

# EXTERNAL AND INTERNAL SUPERVISION

*In search of a connection*



LEONIE SCHAKEL



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**EXTERNAL AND INTERNAL SUPERVISION**  
**In search of a connection**

**EXTERN EN INTERN TOEZICHT**  
**Op zoek naar een connectie**

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# 1

## Introduction



## 1.1 INTRODUCTION

Since the introduction in 2006 of a healthcare system based on the principles of managed competition, health care in the Netherlands has increasingly developed into a sector where the government creates the preconditions for care whilst health care providers are responsible for providing care within these preconditions (Ministry of Health, 2005; Van Kleef, 2012). By leaving important organizational decisions, such as decisions about real estate, to health care providers instead of the state, health care providers are given the opportunity to tailor their services to the wishes of patients (Ministry of Health, 2005). Numerous positive developments allegedly stem from this managed competition system, such as declining waiting lists for a number of types of care and more freedom of choice for patients. Small-scale initiatives, specialized independent treatment centers, and chain care initiatives have emerged (Ministry of Health, 2009).

However, there have also been less positive developments. While healthcare providers are allowed to make their own market-based decisions, it does not always mean that these decisions are 'good' from a public interest perspective. Incidents have occurred in the healthcare sector and in other semi-public sectors, such as education and social housing (Ministry of Economic Affairs, 2014). For example, the quality or safety of services was lost sight of, or too many risks were taken with public funding (Ministry of Economic Affairs, 2014). In several cases, these incidents led to social outrage. As a result, the function of supervision within and of semi-public organizations has come to the fore in the last decade (Strating et al., 2020).

Several reports have been written indicating how the quality of supervision could be improved (WRR, 2010; Halsema et al., 2013; RVZ, 2013; WRR, 2015). Based on these reports, a government-wide approach to the financial management and supervision of the semi-public sector was introduced in 2014 (Ministry of Economic Affairs, 2014). The approach was based on the idea that the governance of semi-public organizations had not kept pace with the professionalization of services, the increasing size of organizations and the increasing complexity of the environment; and the idea that the state was not intervening sufficiently to safeguard public interests (Ministry of Economic Affairs, 2014). According to the Minister of Economic Affairs, the governance of semi-public organizations needed to be improved, keeping a balance between service to citizens and professionals and sound financial and organizational management, as well as a better balance between public and private interests (Minister of Economic Affairs, 2014).

At the beginning of 2015, the Minister of Health, Welfare and Sport (Minister of Health) presented a 'good governance agenda' specifically for the healthcare sector (Ministry of

Health, 2015; Ministry of Health, 2016a), emphasizing the importance of an appropriate governance structure – a professional executive board that is responsible for day-to-day management and is supervised by a formally independent internal supervisory board – in order to provide for the adequate functioning of healthcare organizations. In addition, the Minister indicated that external supervision, carried out by public regulators in the healthcare sector, should focus on the governance of organizations and act in the event of mismanagement: where executives and internal supervisors fall short, external supervisors, especially the Dutch Healthcare Authority (Nederlandse Zorgautoriteit, NZa) – regulating the accessibility, affordability and transparency of quality of health care – and the Dutch Health and Youth Care Inspectorate (the Inspectorate)<sup>1</sup> – regulating the quality and safety of health care – step in to protect the public interest (Ministry of Health, 2016a). The division of the supervision of healthcare quality on the one hand, and supervision of administrative aspects on the other, between the Inspectorate and the NZa, makes the healthcare sector different from other sectors, such as the education sector, where one inspectorate supervises both areas.

As one of the areas where improvement was possible, the Minister of Health called for enhancing supervision through interaction between external and internal supervision, in the context of good governance. Whereas external supervisors traditionally engaged with executives and not with internal supervisors, now the NZa, the Inspectorate and the association of internal supervisors were called upon to meet and explore how external and internal supervision could supplement and reinforce each other (Vaste commissie voor Volksgezondheid, Welzijn en Sport (VWS), 2015b; Ministry of Health, 2016a). Because executives are ultimately responsible for the health care organization, they are the first point of contact for external supervisors. By also engaging with the supervisory board, external supervisors obtain a picture of how the internal supervisor organizes and implements its responsibility towards the executive board, and vice versa (Ministry of Health, 2014). That is to say, a focus on the internal supervisor also shifts the perspective from the execution of public policies to the governance of the organization. If the external supervisor has confidence in the way the organization is governed, according to the Minister, the external supervisor can show restraint with regard to its own supervisory activities (Vaste commissie voor VWS, 2015a).

