Carbonara 2011, p. 231.
364. ISO focus June 2010, p. 17 available at http://digital.iso.org/Olive/ODE/ISO focus-Plus-Org/?href=ISOFP/2010/06/01 (accessed April 29, 2013). However, the main source of growth in France is technological improvement. See ISO Focus, p. 18. See on the U.K. and Germany Report of the expert panel for the review of the European standarization system, p. 29.
365. Cf. Ogus and Carbonara 2011, pp. 233 and 234.
366. Ogus and Carbonara 2011, pp. 234 and 242.
367. See also Ogus and Carbonara 2011, pp. 234 and 242.
368. Gandara 2013, pp. 25 and 112-133. See on the relation between price (increase) and environmental benefits also the United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 30-33, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013). Price premiums might vary over time. See Alvarez and Van Hagen 2012, p. 11.
369. Ogus and Carbonara 2011, pp. 235 and 236.

and these sanctions become public, this might lead consumers to update their beliefs on the behavior of all regulatees reducing the perceived quality of the goods provided by them (especially if credence goods are involved), which might induce the group of regulatees (or the overarching body) to refrain from punishment.[370] This might be detrimental to consumers as well.

Therefore, it is important to assess consumer detriment because private regulation tends to optimize the benefits to the regulatees but to lose track of the consumer detriment (and other external consequences) resulting from it. However, to date no research has been done on (detrimental) effects of international private regulation on consumers. Notwithstanding this, insights may be derived from research instigated by the European Commission on consumer detriment arising from (intended) European legislation. The main indicators for measuring consumer detriment (relevant in connection with international private regulation) are: (i) market power indicators, (ii) information deficit indicators,[371] and (iii) consumer complaint indicators.[372]

Market power indicators (i) are likely to be sensitive to the definition of the market to which they are applied. Carrying out a robust market definition exercise can be a resource-intensive and time-consuming process. In competition cases, where market definition is an important first stage of analysis, substantial resources are sometimes devoted to this issue.[373] If available, such indicators may point to consumer detriment.

As to information deficit indicators (ii), the occurrence of certain market conditions may result in consumer detriment. These market conditions are: (a) high search costs, (b) 'focal' competition, (c) bundled goods or after-markets, (d) complex

370. Ogus and Carbonara contend that an effective overarching body might counter this problem. See Ogus and Carbonara 2011, p. 238.

371. For example, in the area of CSR the European Commission has found misleading marketing related to the environmental impact of products (so-called 'green-washing') in the context of the report on the application of the Unfair Commercial Practices Directive foreseen for 2012, and considers the need for possible specific measures on this issue. See Communication from the Commission on a renewed EU strategy 2011-14 for Corporate Social Responsibility of October 25 2011, COM(2011) 681, p. 9, to be found at ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf.

372. See Final Report for DG SANCO http://ec.europa.eu/consumers/strategy/docs/study_consumer_detriment.pdf, p. 568 ff. However the research reveals that measuring consumer detriment is very complicated and may involve many different techniques such as consumer surveys, mystery shopping, complaints with adjustments, various market models, and evidence from awards in court cases. See Final Report for DG SANCO, p. 223. However, none of the individual methods can be applied sufficiently widely to be useful as a simple generic tool to assess the impact of policy on consumers because all methods can only deal with certain specific sources of detriment and/or are only applicable under certain limited conditions. See Final Report for DG SANCO, pp. 225 and 226. It is furthermore difficult to assess consumer detriment because differences between countries exits in terms of pricing, market power, information problems, and trade barriers. See Final Report for DG SANCO, pp. 231-234. Besides these issues there are practical problems, for example should wholesale or retail prices be compared (and including or excluding taxes) and if prices differ between customer groups within a country, which customer group should be considered? See Final Report for DG SANCO, pp. 234 and 235. Furthermore some indicators should be accorded greater weight than others, depending on: (a) the priority placed on the type of problem market which the indicator is designed to identify; (b) the extent to which the indicator reliably identifies a particular type of problem market; (c) the extent to which the data which are available are a good proxy for what the indicator is meant to measure. The study presents results using an illustrative weighting scheme. See Final Report for DG SANCO, pp. 301, 302 and 307. See for the possible impact of a certain directive measured using these factors, Final Report for DG SANCO, pp. 385 and 387 ff.

373. Final Report for DG SANCO, p. 351.

products, (e) infrequent purchases, (f) credence goods being sold, (g) commission payments made to salespeople.[374] This information deficit for example exists in connection with environmental information. Eco-labels play a role in bridging this gap and lower the cost of information gathering.[375] However, eco-labeled products by and large use pricing to distinguish them from other products. This might have adverse effects because the consumers might perceive a higher price as a sign of higher (environmental) quality and overall prices might be higher in a market with an eco-label segment.[376] This problem might be countered by separating and clarifying the nature of the increase in price.[377]

As to the consumer complaint indicators (iii) consumer surveys may be used to assess consumer detriment.[378] This method is for example used in the INRA/Deloitte methodology for measuring consumer satisfaction. The core questionnaire consists of seven different 'blocks' of questions, covering the following variables: (a) overall satisfaction, (b) evaluation of quality, (c) evaluation of price, (d) image perception, (e) market and personal factors, (f) consumer commitment, (g) complaint behavior.[379] Another survey has been carried out by Taylor Nelson Sofres (TNS) and involved a sample of 2,220 U.K. adults.[380] The questionnaire consisted of 45 questions, of which 31 related to consumer experiences involving some kind of detriment, and 14 related to demographic factors. The 31 questions relating to detriment were divided by sub-headings as follows: (a) have you had a problem with goods or services in the last 12 months, (b) what products or services gave rise to problems, (c) how many problems in each category of goods and services, (d) when did it/they start, (e) who has to deal with the problem(s), (f) who is/was affected, (g) what type of problem was it (e.g. safety, unreliability, late delivery), (h) how long did the problem take to be resolved (or how long has it been going on if unresolved), (i) how much money was involved in the initial purchase, (j) what action did you take to deal with the problem, (k) how much time and money did you spent to resolve the problem (or how much so far), (l) actions taken by the supplier, (m) interviewee's criticisms of the supplier, (n) compensation received or expected, (o) interviewee's propensity to complain.[381] Both of these surveys in essence pose comparable questions, but it is hard to infer economic detriment from the aggregate answers if one looks beyond the level of an individual consumer. However, if the aggregate answers show a low consumer satisfaction, this may be an indication of consumer detriment.[382] Therefore significant value can be obtained from analysis of consumer

374. Final Report for DG SANCO, pp. 301 and 368. See also in connection with eco-labels Gandara 2013, pp. 64-77.
375. See Gandara 2013, pp. 73-77, 121, 128-133 and 337.
376. Gandara 2013, pp. 116 and 124.
377. Gandara 2013, p. 118.
378. See for possible factors Final Report for DG SANCO, pp. 240 and 241.
379. Final Report for DG SANCO, p. 241.
380. The OFT's report arising from the survey was published as Research Paper No. 296 in February 2000.
381. Final Report for DG SANCO, pp. 245 and 246.
382. However, the problem is that a small number of consumers reported very large financial losses. Therefore one should (a) increase the statistical robustness of estimates of financial detriment (in order to do this, the survey needs to pick up more cases of large financial detriment) and (b) verify that the data is correct when respondents report very high figures for financial costs. Achieving statistically robust results could by established by: (a) increasing the overall sample size used in the survey, as suggested by the OFT but a large enough sample would be prohibitively expensive, (b) splitting the sample, and asking (for instance) half of the respondents about the most recent

complaint data. In particular, where sufficiently detailed data are available, it can provide indications of: (a) the sectors where consumers are experiencing detriment, (b) the nature of that detriment, (c) how detriment breaks down between different methods of purchase, (d) the potential scope for financial detriment associated with different complaints (based on the value of the transaction).[383]
Indicators (i)-(iii) may be applied to assess whether international private regulation is detrimental to consumers, provided they are stakeholders in connection with certain international private regulation. If international private regulation for example causes a shift in market power to the detriment of consumers, this may contribute to less efficiency of private regulation. Information deficit is an important issue regarding international private regulation too, but in a slightly different way. Often consumers are not (directly) involved in the rulemaking process and for them it is even harder to assess which rules apply and whether the rules are complied with than it is for the governing body or other stakeholders. This may cause economic detriment to consumers. Hence, as discussed before, transparency (also to consumers) is important. Consumer complaints may also indicate consumer detriment caused by international private regulation. However not all of these indicators are able to assess the detriment to consumers. Quantifying detriment seems possible regarding adversarial market power, because this may for example cause an increase in pricing. Also information deficits may cause consumers to pay too much for certain products/services, buy products/services they do not need, or suffer loss because of unclear products/services. However, as to consumer complaints not all the factors mentioned above under (iii) might be used. From the survey which has been carried out by Taylor Nelson Sofres the abovementioned factors (k), (l) and (n) may be used. The factors derived from the IRNA/Deloitte research are hard to quantify and thus less suited for the purpose of quantification. Therefore detriment to consumers may be defined as:

$dC = \pi M,I,C$

Whereby the abbreviations mean:

dC: aggregate detriment to consumers

$\pi$ is depending on

M: aggregate consumer detriment caused by market power created by international private regulation

I: aggregate consumer detriment caused by informational deficits created by international private regulation

problem and half about the worst problem, (c) using filter questions inserted into an Omnibus survey to build up a database of consumers who have experienced problems which gave rise to large financial costs, and then including them within a separate full-scale quantitative survey and (d) side-stepping the problem by focusing on other types of data or analysis. See Final Report for DG SANCO, pp. 272-276.

383. Final Report for DG SANCO, pp. 408 and 409.

C: aggregate consumer detriment caused by unsolved complaints caused by international private regulation

Furthermore, international private regulation might have a detrimental impact on competitiveness, innovation, trade, or markets.[384] For example contracts between CSR competitors in order to create a level playing field or eco-labels might disrupt competition.[385] For example, if certification in connection with eco-labeling brings about high costs,[386] small companies might not have the means to engage in such eco-labels or remain certified, although this might be profitable for other (larger) companies.[387] Moreover, international private regulation, especially if it is adopted in supply chains, might put undue pressure on smaller and medium-sized suppliers vis-à-vis multinational enterprises imposing this regulation and turning it into a competitive advantage for lager companies.[388] Furthermore, because of the informational failures regarding the environmental attributes of a certain product, free-riders might reap benefits of the environmental market created by eco-labels without incurring any of the costs, for example by using terms with no clear meaning like 'all natural' or 'eco-friendly'.[389] This results in unfair competition between free-riders and the companies investing in real (certified) eco-labels and might jeopardize eco-labels because they lose their advantage on the (environmental) market.[390] International private regulation might also exclude or complicate access to a certain market.[391] For example, certain standards might favor producers in developed countries because they use production methods which are close to or compliant with these standards, whereas these methods are less common in developing

384. Especially on trade the WTO Technical Barriers to Trade (TBT) Agreement and especially annex 3 to be found at www.wto.org (accessed March 27, 2013), involves best practices for standard setting in order to counter trade barriers. This annex *inter alia* involves the obligation to consult WTO-members on draft standards. See in connection with (sustainability) standards and trade barriers also the United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 18-25, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013). Cf. sections 6.1.2, 6.3.1 and 6.3.2 of the ISEAL Code of Good Practice and the Annexes to the Impact Assessment Guidelines of the European Commission of 2009, p. 24, to be found at http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf (accessed November 13, 2013). See in connection with standardization Neerhof 2013, pp. 174-177 and 196-198. Furthermore, see on agreements between competitors in the EU the Communication of the European Commission on the applicability of section 101 TFEU on horizontal agreements OJ 2011 C 11/55-64.
385. See on eco-labels Gandara 2013, pp. 92-96, 105 and 106.
386. Which by and large it does. See Gandara 2013, pp. 164 and 268.
387. Gandara 2013, p. 120. See in general Utting 2001, p. 98; the United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 27 and 28, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013); Alvarez and Van Hagen 2012, pp. 12, 14, 22 and 23.
388. Utting 2001, p. 107.
389. Gandara 2013, pp. 133-142, 269 and 271-274. She refers to this phenomenon as 'greenwashing'. Other types of greenwashing exist, for example using false labels, making claims on environmental performance which has been proscribed by law and false environmental claims. Whether greenwashing takes place might depend on the type of purchasers in the supply chain and whether alignment with other initiatives is established. See Alvarez and Van Hagen 2012, pp. 23-25.
390. See on (different types of) price premiums (which do not always increase profit depending on the position in e.g. a supply chain) e.g. United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, pp. 30-33, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013).
391. See e.g. on eco-labeling Gandara 2013, p. 159.

countries.[392] Innovation might be hampered if certain international private regulation (for example of supply chains or an eco-label) demands the application of certain (non-innovative) techniques which are considered to be beneficial to the environment.[393]

Besides economic effects on stakeholders, such as consumers and companies, one should also take into account the economic consequences of international private regulation on the public interest, such as the environment or labor conditions. Certain international private regulation may well be beneficial to its stakeholders, for example businesses and consumers, but may have adverse effects on the environment or workers.[394] Environmental damage as well as bad labor conditions should obviously be prevented as much as possible. In addition governments might have to bear costs to monitor the industry at an arms' length.[395] Therefore the damage to the public interest or to labor conditions has to be assessed too. However, the public interest might also benefit from international private regulation. It may benefit because a standard contributes to sustainability. For example, eco-labels might benefit the environment. However, the actual impact of private standards, such as involved in eco-labels, on the environment is not easy to assess.[396] Environmental problems are generally caused by different intertwined factors.[397] To assess the effectiveness of a standard these factors have to be considered. Furthermore, if private standards and other policy instruments compete, it might be difficult assess the influence of each individual label or instrument.[398] It is contended that the quality of the standards or criteria (of the eco-label) and its credibility might function as a proxy indicator of actual (beneficial) environmental impact.[399] Important aspects are whether (i) the environmental issue has not been addressed more efficiently through government regulation (in which case the standards are superfluous), (ii) they address more than a single environmental issue (because single issue labels tend to lose sight of other environmental detriment generated by a product), (iii) they use a lifecycle analysis of a product instead of the impact of the

392. See in connection with fishery and forest standards Alvarez and Van Hagen 2012, pp. 13 and 14.
393. This might also disrupt competition. See Gandara 2013, p. 105.
394. Renda provides some indicators to assess such detriment. See Renda 2011, p. 132. These however do not involve improvement of the environment also for future generations and portions of the territory that are not regularly inhabited and are not considered to be good indicators. See Renda 2011, pp. 132 and 133. However, these do not involve improvement of the environment also for future generations and assessments regarding portions of the territory that are not regularly inhabited. Therefore, the indicators are not considered to be very useful.
395. Overmars 2011, p. 22. However some economic models (e.g. the standard cost model) assume 100% compliance. In such models the cost of enforcement is not considered. See e.g. Renda 2011, p. 132.
396. Therefore, the actual impact on the environment of an eco-label is hardly ever assessed. See Gandara 2013, pp. 266 and 267. Cf. the United Nations Forum on Sustainability Standards (UNFSS) report Today's landscape and issues & initiatives to reach public policy objectives, part 1: issues, p. 27, to be found at http://unfss.org/documentation/general-documentation (accessed October 23, 2013).
397. Gandara 2013, p. 28.
398. See on eco-labels Gandara 2013, p. 28. Eco-labeling entities might not be interested in this type of research, unless coerced to conduct it, because if the research shows no actual impact, potential users might not invest in this label. See Gandara 2013, pp. 28 and 45. However, eco-labels should assess the actual impact according to Gandara 2013, p. 28.
399. Gandara 2013, pp. 30-34. The quality of eco-labels is addressed by the ISO-14020 Environmental labels and declarations — General Principles and ISO-14021 and ISO-14025 standards. See on this e.g. Gandara 2013, pp. 40-44. However, few eco-labels actually meet these standards. See Gandara 2013, pp. 43 and 44.

production only, (iv) they are performance-based (as opposed to process-based because changes to the processes (of the producer) do not necessarily generate an improved environmental performance), (v) the standards are raised regularly (so that they meet the newest environmental requirements and insights), (vi) they involve specific standards for specific industries, products or environmental issues and (vii) they are regularly certified.[400] Furthermore, a pro-environmental community has to exist in order for eco-labels to perform, and the producers need to have the possibility to increase prices and make their environmental performance public (by showing that their environmental performance is higher than prescribed by law).[401] By and large this possibility does not exist if the eco-label is endorsed by the public regulator because the regulatory nature of it tends to monopolize the market.[402] Therefore, international private regulation is needed in this respect. However, if the impact of a private standard, such as an eco-label, remains unclear and poses high cost to an industry and consumers, the question is whether the (unclear) contribution to the public good outweighs the cost of participation by an industry and the detriment to consumers.[403] In many instances the answer to this question seems rhetorical. However, even if an eco-label is successful in the aforementioned sense, over-demand might result in eco-labels emerging on the market with lower standards and being less advantageous to the environment.[404] Furthermore, if too many eco-labels exist the (necessary higher)[405] prices are not sustainable.[406]
The advantage to the public interest might comprise the prevention of legislation, flexibility, and diminished enforcement effort too.[407] Furthermore, independent supervisory bodies might decrease the use of the government-funded judicial systems.[408] Besides this, the industry might have specific knowledge not available to the government, and might be able to set standards at lower cost than the government. Private regulation thus benefits to the public good.