Both external and internal supervisors have since wondered how an appropriate relationship could be shaped and opinions of how to interact, or whether there should be interaction at all, differ (De Ridder, 2013; Stoopendaal et al., 2014; Stoopendaal et al.,

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1 On 1 October 2017, the Health Care Inspectorate (Dutch abbreviation: IGZ) and the Youth Care Inspectorate merged to form the Dutch Health and Youth Care Inspectorate (the Inspectorate).



2016; Stoopendaal & Bovenkamp, 2018; Frissen & Meurs, 2020; Schraven, 2019). At the start of this thesis, building a relationship between external supervisors and internal supervisors in healthcare – but also in other semi-public sectors – was still in the starting blocks. There was little practical experience to get an idea of what such a relationship might look like. Existing scientific literature also failed to provide an answer, since scholars pay little attention to the relationship between external and internal supervision. While external supervisors can count on a great deal of attention from various scientific disciplines (e.g., Black, 2002; Levi-Faur, 2011), internal supervisory practices are mainly studied from a corporate governance theory, and more specifically, the principal-agent – or related – perspectives (e.g., De Waal, 2020; Mostert, 2020). What happens when these two supervisors meet has been understudied (De Ridder, 2013; De Waal, 2020).

It is at this juncture where this thesis comes in. The aim of this thesis is to increase our understanding of the relationship between external and internal supervisors. Scholarly knowledge can contribute to the professionalization of the supervisory profession (Van Erp & Van der Steen, 2018) both for the benefit of external supervision and for internal supervision. The Dutch context is very suitable for studying this now that attention for cooperation between the two supervisors is on the rise. This thesis focuses on the building of a new relationship between external and internal supervision and the way this relationship develops in general, and in the Dutch health care sector in particular. In so doing, it seeks an answer to the following question:

*How can external and internal supervisors complement, reinforce or substitute each other in their goal of supervising organizations?*

This emerging attention on cooperation between internal and external supervision is part of a shift in (thinking about) regulation from outcome focused to process-oriented regulation which urges to rethink this regulatory relationship (cf. Gilad, 2014). To comprehend the relationship between internal and external supervisors, I build on regulatory theory by making use of two specific theoretical orderings of regulation: the construction of regulatory objects as defined by De Kam (2020) and the three tiers of regulation as identified by Gilad (2014). These orderings help analyse how this shift in focus to good governance as an object of regulation and the related relationship to be built between external and internal supervision is shaped. I will explain this in more detail below, in the theoretical section of this chapter.

This thesis consists of five studies. Since the aim of interaction between external and internal supervision is to contribute to the better safeguarding of public interests (Ministry of Economic Affairs, 2014; Ministry of Health, 2015; Ministry of Health, 2016a), in

the first study I discuss whether it is actually clear what public interests are (chapter 2). By interviewing inspectors from several external supervisory agencies and internal supervisors from healthcare providers, I then report how both internal and external supervisors view a relationship between internal and external supervision and what they believe are opportunities and obstacles for interaction (chapter 3 & 4). Subsequently, I report on my observations of the process of the NZa to shift from a vertical, to a more horizontal, collaborative supervisory practice that involves interaction with internal supervisors (chapter 5). In the final study, I focus on the actual interactions between both supervisors and their attempt to discuss, or to alter, organizational governance practices (chapter 6). I will elaborate on these studies and the methods I used in the last two paragraphs of this introduction.

## **1.2 A BRIEF HISTORY**

To clarify what preceded the introduction of the good governance agenda of the Minister of Health, in the healthcare sector, I will first give a brief introduction to the history of the Dutch healthcare system and the role of external and internal supervision. I will then describe how this issue is embedded in the relevant regulatory theory.