From the above it could be inferred that several indicators might be applied to measure the *ex post* economic effects of international private regulation at a macro level. Obviously such a measurement is not without hurdles, as has been illustrated previously, and is especially appropriate if the international private regulation at stake more or less resembles public regulation in terms of the number of regulatees and the content of the rules.

400. Gandara 2013, pp. 30-34, 37-44, 46-52 and 329. However, regarding issue (vii) verification instead of certification (especially in business to business environment) is deemed effective too. See Gandara 2013, p. 50.
401. Gandara 2013, pp. 160, 166-169 and 264-270 (law and economics analysis showing that the increase in price is not always useful and other informational tools are necessary) and 290. However, the focus on making the environmental performance public might hamper useful pre-environmental behavior that cannot be demonstrated. See Gandara 2013, p. 170.
402. Gandara 2013, pp. 223 and 229. In this respect the eco-label developed by the European Commission might be disadvantageous. See for this label www.ecolabel.eu (accessed August 7, 2013).
403. Cf. in connection with ISO-standards ISO Focus, p. 33.
404. See on the FSC (sustainable wood) Gandara 2013, p. 125.
405. Gandara 2013, p. 127. She points out that eco-labels work best if the environmental legislative standards are not too high. See Gandara 2013, p. 127.
406. Gandara 2013, p. 126.
407. Overmars 2011, p. 18.
408. Overmars 2011, p. 21.

The following (abovementioned) indicators might be used to make such an assessment:

i. the Standard Cost Model for the measurement and reduction of the (administrative) burden of international private regulation to regulatees;[409]
ii. changes in the growth of gross domestic product caused by international private regulation;
iii. consumer benefit or detriment;
iv. competitiveness and trade;
v. impact on the potential for innovation and technological development;
vi. improvement of labor conditions and social welfare;
vii. benefit or detriment to the public interest.

That said, it should be noted that international private regulation might not affect all these indicators. One should only assess those indicators on which the regulation might have an impact. For example, regulation on equal pay among men and women is more likely to have gender effects rather than impact on climate change and the environment.[410]

However, this kind of macro-economic research is rather costly and the outcome is to a certain extent speculative because of the extensive use of assumptions. Besides this, international private regulation often does not resemble public regulation at all. The nature of private regulation might be rather different from public regulation in terms of the number of regulatees and the content of the rules. This is true, for example, regarding codes of conduct, international private regulation involving principles and regulation through contractual provisions in supply chains. A macro analysis seems less appropriate regarding such international private regulation. Furthermore, this research at a macro level does not give a handle on the economic effects/benefits of international private regulation on/for individual companies. To make a proper assessment of these effects a 'bottom up' (micro economic) approach is required. This approach is partially reflected by the policy of the European Commission on CSR, which calls for maximizing the shared value for the owners/shareholders of an enterprise as well as for its other stakeholders and society at large.[411] As far as enterprises are concerned, research has revealed that private regulation such as standardization may contribute to the profitability of enterprises. The same is true in connection with sustainable entrepreneurship.[412] An increase in profitability (for example resulting from an increase in market access) is an important indicator to assess the economic effects of international private regulation, as the willingness of industry to establish and/or adhere to private regulation is increased (or even driven) by expected benefit.[413] However, although continuity

409. This model has been discussed in the *ex ante* economic avenue.
410. See e.g. Fritsch, Radaelli, Schrefler and Renda 2012, p. 4.
411. Communication from the Commission on a renewed EU strategy 2011-14 for Corporate Social Responsibility of October 25 2011, COM(2011) 681, p. 6, to be found at http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf.
412. See e.g. Eccles, Ioannou and Serafeim 2011. See also Porter and Kramer 2011, pp. 3-17, who especially promote the concept of 'shared value'. Furthermore, this is beneficial to investors too because the return on investment increases as well.
413. Overmars 2011, p. 20. Cf. Casey and Scott 2011, p. 91; Ogus and Carbonara 2011, p. 244. Cf. Alvarez and Van Hagen 2012, p. 11.

and profitability are important (long-term) aims, business is increasingly inclined to live up to its responsibility in the CSR field — also if governments are unable to set (national or international) standards — by including other interests (of external stakeholders) into their (CSR) policy and by reporting on those non-financial topics.[414] Furthermore, customers and investors (as well as society[415]) increasingly require a (sound) CSR policy. Therefore, the (further) dissemination of international private CSR regulation is not only driven by an increase in profits caused by this type of regulation, but also involves a delicate process of (enhanced) assured non-financial reporting and of meeting the (CSR) requirements of customers, investors, and society at large.

As to the micro-economic effects of international private regulation, research has been conducted as to the economic effects of standardization.[416] Standardization is used in the CSR arena too, for example for environmental issues.[417] However, this research involves technical standards only and not the relevant (management) standards in the CSR arena. Therefore, the usage of this method to assess the economic impact of standardization, or more generally of international private regulation, in the CSR arena is not axiomatic. Technical processes within a company are quite distinct and have less external impact as such. In this respect, standardization has to be distinguished from CSR. A company CSR policy (based on private regulation) might be profitable to this company, but might have external consequences for consumers, local communities, or the environment. Besides this, the process from extracting raw materials to the delivery of a certain product to a consumer might be rather long. This process regularly involves a (long) chain of activities of several enterprises. Furthermore, the implementation by certain international private CSR regulation throughout the supply chain is time-consuming and the (economic) effects thereof are less clear. This assessment is further complicated because the profit of an enterprise depends on many factors, especially on the long run. Besides this, negative media because of a violation of international private CSR regulation might be more threatening to a company's profit than non-compliance with international technical standards. However, this depends on the industry. The producer of consumer goods might envisage harsher consequences due to negative media attention than a company in the arms industry, and might profit more from positive media if it complies with private CSR regulation. For the company in the arms industry the (expected) benefit from compliance with international private regulation in the CSR arena might be lower. Furthermore, the abandonment of child labor, for example, turns on whether the industry in general is (child) labor intensive and whether products are sold to consumers and not in a business-to-business market.[418] If both requirements are met negative media attention is deemed to have adverse effects on that certain company.

414. Cf. Ogus and Carbonara 2011, p. 244. Part of this non-financial reporting is liaising with external stakeholders.
415. Which demands might be expressed through legislation, but also through e.g. social media, the Internet, or civic voice organizations (e.g. NGOs).
416. See ISO focus, pp. 11-19.
417. See on environmental issues the ISO 14000 series. On CSR as a whole the ISO 26000 standard applies.
418. Cf. Kolk and Van Tulder 2005, p. 7.

Therefore, economic effects of international private CSR regulation on the micro level are not easily measured and depend on the specifics of the industry. However, as has been mentioned before, research has shown that CSR might be profitable to companies, consumers, and local communities as well as beneficial to the environment.[419] For example, a (certified) eco-label might lower the cost of reputation building for a company in the environmental arena because the eco-label might be well known in the market and might be connected to environmental improvement by consumers.[420] The eco-label supports the environmental claim and the (environmental) reputation of the company in such instances. It might even permeate to the other (non-labeled) products of such a company.[421]

How then to find a method to assess the economic effects of international private CSR regulation on the micro level? Many methods exist to measure the economic effects of CSR on companies.[422] The Global Reporting Initiative (GRI) might play a role in this.[423] Another useful instrument for the agricultural sector might be the

419. See e.g. Eccles, Ioannou and Serafeim 2011; Porter and Kramer 2006, p. 3; Gandara 2013, pp. 157-171. Cf. Porter and Kramer 2011, pp. 3-17, who promote the concept of 'shared value'. However, Gandara notes that a correlation between sustainability and financial performance has been found but not a causal relationship. See Gandara 2013, p. 151.

420. Gandara 2013, pp. 88-92. However, she also addresses the downside because the aforementioned cost reduction is the highest for companies with a rather poor environmental performance. Furthermore, companies with a good environmental performance might incur high costs because of the certification process and might receive marginal benefits. See Gandara 2013, pp. 90-92.

421. Cf. Gandara 2013, p. 100.

422. It is not possible to review all methods in this paper. Indicators to measure detriment to e.g. local communities by analyzing complaints (e.g. about illness, increased mortality as well as damage to economic and environmental assets) are provided by Renda. However, these indicators are not considered to be adequate measurement tools. See Renda 2011, pp. 132 and 133. The human development indicator might also provide some insight into the (economic) advantages of international private regulation to other stakeholders (for example local communities). However, it is contended an increase in wealth may not constitute a social improvement unless it furthers some other goal such as utility and therefore is not a useful indicator. See Renda 2011, p. 104. Furthermore, an aid in the environmental area might be SimaPro software, which uses many of these methods to assess the effects of company activities on the environment, climate, and health. See www.pre-sustainability.com/download/Webdemo/SimaPro_7_Introduction.htm (accessed April 29, 2013). Cf. the Sustainability Measurement & Reporting System (SMRS), a global platform which enables research on the effects of company activities on climate, raw materials, health, water use and the environment at an industry level. See www.sustainabilityconsortium.org/open-io/use-the-model (accessed April 29, 2013). On www.earthster.org (accessed April 29, 2013) software could be found which assesses the impact of company activities on the environment at an industry level.

423. See www.globalreporting.org (accessed May 29, 2013) and e.g. C.A. Williams, *International Law and Politics*, vol. 36, 2004, pp. 471-477. See on the history of this initiative Alberto Fonseca, 'Barriers to Strengthening the Global Reporting Initiative Framework: Exploring the perceptions of consultants, practitioners and researchers' (2010), to be found at www.csin-rcid.ca/downloads/csin_conf_alberto_fonseca.pdf (accessed April 29, 2013), pp. 3 and 4. This type of reporting is required by some (certifiable) management systems as the Dutch 'MVO prestatieladder' (at application level 5 in which GRI reporting application level B+ is required), see www.mvoprestatieladder.nl (accessed April 29, 2013). However, although the GRI seems an open, inclusive organization aiming at public policy goals, its performance in this respect is questioned. Some consider the nature of the indicators rather formalistic and giving rise to a 'box-ticking' mentality as well as difficult to apply (e.g. the human rights indicators). A survey amongst stakeholders on the performance of GRI has revealed a lack of integrated indicators, no obligation for external assurance, a lack of guidance on stakeholder engagement and limited participation as well as a lack of real inclusiveness because of the focus on internal organizational performance and losing sight of the physical space surrounding specific facilities or industrial plants. See Fonseca 2010, p. 5 ff. Cf. Cafaggi and Renda 2012, p. 18. However, some contend the GRI has succeeded in operationalizing the accountability as a virtue. See Curtin and Senden 2011, p. 178. Besides the GRI, a new organization has been established, the International Integrated Reporting Committee (IIRC), which aims at creating an internationally

joint ISEAL and FAO initiative Sustainability Assessment of Food and Agriculture systems (SAFA guidelines).[424] GRI provides organizational reporting guidance. Its framework enables all companies and organizations to measure and report their sustainability performance.[425] The SAFA guidelines involve a comparable (and comprehensive) framework in the agricultural area. The following research on the GRI therefore applies *mutatis mutandis* to the SAFA guidelines. A sustainability report is an organizational report that gives information about economic, environmental, social, and governance performance. Sustainability reporting is a form of non-financial reporting. It is also an intrinsic element of integrated reporting; a recent development that combines the analysis of financial and non-financial performance. Sustainability reporting involves the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development. In order to produce a regular sustainability report, companies should set up a program of data collection, communication, and responses. A sustainability report should provide a balanced and reasonable representation of the sustainability performance of the reporting organization, including both positive and negative contributions. The GRI provides that companies, *inter alia*, provide performance indicators that elicit comparable information on the economic, environmental, and social performance of that company.[426] Furthermore, the sustainability report has to focus on the organization's key impact on sustainability and effect on stakeholders, including rights as defined by national laws and relevant internationally agreed standards. In order to meet the GRI requirements the reporting organization should identify (i) on which topics it has significant economic, environmental, and social impact, (ii) its stakeholders[427] and explain in the report how it has responded to their reasonable expectations and interests and should (iii) put the performance information in the context of the limits and demands placed on environmental or social resources at the sectoral,

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accepted reporting framework enabling companies to combine financial and non-financial reporting. See www.theiirc.org (accessed April 29, 2013).

424. To be found at www.fao.org (accessed April 29, 2013). See on this initiative e.g. Cafaggi and Renda 2012, pp. 23-25. See also the TruePrice initiative http://trueprice.org (accessed October 30, 2013), which aims at establishing a methodology to make (external) social and environmental impact transparent at the price-level of individual products. This might be an interesting tool to assess the impact of an initiative which is implemented by a company on the price-level (in terms of improvement of environmental and social impact).

425. See also the ISEAL Assessing the Impacts of Social and Environmental Standards Systems, to be found at www.isealalliance.org/online-community/resources/iseal-impacts-code-of-good-practice (accessed April 29, 2013), p. 8 for the elements the assessment should involve. See on this e.g. Cafaggi and Renda 2012, pp. 20-23. See for indicators regarding human rights e.g. https://hrca2.humanrightsbusiness.org/docs/file/HRCA%20Quick%20Check_English.pdf (accessed November 21, 2013) of the Danish Human Rights Institute. See on assessing human rights impact in supply chains: Shift, From Audit to Innovation: Advancing Human Rights in Global Supply Chains, August 2013, to be found at www.shiftproject.org (accessed September 11, 2013), p. 10. Third party rating agencies, such as Vigeo (www.vigeo.com) and Sustainalytics (www.sustainalytics.com), assess human rights performance of entities on behalf of investors too, but their analysis is not made public unfortunately. Some public indices such as the Dow Jones Sustainabilty Index involve human rights indicators as well (however, to date only 6% of the indicators are related to them, see the questionnaire www.robecosam.com/images/sample-questionnaire.pdf (accessed November 27, 2013) at 3.2.2).

426. To date the most advanced performance indicators are involved in the G3 reporting framework. A new G4 reporting framework is under construction.

427. Which refers to entities or individuals significantly affected by the activities of the company. Examples of stakeholder groups are civil society, customers, employees (and other workers, and their trade unions), local communities, shareholders and providers of capital, and suppliers.

local, regional, or global level. For example, this could mean that in addition to reporting on trends in eco-efficiency, an organization might also present its absolute pollution loading in relation to the capacity of the regional ecosystem to absorb the pollutant in a sustainable manner. Furthermore, (iv) coverage of the material topics and indicators, and definition of the report boundary should be sufficient to reflect significant economic, environmental, and social impacts (for example along the supply chain[428]) and enable stakeholders to assess the company's performance in the reporting period. Reported information should be presented in a manner that enables stakeholders to analyze changes in the performance of the company over time, and could support analysis relative to other companies. A company should include total numbers (absolute data such as tons of waste) as well as ratios (normalized data such as waste per unit of production) to enable analytical comparisons. GRI has different application levels.[429]

Because the GRI reporting, especially if the highest application level (A) is implemented, enables stakeholders to analyze changes in the performance of a company over time, and could support analysis relative to other companies, it might be a helpful tool to assess the economic impact of the implementation of private regulation in the area of CSR. If a company uses the GRI reporting tool one could assess its economic, environmental, and social performance indicators before and after the implementation of certain private regulation in the CSR arena. Because the sustainability reports are made public, stakeholders and researchers are able to make this assessment too.

From this analysis it could be inferred that private regulation in the CSR arena is deemed effective in an economic sense (is efficient) if (i) the profits of the reporting company increase (in the long run) after implementing the private regulation,[430] which could be inferred from the (common) financial reporting, and (ii) the external (environmental and societal) consequences of the company's operations do not increase (or ideally decrease), which could be inferred from the non-financial performance indicators. However, an increase or decrease in profits might have many causes, especially if measured over a longer period of time. Therefore, an increase or decrease in profits might not be attributable to the implementation of certain private CSR regulation. So the financial statements should be scrutinized to assess whether other factors could have caused changes in profits. As far as possible, these other factors should be left out of the analysis. However, these other factors, such as an increase in production, might also cause an increase in environmental and social consequences. Such an increase might only be left out of the analysis if the increase is consistent with the implemented private CSR initiative. A further complication is that many companies do not adhere to a single private CSR initiative but implement multiple initiatives. Therefore, it might be difficult to assess which increase in profit could be attributed to the implementation of a certain CSR initi-

428. However, only if the company has control over the entity in the supply chain or has significant influence on this entity. In the former circumstance the company has to provide performance indicators and in the latter it has to disclose the management approach of the entity in the supply chain.

429. These are A, B and C to which a '+' might be added if external assurance is utilized. Level A is the most elaborate level of reporting and involves all indicators of the GRI on the economic, environmental, and social impact of a company.

430. Fully implementing private CSR regulation might be rather time-consuming and therefore the measurement of profits before and after implementation might be far apart.

ative. This hurdle might be overcome by assessing at which time certain private CSR initiatives are implemented. If these initiatives are not implemented at the same time, one could commence measurement of an increase in profits and the change of external consequences after implementation of a first initiative but before the implementation of a second. In this regard it is important that GRI requires companies to indicate to which initiatives they adhere in their non-financial report. Furthermore, it is conceivable that private CSR initiatives concern different topics, for example water usage and sustainable fishery. In such cases it might be possible to attribute part of the increase in profits and a change in environmental and social consequences to a certain initiative.