### **1.2.1 A brief history of the Dutch public healthcare system**

Prior to the 19<sup>th</sup> century in the Netherlands, the majority of care was provided by private individuals (Van de Ven & Schut, 2008). Around 1800, the first aspect of health care that became an object of state supervision was the quality of health care. Local Committees of Supervision (*Toevoorzigt*) supervised the practice of medicine and the control of epidemic diseases (Ministry of Social Affairs and Health, 1966). Financial access to care has long been a private matter. Insurance against healthcare costs originated in the medieval *gildenkassen*, the collective treasury of professional associations to which all members made a financial contribution. In the 19th century the *gildenkassen* were slowly replaced by private health insurance funds. In 1941, under German occupation, a general and compulsory health insurance fund was introduced for employees below a certain wage limit. This fund was succeeded by the Health Fund Act (*Ziekenfondswet*) in 1964. The Health Insurance Act (*Zorgverzekeringswet, Zvw*), which replaced the Healthcare Fund Act in 2006, makes health insurance compulsory for all Dutch residents and people who pay wage tax in the Netherlands (Van de Ven & Schut, 2008; Ikkersheim et al., 2010; Vonk & Schut, 2018).

Affordability of care was regulated almost two centuries later. In 1982, the Health Care Rates Act (*Wet Tarieven Gezondheidszorg, WTG*) came into effect to curb the increases

in healthcare rates. In the last decades of the 20<sup>th</sup> century, the health care system was based on central supply management and health care providers were allowed to charge by the State approved rates only. Since the early 1990s, regulated markets and New Public Management (NPM) have been gradually introduced in the Dutch health care sector (Van Kleef, 2012; Van de Bovenkamp et al., 2014). In 2006, the successor to the Healthcare Tariffs Act, the Healthcare Market Regulation Act (Wmg), came into effect. With the Wmg, the system of central supply management was abandoned and replaced by a system of regulated market forces. The Wmg aimed to remove inefficient incentives in the system and, for example, offered a solution for long waiting times in health care (Ministry of Health, 2005). The Healthcare Market Regulation Act and the Health Insurance Act marked a major change from government control to a system based on the principles of managed competition: insurers and providers of care compete on price and quality while the government has set certain rules to guarantee universal access to good-quality care (Van Kleef, 2012). The introduction of market mechanisms results in health care becoming a sector steered by increasingly mixed or hybrid institutional arrangements (Van de Bovenkamp et al., 2014, p. 208; see also Bal, 2008). As a result of this mix of market, hierarchy and professionalism mechanisms, health care providers are, for instance, expected to deliver service of high quality, but for a minimum price in order to keep public healthcare spending sustainable. Health care providers are also expected to establish efficient structures and processes without, however, compromising standards regarding the quality of work and the participation of users (Klenk, 2020, p. 138; see also Schott et al., 2016).

Traditionally, public interests and policies for civil society were jointly formulated by public and private parties and the position of professionals in the healthcare sector has been strong (Bal, 2008; Van de Bovenkamp et al., 2014). Consequently, self-regulation has always been an important mechanism in governing health care (Van de Bovenkamp et al., 2014). Van de Bovenkamp et al. (2014) have shown that the introduction of regulated markets in public sectors did not mean that other governing mechanisms, such as self-regulation and consensus-building, disappeared. Instead, by layering different kinds of mechanisms, complex mixes of institutional arrangements were created. As a result of the introduction of the regulated market, professional self-regulation and civil society consultation have become somewhat less important, although both still play a role within the new healthcare system and are incorporated into new governance mechanisms (Van de Bovenkamp et al., 2014).

State intervention is first targeted at regulating the market, which means setting the ground rules for this market, after which the market parties can negotiate contracts (Van de Bovenkamp et al., 2014). According to the Minister of Health, state agencies guard the

public interest and monitor compliance with the rules (Ministry of Health, 2005; Ministry of Health, 2016a). Although these public interests, affordability, accessibility and quality of care, appear to be strictly delineated concepts, in practice it is unclear what is meant by ‘public interests’: in many situations, the composition of public interests is not clear nor which interest should prevail (Halsema et al., 2013). I shall elaborate on this theme in chapter 2.