Put into a formula: private CSR regulation is efficient (on a micro level) if:

$PAc_{csr} - PBc_{csr} > 0$ and
$\Delta EC + \Delta SC \leq 0$

In which:
$PAc_{csr}$ is the company's profit after implementation of a certain private CSR initiative,
$PBc_{csr}$ is the company's profit before implementation,
$\Delta EC$ is the change of environmental consequences of the company's operations, and
$\Delta SC$ is the change of social consequences of the company's operations.[431]

An objection to this way of measuring efficiency through the GRI reporting might be that the figures and statements are provided by the company. Therefore, they might be considered to be less trustworthy, especially by external stakeholders. However, regarding the financial statement this distrust seems only partially justified because external assurance (by an accountant) is required in most countries. As to the non-financial statements, this distrust might be understandable, but in this regard GRI also provides for external assurance. Obviously, if external assurance is applied, the credibility of the reports increases. Furthermore, one might assess the efficiency of certain private CSR regulation by using financial and non-financial GRI reports from multiple companies. If efficiency in the abovementioned sense could be inferred from several GRI reports, this strengthens the assumption of effi-

431. EC and SC are assumed to be quantifiable in this formula. However, it should be noted that these consequences cannot be monetized for all aspects. In the GRI reports, these consequences are considered to be of a non-financial nature. For example the impact on human rights in a certain local community or on diversity is not easy to measure in a figure. In such instances, the non-financial report stating the changes in this respect have to be considered without attributing a figure to these changes. Obviously, this may cause problems if the environmental and social consequences are not aligned. For example if the figures regarding environmental impact show a positive effect and the (non-figurative) social statements a negative, the question arises as to whether the overall effect (EC + SC) is positive. Furthermore, it might be hard to assess whether the human rights situation has improved if the number of human rights issues has decreased but the severity of the remaining issues has increased. Unfortunately, the answer to these questions cannot be given in a truly objective way, but only more subjectively through assessing which effect seems to be predominant (for example by engaging with the affected community). However, this is still better than refraining from any assessment at all, especially if reports from other companies adhering to certain private regulation are available too.

ciency of a particular initiative (this involves an assessment at the meso level). Considering the reports of multiple companies also could assist in assessing efficiency of private CSR initiatives if a certain company has implemented several initiatives at the same time or soon after one another. If one compares the reports of multiple companies which but for one have implemented different initiatives and assesses efficiency in the abovementioned sense with all these companies, this raises the assumption that the initiative they all have implemented is efficient. Therefore GRI reports are helpful in assessing the efficiency of private CSR regulation on a micro economic level, especially if companies have adopted the A+ (the highest externally assured) application level. If so, they have to report on all environmental and social performance indicators have external assurance on the report. From these reports the efficiency of private CSR regulation can be inferred best in the way described previously.

However, few companies have adopted the GRI A(+) application level.[432] Because companies which have adopted the GRI B or C application level do not have to report on all environmental and social performance indicators, assessing the efficiency of private CSR regulation is more complex, although these reports might still provide some guidance using the indicators which are reported on. Furthermore, GRI reporting seems to be adopted by companies which have an interest in sustainability. Therefore, assessing the effects of not implementing private CSR regulation by using GRI reports is less feasible because the companies which have not implemented private CSR regulation are not very likely to use the GRI reporting tool. Thus the assessment of efficiency is mainly undertaken by using reports from companies which have implemented private regulation.[433] This might be compensated for, and this method might also be of use if no GRI reports are available for companies which have implemented a particular private CSR initiative, by using other assessment tools, for example on environmental impact in connection with scrutinizing publicized financial data.[434] However, the current assessment tools do not require companies to make the results of their assessments public. Therefore, these assessments are not fit for external research on the efficiency of private CSR initiatives. In order to enable (better) future research on the effectiveness of inter-

432. Only 20% of the GRI-based reports published in 2008 declared an A+ level. These reports mainly stem from large transnational corporations based in OECD countries. See Fronseca 2010, p. 13.

433. These companies might be intrinsically motivated to make a success of international private CSR regulation, which might cause an increase in profit although the regulation itself is rather ineffective. However, the more companies which have implemented particular private CSR regulation that report an increase in profit after implementation, the more likely it becomes this is (at least partly) attributable to the private regulation. Furthermore, this increase in profit after implementation provides at least an indication of efficiency unlike refraining from any assessment at all.

434. For environmental data one could for example use the Carbon Disclosure Project, available at www.cdproject.net (accessed April 29, 2013). Besides this, many tools are available to assess environmental impact. See e.g. the Sustainability Measurement & Reporting System (SMRS), a global platform which enables research on the effects of company activities on climate, raw materials, health, water use, and the environment at an industry level. See www.sustainabilityconsortium.org/open-io/use-the-model (accessed April 29, 2013). See also the SimaPro software, which uses many methods to assess the effects of company activities on the environment, climate, and health. See www.pre-sustainability.com/download/Webdemo/SimaPro_7_Introduction.htm (accessed April 29, 2013). On www.earthster.org (accessed April 29, 2013) software can be found which assesses the impact of company activities on the environment at an industry level. Other indicators also should be used if the efficiency of the GRI initiative itself is assessed. This assessment is necessary before researching the efficiency of other international private regulation because the effects of this regulation and the GRI might become blurred.

national private CSR regulation, the implementation of GRI reporting (preferably at the A(+) application level) or comparable reporting requirements should be promoted.[435] An even better solution would be to adopt a GRI or comparable reporting requirement in future international private CSR regulation (or elsewhere).[436] Thus the requirement of GRI reporting (or comparable kinds of reporting) becomes an indicator of effectiveness of future international private CSR regulation itself because it enables better research on its efficiency.

However, the economic approach by itself is not a reliable indicator which emanates (*ex post*) effectiveness of international private regulation. Contrary to what is assumed by classical economic theory, human decision making is not solely based on economic appraisal of a situation, but additionally on other assessments, and is also biased.[437] For example network effects, herd behavior and bandwagon effects are typical cases in which the interdependence between individuals and their dynamic interaction makes it impossible to follow a single mathematical aggregation of individual preferences as in the Pareto efficiency (connected to the macro level approach), in which an aggregate increase in wealth agreed upon by all members of society is predominant.[438] As biases emerge, effective international private regulation ought to operate directly on them to assist people either to reduce or to eliminate them, but this aspect of effectiveness is not covered by the economic avenue.[439] Besides this, acceptance of particular international private regulation by stakeholders is important. Economic efficiency, for example, tends to neglect the division of wealth caused by international private regulation,[440] which is an important factor in the acceptance thereof. The welfare of an individual most often depends on that individual's relative, rather than absolute well-being.[441] An individual earning USD 50 000 in a company where everybody receives the same amount might be happier than an individual who earns USD 60 000 in a company in which everybody else earns USD 80 000.[442] If the per capita income of a local community increases by USD 5 as a result of the implementation of private CSR regulation, it makes a difference whether this community is located in Nigeria or Canada. These and other distributional issues, which relate to returns on income and the assessment of how

435. Cf. Balleisen and Eisner 2009, pp. 136 and 142. See for an example the OECD Guidelines for Multinational Enterprises www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm (accessed March 20, 2013), Principle III.2-III.4 (and Commentaries 30-33), which involve such an requirement (though not at the GRI A+ or comparable level). Furthermore, the SEC requires companies listed at the New York Stock Exchange to report on sustainability issues such as climate change. See e.g. http://sustainca.org/blog/climate/sec-guidelines-sustainability-reporting (accessed November 27, 2013).
436. Either direct or through an overarching body. Cf. the MSI evaluation tool, pp. 19 and 20. Cf. Kolk and Van Tulder 2005, p. 10, who argue that the extent to which a code of conduct involves quantitative standards should be adopted as an effectiveness indicator.
437. See e.g. Renda 2011, pp. 110 and 111.
438. Renda 2011, pp. 117, 118 and 126. The same is true regarding the Kaldor-Hicks Principle, although in this Principle the possibility that someone is left worse off after an efficient policy change is explicitly contemplated. This Principle is an important feature of the U.S. impact assessment on major secondary legislation. See Renda 2011, pp. 127 and 128. Therefore, the aggregate increase in wealth agreed upon by all members of society has lost its predominant position in current law and economics. See e.g. Faure 2011, p. 1061.
439. Jolls 2007, pp. 34 and 35.
440. Cf. Renda 2011, p. 122.
441. Renda 2011, p. 118.
442. Renda 2011, p. 125.

much an increase in wealth contributes to the utility for an individual (the same increase in wealth has a different utility for a poor or a rich individual),[443] are neglected in classical economics.[444]

As is previously discussed, the economic avenue as a whole is especially fit to measure *ex post* effects of international private regulation.[445] Only the macro-economic approach is helpful in assessing the economic efficiency of international private regulation *ex ante*. However, it has emanated from the foregoing that a single economic approach does not suffice to assess the (*ex post*) effectiveness of international private regulation. Other disciplines are needed to correct the shortcomings of the economic avenue.[446] As to the distributional shortcomings of the economic approach, the acceptance of international private regulation is important. This topic is covered by the sociological avenue.[447] That said, the economic avenue ought to be one of the main factors in the *ex post* assessment of the effectiveness of international private regulation, alongside the legal approach, despite these shortcomings.