### **1.2.2 A brief introduction of the Dutch public healthcare regulators**

Three regulators are appointed to jointly safeguard the quality, accessibility and affordability of healthcare, each with their own responsibilities and powers. The sector-specific supervision by the NZa, introduced in 2006, is supplementary to the already existing supervision of general competition by the Dutch Consumer and Market Authority (ACM) and the supervision of the quality and safety of healthcare by the Inspectorate (Ministry of Health, 2009, p. 34; Ministry of Health, 2016a).

ACM is an autonomous administrative authority, falling under the scope of the Dutch Ministry of Economic Affairs and Climate Policy. ACM supervises all economic sectors and aims to contribute to realizing a healthy economy by ensuring that markets work well for people and businesses.<sup>2</sup> To ensure that markets work well, ACM enforces the rules for free and regulated markets and promotes compliance with those rules. ACM has additional tasks with regard to some specific markets (e.g., energy, telecommunications, transport and postal markets) in order to safeguard affordability, quality, continuity, and accessibility, but apart from a specific role in the regulation of mergers, ACM has no specific duties regarding the healthcare sector.

The Inspectorate is part of the Dutch Ministry of Health, Welfare and Sport (Ministry of Health), and is assigned to investigate and improve the state of public health, monitoring compliance with public health regulations and issuing advice to the Minister of Health.<sup>3</sup> The Inspectorate, in its current constitution, was created in 2017 after a merger between its predecessor, the Health Care Inspectorate, and the Youth Care Inspectorate. The core of the legislation in the field of quality of care is that care providers themselves are responsible for providing good and responsible care. The Inspectorate monitors the quality and safety of the provided care and intervenes if it deems it necessary (Inspectorate, 2013). For example, the Inspectorate can impose an instruction whereby it obliges a healthcare provider to take measures to improve care; it can impose punitive fines; or the Inspectorate can impose an ‘intensified supervision regime’. By imposing an

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2 <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission>. Accessed on 9 March 2021.

3 Article 36 Health Act (Gezondheidswet).



intensified supervision regime, the care provider is given the opportunity to remedy the shortcomings identified by the Inspectorate. During this period of time, the Inspectorate intensifies its supervision activities within the healthcare facility (Kok et al., 2020). During an intensified supervision regime, the Inspectorate maintains close contact with the care provider, for example, through extra (unexpected) visits and requesting results reports of the improvement plan. The Inspectorate makes the imposition of an intensified supervision regime public by stating the name of the healthcare provider concerned.<sup>4</sup>

The NZa is an autonomous administrative authority, which falls under the scope of the Dutch Ministry of Health. Within the frameworks set by the Minister, the NZa regulates the affordability, accessibility and transparency of health care markets, advises the Minister – for example on which sectors within the health care sector can be liberalized – and supervises the articles of law with prescriptions for (mainly) healthcare providers and healthcare insurers (Ministry of Health, 2005). The NZa, unlike the Inspectorate, has a dual function: the NZa has the authority to legislate (e.g., rules on the transparency of the services of healthcare providers) and supervises whether the health care sector complies with these rules. If healthcare providers or health insurers do not comply with the law, the NZa can instruct them to take measures to improve their conduct or the NZa can impose penalties or fines.

The NZa and Inspectorate both state that they use risk-based regulation (Inspectorate, 2021; NZa, 2014) to focus on the greatest risks in healthcare; they collect risk information and focus on a particular risk while visiting a regulatee. Sometimes, they pay extra attention to certain themes, such as e-health or appropriate use of care. Following Sparrow (Sparrow, 2000), the NZa indicates it also uses problem-oriented regulation by '*picking important problems and fixing them*' (NZa, 2014). Besides risk-based regulation, the Inspectorate states that it uses incident-based regulation to respond to reports from citizens, healthcare providers, manufacturers, municipalities and other authorities (Inspectorate, 2021). The Inspectorate and NZa both have invested in the development of new regulatory methodologies – such as the Inspectorate's experiment with system-based regulation (Stoopendaal et al., 2016; De Bree & Stoopendaal, 2020) – and the NZa's responsive, non-punitive regulatory strategy in networked settings, to alter hospital practices from cosmetic compliance to institutionalized compliance (Van Erp et al., 2020).