### 2.4.3 **Sociological approach**

The sociological approach might be of importance too in the *ex post* approach of assessing the effectiveness of existing international private regulation. The better international private regulation is actually accepted, the greater the incentives to comply with it. This might reduce the costs of enforcement and dispute resolution. Alternatively, if acceptance is rather poor, this might be a contra-indicator. However, the degree of acceptance is not easily measured. It might, for example, take some time before the implementation of a certain private regulatory regime brings about perceptible effects. Furthermore, private regulation is often intertwined with government regulation and it is therefore rather complicated to isolate the effects of a private regulatory regime.[448] Besides this, acceptance may vary between the different actors which are subject to the regime. Acceptance might then be assessed by conducting surveys with the relevant stakeholders. It should be noted this approach is *ex post*; *ex ante* research of this kind is not conceivable. However, this requires research which is often rather time-consuming and costly. Acceptance should preferably be assessed without the necessity for extensive surveys. An indicator of acceptance at the company level might be the commitment of the management of a company as well as financial commitment of that company to a certain initiative.[449] The higher the (reported) management and financial commitment of the company is, the higher the degree of assumed acceptance. Obviously, the fact

443. In technical terms: a diminishing marginal utility of income. See e.g. Easterlin 2004.
444. Renda 2011, p. 122. Renda gives the example of a poor and a rich cousin who have to divide an inheritance and will only inherit on condition that they agree on how to divide the sum.
445. However, it is possible to assess the economic effects of a particular desirable division of wealth. See Faure 2011, p. 1061. Therefore the economic approach also might assist the *ex ante* appraisal of international private regulation.
446. Therefore, the importance of human behavior is recognized in current law and economics. See e.g. Faure 2011, pp. 1061 and 1062. Cf. Klick 2011, p. 23 ff.
447. This approach is, as has been previously discussed, important to alternative forms of legitimacy of international private regulation as well. Besides this, insights might be derived from social psychology and political science which also research acceptance of norms.
448. Oude Vrielink 2011, p. 69.
449. See on codes of conduct in de CSR area Kolk and Van Tulder 2005, p. 10.

that a company has implemented a certain ISO standard indicates acceptance thereof. Furthermore, it seems, for example, clear which companies are committed itself to the Global Compact (in the CSR area), because of the list of adhering companies. However, this might not be a very reliable indicator. A company could adhere to the Global Compact but the implementation of its principles might be scant. In such instances the existence of an effective enforcement framework as well as extensive referral to it in social or other media might be indicators of acceptance.

Some examples might illustrate the importance of actual acceptance of international private regulation. The acceptance/legitimacy of ISO standards was traditionally assessed by reference to the degree of expertise and the extent to which ISO standards rationalized technical standards.[450] The ISO however expanded its scope from technical standards to a social responsibility standard, ISO 26000. Expertise and rationalization were insufficient to legitimate the new standard. The ISO recognized that given the potential users of such a standard it had to adapt its standard-setting procedure to open it up to wider stakeholders such as NGOs and consumer groups. In order to do this ISO set up six specific stakeholder categories and created new procedural rules so that all stakeholder views were represented.[451] By doing so, it faced new types of stakeholders who had different legitimacy demands from those previously dealt with. In particular a legitimacy dilemma was created when NGO and consumer stakeholder groups demanded that the standard-setting process be more transparent and open to the media. This demand for increased transparency was successfully contested by the industry stakeholder groups.
The acceptance/legitimacy of the Dutch corporate governance code, Principle II.1.2.d of which obliges companies listed on the Dutch Stock Exchange to state the main elements of CSR issues that are relevant to the company,[452] is questioned too. It is purported that the stakeholders are unclear. Furthermore, this code is not established by an industry organization but by different stakeholders from different disciplines and backgrounds, with different interests. A clear picture of the organization is absent and stemming from this it remains unclear whether all stakeholders feel adequately represented.[453] Furthermore, it is questionable whether all the information and expertise needed to solve the societal problem and to support the measures implemented was gathered.[454] Despite these objections section 2:8 of the Dutch Civil Code, which deals with good faith and fair dealing in company law, converts the corporate governance code into norms which are enforceable through national courts.[455]

450. Casey and Scott 2011, p. 92. This however is not an informal process of rulemaking, the ISO has created a set of procedures for the creation of standards. See Kopell 2010, p. 148.
451. Casey and Scott 2011, p. 92. Such a multi-stakeholder model was also applied when drafting the model mining development agreement, a model agreement drafted for the extracting industry, which *inter alia* contains provisions on CSR (Provisions 22-27 including an obligation to adopt a company based grievance mechanism) and requires the operator to conduct a feasibility study and assess the environmental and social impact of its operations prior to commencing its operations (Provision 2.4). This model is available at www.mmdaproject.org/presentations/MMDA1_0_110404-Bookletv3.pdf (accessed April 29, 2013).
452. See for this code http://commissiecorporategovernance.nl/ (accessed November 13, 2013).
453. Overmars 2011, p. 25.
454. Overmars 2011, p. 25.
455. See e.g. Willems 2012, p. 305.

The social perspective may be used to assess whether a certain initiative is effective *ex post*. One might assess actual acceptance of international private regulation. Obviously acceptance might differ amongst different (groups of) stakeholders. Therefore the level of acceptance has to be assessed within all (groups of) stakeholders. To assess (actual) acceptance the same indicators found in paragraph 2.3.3 above might be helpful. The *ex post* sociological approach bridges some pitfalls of the economic approach. Effectiveness of international private regulation in a sociological sense might infer that distributional issues (the 'fair' division of wealth), return on income and some aspects of individual happiness, have been covered.[456] If not, this regulation obviously has a high probability of not being effective in a sociological sense. Using the sociological approach to bridge these pitfalls of the economic approach is in my opinion preferable to trying to adjust economic models, which by their nature have difficulty in dealing with concepts of fairness and distributional issues.[457] Furthermore, acceptance might bridge the lack of legitimacy (in the traditional sense) of existing international private regulation, at least in part.

### 2.4.4 **Integrated approach**

Four avenues have been discussed to assess the effectiveness of international private regulation. All of them provide useful insights, either for the rule-setting process (*ex ante* approach), or the assessment of existing international private regulation (*ex post* assessment), or for both. However, neither of them is sufficient in itself to make an overarching effectiveness assessment. All approaches have their qualities, but also pitfalls. Research has also revealed that trust in certain standards results from both of these approaches.[458] Therefore, an integrated (*ex ante* and *ex post*) approach is needed to enhance the scientific value of this type of effectiveness research and to bridge the gaps which the separate approaches leave. In this contribution the focus has been on international private regulation in the CSR arena. Hence, the models mentioned below especially refer to effectiveness of international private regulation in that arena.

#### 2.4.4.1 *Ex ante approach*

The *ex ante* approach could, as has been previously shown, benefit from the legal, macro-economic, sociological and psychological perspectives to assist private rule makers in instigating effective international private regulation. Therefore, the effectiveness assessment will be more useful and based on actual future impact as more perspectives are taken into consideration.

456. Cf. Renda 2011, p. 139.
457. Cf. Renda 2011, pp. 141-143.
458. Alvarez and Van Hagen refer to a survey of business, government, and NGOs commissioned by ISEAL in 2010 (The ISEAL 100: A survey of thought leader views on sustainability standards 2010. ISEAL Alliance, London, 2011), in which respondents mentioned four main elements that create trust in a standard: credible verification processes, including accreditation and third-party certification (55%); a standard document being science-based, comprehensive, and practical (38%); a credible multi-stakeholder standard-setting process that has the support of all relevant stakeholders (NGOs, local communities/smallholders/producers, enterprises) (35%); a transparent governance model (32%) and being able to show an impact (11%). See Alvarez and Van Hagen 2012, p. 20.

| Elaboration of effectiveness assessment | Perspectives |
|---|---|
| A | All four perspectives |
| B | Three perspectives |
| C | Two perspectives |
| D | One perspective |

The relative value of the legal, sociological, and psychological (behavioral) avenues as such is equal. One should attempt to meet as much as possible indicators derived from these three perspectives. These require a yes/no (0/1) answer for some indicators and a more elaborate score for others. As some of the avenues have more indicators than others and a possibility of higher scores, the highest possible score on a certain avenue might be different than on others. This does not necessarily mean that an avenue with a lower possible highest score is less important, but in comparison to other initiatives the overall score is a useful tool to compare effectiveness. Furthermore, the expected impact on a macro level (if applicable) should be assessed in order to strive for macro-economic efficiency in the design process of international private regulation. This expected impact should be assessed in actual figures. International private regulation is more effective compared to other private regulation if it shows a higher (total) score on the legal, sociological, and psychological perspectives, and a positive future impact (economic avenue) is expected. It is less effective if positive future impact is expected but a lower score on the other three avenues is recorded. It is least effective if negative impact (economic avenue) is expected and a lower score on the other three avenues is recorded. The *ex ante* effectiveness model is as follows:

| Effectiveness indicators (*ex ante*) | | Yes (1)-No(0)[459] |
|---|---|---|
| Legal approach | | |
| | Articulate specific and assessable objectives | 0-3[460] |
| | Existing (public or private) regulation does not reach these objectives (if all objectives are met, refrain from new regulation) | 0-6[461] |

459. Unless indicated otherwise.
460. 0: no specific and assessable objectives, 1: specific objectives only, 2: specific objectives and criteria/indicators to assess whether these objectives have been met, 3: as 2 but with verifiers to make this assessment.
461. 0: verifiers indicate that other regulation meets all the objectives, 1: indicators/criteria indicate that other regulation meets all the objectives, 2: it is not possible to assess whether other regulation meets the objectives, 3: verifiers indicate that other regulation meets some of the objectives, 4: indicators/criteria indicate that other regulation meets some of the objectives, 5: indicators/criteria indicate that no other regulation exists which meets the objectives, 6: verifiers indicate that no other regulation exists which meets the objectives.

| | | | |
|---|---|---|---|
| | Articulate 'conflict of law' rules | | 0-6[462] |
| | Regular evaluation of the regulation and its functioning and (if necessary) review of the regulation | | 0-6[463] |
| | Enforcement | | |
| | | The existence of a supervisory body to which parties are accountable and the power of supervisory body to pass judgment and impose sanctions | 0-3[464] |
| | | A supervisory body which controls access to scarce resources | |
| | | (A) serious (threat of) contractual enforcement or other means of enforcement or endorsement if necessary through state legislation and/or (effective) enforcement by states | 0-3[465] |

462. 0: no such rules, 1: only general explanation which rules prevail and why, 2: rules exist which explain which specific standard/rule prevails in connection with public or private regulation and in which circumstances for less than 50% of the standards/rules, 3: rules exist which explain which specific standard/rule prevails in connection with public or private regulation and in which circumstances for more than 50% of the standards/rules, 4: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for less than 50% of the standards/rules, 5: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for more than 50% of the standards/rules, 6: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for more than 50% of the standards/rules and other relevant bodies which set international private regulation are informed if rules are set or reviewed.

463. 0: no evaluation and review, 1: irregular evaluation not involving stakeholders or past grievances and without review, 2: regular evaluation (at least every 5 years) not involving stakeholders or past grievances and without review, 3: irregular evaluation involving stakeholders and past grievances without review, 4: regular evaluation (at least every 5 years) involving stakeholders and past grievances without review, 5: irregular evaluation and review involving stakeholders and past grievances, 6: regular evaluation and review (at least every 5 years) involving stakeholders and past grievances.

464. 0: no supervisory body, 1: supervisory body exists, but no accountability (possibility to pass judgment) and no sanctions, 2: supervisory body exists and accountability but no sanctions, 3: supervisory body exists, accountability and possibility of imposing sanctions (such as expelling members).

465. 0: no possibility to enforce, 1: only private enforcement (e.g. through (blocking) entrance to a market, shareholders, media attention), 2: (contractual or other) enforcement through state legislation in some states, 3: (contractual or other) enforcement through state legislation and/or treaties on a global level (e.g. trademarks).

| | | | |
|---|---|---|---|
| | | Specific rules/standards | 0-9[466] |
| | | Sufficient bureaucratic capacity | |
| | | Sufficient (legal) knowledge of the private rule maker | |
| | | An effective complaint and dispute management mechanism | 0-9[467] |
| | | Certification or assessment of compliance by third parties supported by a reporting requirement | 0-6[468] |

466 0: principles only, 1: the norms meets none of the criteria for specificity ((i) involves a clear norm/standard which is interpreted and applied consistently, (ii) states if exceptions to the general rule exist and, if so, under which circumstances they apply, (iii) to whom the rules apply (e.g. only the companies themselves or suppliers and financing entities too), (iv) refers to applicable (international) norms and treaties (e.g. in the area of human rights or environment)), 2: as 1 but less than 50% of the norms meet one criterion, 3: as 1 but less than 50% of the norms meet two criteria, 4: as 1 but less than 50% of the norms meet three criteria, 5: as 1 but less than 50% of the norms meet all criteria, 6: as 1 but more than 50% of the norms meet one criterion, 7: as 1 but more than 50% of the norms meet two criteria, 8: as 1 but more than 50% of the norms meet three criteria, 9: as 1 but more than 50% of the norms meet all criteria.

467. 0: dispute management mechanism meets none of the criteria of Guiding Principle 31 of the Ruggie Framework and involves no evaluation of outcomes, 1: dispute management mechanism meets at least one of the criteria of Guiding Principle 31, 2: dispute management mechanism meets at least two of the criteria of Guiding Principle 31, and so on up to: 9: dispute management mechanism meets all criteria of Guiding Principle 31 and involves an evaluation of the outcomes of the mechanism.

468. 0: no certification or assessment by third parties, 1: involves assessment by independent third parties, 2: involves certification for less than 50% of the operations of members, 3: involves certification for more than 50% of the operations of members, 4: involves assessment by independent third parties and a reporting requirement (which either obliges the regulatee to make the results of the assessment by the third party public or allows the third party to share the information retrieved with the overarching body the regulatee is accountable to), 5: involves certification for less than 50% of the operations of members and a reporting requirement (which either obliges the regulatee to make the results of the assessment by the third party public or allows the third party to share the information retrieved with the overarching body the regulatee is accountable to), 6: involves certification for more than 50% of the operations of members and a reporting requirement.

| Sociological approach | | | |
|---|---|---|---|
| | The degree of knowledge and application of regulation | | 0-2[469] |
| | Acceptance (has to be assessed per (group of) stakeholder(s)) | A stable group of stakeholders | |
| | | Willingness to collaborate and to address relevant issues | 0-2[470] |
| | | Shared vision on relevant issues | 0-2[471] |
| | | The degree to which the actions of a governing body are aligned with this shared vision | 0-2[472] |
| | | Tradition of and experience with private rulemaking | |
| | | The way the regulation fits within the strategic choices and dilemmas faced by the regulatees | 0-2[473] |
| | | Own interest in the regulation | 0-2[474] |
| | | A slowly changing environment | |
| | | Support from governments | 0-2[475] |

469. 0: no training and education on norms and no explanation on background and objectives, 1: explanation on background and objectives but no training and education on norms, 2: explanation on background and objectives and training and education on norms.
470. 0: no willingness to collaborate, 1: minority of stakeholders want to collaborate, 2: majority of stakeholders want to collaborate.
471. 0: no shared vision, 1: minority of stakeholders have a shared vision, 2: majority of stakeholders have a shared vision.
472. 0: actions are not aligned, 1: minority of actions are aligned, 2: majority of actions are aligned.
473. 0: does not fit, 1: only fits within the strategic choices of a minority of the regulatees, 2: fits within the strategic choices of the majority of the regulatees.
474. 0: no own interest, 1: only in the own interest of a minority of the stakeholders, 2: in the own interest of the majority of the stakeholders.
475. 0: no support, 1: support from (Western) government(s), 2: global support from governments.

| | | | |
|---|---|---|---|
| | Effective mode of transmission | | 0-3[476] |
| | Inclusiveness vis-à-vis stakeholders and effective stakeholder engagement | | 0-7[477] |
| Psychological approach | | | |
| | Takes into account the fact that human decision making is not flawless and expects failures | | 0-2[478] |
| | Structures complex choices | Restricts the number of choices | 0-4[479] |
| | | Provides information which assists people in making proper decisions | 0-4[480] |

476. 0: no transmission through market mechanisms or contracts, 1: transmission through market mechanisms, 2: transmission through contracts, 3: transmission through market mechanisms and contracts.

477. 0: no stakeholder engagement, 1: one of four criteria ((i) a proper procedure in which the relevant stakeholders are identified and engaged in the rule-setting process, preferably through (with administrative procedures comparable) engagement rules, (ii) an assessment of their interests, (iii) a procedure in which adequate and timely information (on the rule-setting process and its substantive norms) is provided in such a manner that the relevant stakeholders are able to access and understand it and (iv) sufficient documentation of the process and reporting to the stakeholders) on stakeholder engagement is met, 2: two of four criteria are met, 3: three of four criteria are met, 4: all criteria are met, 5: all criteria are met and affected stakeholders make up a meaningful segment of the participants, 6: all criteria are met, affected stakeholders make up a meaningful segment of the participants and necessary funding is provided for stakeholder engagement; 7: all criteria are met, affected stakeholders make up a meaningful segment of the participants, necessary funding is provided for stakeholder engagement and diversity of stakeholders (e.g. geographical spread, gender, constituency) is maintained.

478. 0: no account of behavioral effects, 1: takes into account the behavioral effects on regulatees, 2: takes into account the behavioral effects on all stakeholders.