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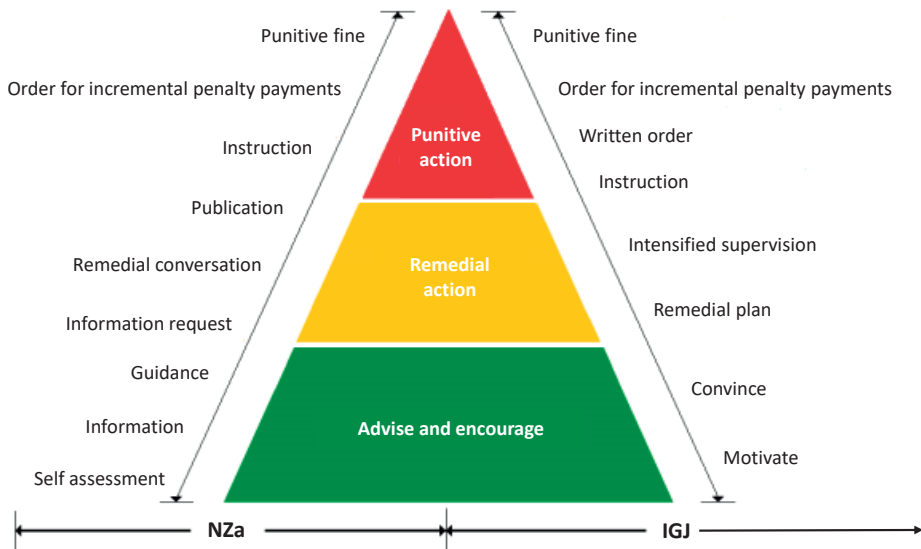
4 <https://www.igj.nl/onderwerpen/maatregelen/verschert-toezicht>. Accessed on 9 March 2021.

*Regulating good governance*

Along with the increased focus on organizational governance in other public sectors, in the last decade, the Inspectorate has increasingly focused on what constitutes 'good governance' in relation to, among other things, internal supervision (with regard to quality and safety) (Inspectorate, 2009; Inspectorate, 2011). In 2016, the NZa and the Inspectorate joint forces and issued a joint supervisory framework on good governance (NZa & Inspectorate, 2016; Stoopendaal, 2016). They revisited the Framework in 2020 (NZa & Inspectorate, 2020). In the framework, 'good governance' is not defined in exact terms. The supervisory framework explains good governance in terms of expected results (good, affordable healthcare), behaviour & organizational culture (including the behaviour of the executives and the internal supervisory board), and expected 'systems' (the instruments with which a care provider has insight into the state of affairs in the field of quality, safety, registration and declaration and manages, checks and adjusts these). The NZa and the Inspectorate explain how they aspire to regulate good governance: When the executive board and the internal supervisory board of a care provider do not live up to these expectations, the NZa and the Inspectorate will invite the boards to a meeting that they have labelled a 'governance conversation'. The NZa and the Inspectorate state that when they are confident of the boards' performance, they will show restraint with regard to their own regulatory activities. The NZa and the Inspectorate state that they aspire a dialogue with health care providers in order to assess the extent of good governance and to build trust, aimed at mutual consultation and exchange of information. In chapter 5 of this thesis, we report on the process within the NZa to implement this framework in the NZa's regulatory strategy.

The NZa and the Inspectorate have various options to intervene in the event of 'poor governance' of healthcare organizations (Ministry of Health, 2016a). Explaining regulation on the governance of healthcare providers to Parliament, the Minister illustrated the intervention tools of the NZa and the Inspectorate, as shown below in figure 1.1, with the figure of a pyramid (Ministry of Health, 2016a). This pyramid is based on the pyramid representing the responsive regulation theory of Ayres & Braithwaite (Ayres & Braithwaite, 1992, see paragraph 1.3.2). The use of an instrument can be determined by the situation: the higher in the pyramid, the more serious the situation is and the more compelling the instrument (Ministry of Health, 2016a). Although the terminology differs a bit, the NZa (shown on the left side of the pyramid) and the Inspectorate (shown on the right side of the pyramid) follow the same kind of approach.