479. 0: no restriction, 1: less than 50% of the norms that involve an element of choice restrict the choices of regulatees, 2: more than 50% of the norms that involve an element of choice restrict the choices of regulatees, 3: less than 50% of the norms that involve an element of choice restrict the choices of regulatees and takes into account the choices to be made by other stakeholders which originate from the regulation, 4: more than 50% of the norms that involve an element of choice restrict the choices of regulatees and takes into account the choices to be made by other stakeholders which originate from the regulation.

480. 0: no information, 1: less than 50% of the norms that involve an element of choice provide information to the regulatees, 2: more than 50% of the norms that involve an element of choice provide information to the regulatees, 3: less than 50% of the norms that involve an element of choice provide information to the regulatees and provide information to other stakeholders on choices which originate from the regulation, 4: more than 50% of the norms that involve an element of choice provide information to the regulatees and provide information to other stakeholders on choices which originate from the regulation.

| | | | |
|---|---|---|---|
| | | Demands transparency as to the consequences of a choice | 0-4[481] |
| | Involves a default option which is beneficial to the majority of regulatees | | 0-2[482] |
| | If business is involved, takes into account the organizational model of the regulatees | | 0-2[483] |
| | Enhances crystallization to govern behavior | | 0-2[484] |
| Total score | | | |

| Macro economic approach (figures of expected impact) (if effects occur at the macro level) | | |
|---|---|---|
| | (Administrative) burdens by international private regulation according to the Standard Cost Model | |
| | Changes in the growth of gross domestic product caused by international private regulation | |
| | Additional consumer detriment | |
| | Impact on competitiveness and trade | |
| | Impact on the potential for innovation and technological development | |
| | Impact on labor conditions and social welfare | |
| | Additional detriment to the public interest | |

481. 0: no transparency, 1: less than 50% of the norms that involve an element of choice provide transparency on the consequences of a choice to the regulatees, 2: more than 50% of the norms that involve an element of choice provide transparency on the consequences of a choice to the regulatees, 3: less than 50% of the norms that involve an element of choice provide transparency on the consequences of a choice to the regulatees and provide transparency on the consequences of a choice to other stakeholders on choices which originate from the regulation, 4: more than 50% of the norms that involve an element of choice provide transparency on the consequences of a choice to the regulatees and provide transparency on the consequences of a choice to other stakeholders on choices which originate from the regulation.

482. 0: no default option, 1: less than 50% of the norms that involve an element of choice provide a default option, 2: more than 50% of the norms that involve an element of choice provide a default option.

483. 0: does not take the organizational model into account, 1: takes into account the organizational model of the minority of the regulatees, 2: takes into account the organizational model of the majority of the regulatees.

484. 0: no crystallization, 1: crystallization with the minority of regulatees, 2: crystallization with the majority of regulatees.

#### 2.4.4.2 *Ex post approach*

The *ex post* approach might, as has been previously shown, especially benefit from the legal and economic avenues. However, the sociological avenue might bridge some gaps that the economic avenue leaves. The lower the sociological score, the higher the non-acceptance of international private regulation and thus the risk of it being less effective. In such circumstances, positive impact has to be scrutinized because, for example, distributive effects might have been neglected. Hence, the more these perspectives are taken into account, the more significant the effectiveness assessment will be.

| Elaboration of effectiveness assessment | Perspectives |
|---|---|
| A | All three perspectives |
| B+ | Legal and economic perspectives |
| B- | Legal or economic perspective combined with sociological perspective |
| C+ | Legal or economic perspective only |
| C- | Sociological perspective only |

The indicators mentioned below require a yes/no (0/1) answer for some indicators and a more elaborate score for others. As some of the avenues have more indicators than others and a possibility of higher scores, the highest possible score on a certain avenue might be different than on others. This does not necessarily mean that an avenue with a lower possible highest score is less important, but in comparison to other initiatives the overall score is a useful tool to compare effectiveness. Furthermore, the actual impact on a macro level (if applicable) and micro level (both in figures) should be assessed in order to assess macro- and micro-economic efficiency of existing international private regulation. Existing international private regulation is more effective compared to other private regulation if it has a higher score on the legal and sociological perspectives, and shows a positive impact (economic avenue). It is less effective if it shows a positive impact but a lower score on the other two avenues and least effective if it shows a negative impact (economic avenue) as well as a lower score on the other two avenues. Furthermore, the effectiveness comparison reflects effectiveness at a certain moment in time. It might well be that a certain initiative gains effectiveness later on. The *ex post* model might be defined as follows:

| Effectiveness indicators (*ex post*) | | | Yes(1) or no (0)[485] |
|---|---|---|---|
| Legal approach | | | |
| | Articulate specific and assessable objectives | | 0-3 |
| | Objectives are effectively achieved | | 0-3[486] |
| | Existing (public or private) regulation does not reach these objectives | | 0-6 |
| | Involves 'conflict of law' rules | | 0-6 |
| | Regular evaluation of the regulation and its functioning (and if necessary) review of the regulation | | 0-4 |
| | Enforcement | | |
| | | The existence of a supervisory body to which parties are accountable and the power of supervisory body to pass judgment and impose sanctions | 0-3 |
| | | A supervisory body which controls access to scarce resources | |
| | | (A) serious (threat of) contractual enforcement or other means of enforcement or endorsement if necessary through state legislation and/or enforcement by states | 0-3 |
| | | Specific rules/standards | 0-9 |
| | | Sufficient bureaucratic capacity | |
| | | Sufficient (legal) knowledge of the private rule maker | |
| | | An effective complaint and dispute-management mechanism | 0-9 |
| | | Certification or assessment of compliance by third parties supported by a reporting requirement | 0-6 |
| | | Susceptibility of a certain industry to negative (social) media attention and active NGOs or other organizations monitoring | 0-2[487] |

485. Unless indicated otherwise (for the explanation of the discussed indicators lacking a footnote see the footnotes in the *ex ante* model).

486. 0: objectives are not met, 1: it is not possible to assess whether objectives are met, 2: criteria/indicators indicate that the objectives are met, 3: verifiers indicate that the objectives are met.

487. 0: no susceptibility, 1: susceptibility of less than 50% of a certain industry, 2: susceptibility of more than 50% of a certain industry.

| Sociological approach | | | |
|---|---|---|---|
| | The degree of knowledge and application of regulation | | 0-2 |
| | Acceptance (has to be assessed per (group of) stakeholder(s)) | A stable group of stakeholders | |
| | | Willingness to collaborate and to address relevant issues | 0-2 |
| | | Shared vision on relevant issues | 0-2 |
| | | The degree to which the actions of a governing body are aligned with this shared vision | 0-2 |
| | | Tradition of and experience with private rulemaking | |
| | | The way the regulation fits within the strategic choices and dilemmas faced by the regulatees | 0-2 |
| | | Own interest in the regulation | 0-2 |
| | | A slowly changing environment | |
| | | Support from governments | 0-2 |
| | Effective mode of transmission | | 0-3 |
| | Inclusiveness vis-à-vis stakeholders and effective stakeholder engagement | | 0-7 |
| Total score | | | |

| Economic approach | | |
|---|---|---|
| Macro level (if applicable) | (Administrative) burdens by international private regulation according to the Standard Cost Model | |
| | Changes in the growth of gross domestic product caused by international private regulation | |
| | Additional consumer detriment | |
| | Impact on competitiveness and trade | |
| | Impact on the potential for innovation and technological development | |

| | | |
|---|---|---|
| | Impact on labor conditions and social welfare | |
| | Additional detriment to the public interest | |
| Micro level ((private) regulation lacking macro impact or with macro impact but at level of individual enterprise)[488] | $PAc_{csr} - PBc_{csr} > 0$ and $\Delta EC + \Delta SC \leq 0$[489] (measuring through e.g. GRI) | |

### 2.4.5 **Conclusion**

To conclude the research, the outline of a methodology has been developed to assess the (*ex ante* and *ex post*) effectiveness of international private regulation in the CSR arena in comparison with other international private regulation in this arena. This methodology is useful to evaluate and to abandon the plethora of existing international private regulation in the CSR arena and in designing new private CSR regulation. To perform this function (legal, economic, and sociological) public data need to be collected in order to enable external (scientific) assessment of the effectiveness of international private regulation in the CSR arena. However, it seems a lot of work still has to be done. The outline of the methodology has been described but the details, for example how to assess the macro-economic factors and sociological indicators mentioned previously, still need elaboration. Furthermore, the effectiveness of complaint and conflict resolution mechanisms, for example, requires further research. I expect to discuss these topics in future research.

488. If international private regulation has an impact on more than one regulatee, this impact should preferably be assessed by aggregating the impact on individual regulatees.

489. In which formula $PAc_{csr}$ is the company's profit after implementation of a certain private CSR initiative, $PBc_{csr}$ is the company's profit before implementation, $\Delta EC$ is the change of environmental consequences of the company's operations, and $\Delta SC$ is the change of social consequences of the company's operations.

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