The Minister stresses that, when the NZa and the Inspectorate address a healthcare provider about poor governance, they intervene according to this pyramid. It is striking, however, that what constitutes good or bad governance can be subjective and is



**Figure 1.1:** Intervention pyramid – NZa & Inspectorate (Ministry of Health, 2016a)

often not articulated in detail by enforceable legislation. In cases where the NZa and the Inspectorate consider a health care provider to be governed in a way that might be harmful to the public interest – although not explicitly illegal – the NZa and the Inspectorate nevertheless consider it their duty to act. Hence, in such governance cases, the Inspectorate and the NZa need to construct a regulatory object that is new and not clearly articulated as they search for new approaches to address the issue. In chapter 5, we report on our observations of the process of constructing a new regulatory object by the NZa, working from a vertical to a more horizontal, collaborative supervisory practice that involves interaction with internal supervisors. In chapter 6, we report on how external supervisors of the NZa and the Inspectorate approach a new regulatory relationship with internal supervisors, mobilizing them to obtain a new regulatory object.

### 1.2.3 A brief introduction of internal supervision of healthcare providers

As mentioned earlier, due to the scaling up of healthcare organizations, through autonomous growth or by merging with other organizations, managing healthcare organizations became increasingly complex (Committee Health Care Governance, 1999; Van Ooijen, 2013). An executive board existing of volunteers was no longer able to run such a large professionalized company. This created the need to change the division of powers between the management and the board (Committee Health Care Governance, 1999). In the 1980s, the first supervisory boards appeared in the care sector, at hospitals and large nursing homes (Gerards, 2018). The model was propagated by the Dutch Association of Hospital Directors by means of a report published in 1984 with proposals for a new

governance structure for organizations, in which day-to-day management by executives and internal supervision by members of a supervisory board are separated from each other (Committee Health Care Governance, 1999; Gerards, 2018).<sup>5</sup>

The supervisory board model became popular from the mid-1980s (Stoopendaal, 2008). Although more and more organizations were working with a supervisory board model, there was still a lot of uncertainty about the way in which the model should be structured. In 1993, this led to the establishment of the Dutch Association of Healthcare Directors (NVBG), the predecessor of the Association of Internal Supervisors in the Healthcare Sector (Nederlandse Vereniging van Toezichthouders in Zorg en Welzijn, NVTZ) (Gerards, 2018). The aim of the association was to support supervisors in the broadest sense of the word and to contribute to their professionalism.

The need for good governance increased over the years. Apart from the scaling up of healthcare providers, patients became increasingly empowered and patterns in mutual dependencies between the public, private and professional spheres shifted as legal frameworks for supervision were lacking (Committee Health Care Governance, 1999). In 1999, the Committee Health Care Governance was set up on a private initiative to formulate recommendations on how to shape good governance in healthcare. The Committee published a report with anchor points and thirty recommendations for the structure of the governance of care organizations (Committee Health Care Governance, 1999; Schraven, 2019). The recommendations were not legally binding, but did provide impetus to the discussion about good governance and good supervision in healthcare organizations (Healthcare-wide governance code, 2010).

Subsequently, several healthcare sectors developed their own governance code. In 2006, various sector associations in the healthcare sector drew up a joint code, the 'Zorgbrede governance code' (Healthcare governance code). The code was evaluated and amended in 2010 and 2017. This code offers health care providers an instrument to organize its governance in such a way that it contributes to ensuring good care in a self-regulating manner (Friele et al., 2021). Compliance with the code – according to the 'comply or explain' model – is a membership obligation for all members of the participating sector organizations. The supervisory board model has now also been anchored in statutory regulation.<sup>6</sup>

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5 This supervisory board model is derived from the statutory rules for supervisory boards of corporate companies (Health Care Governance Committee 1999). However, Dutch healthcare providers often take the form of a foundation that has no shareholders, so that the supervisory board is in fact formally accountable to no one (Health Care Governance Committee 1999).

6 Article 6.1 Implementing Decree on the Admission of Healthcare Institutions Act (Uitvoeringsbesluit Wet toelating zorginstellingen).



According to the Zorgbrede governance code of 2017, the supervisory board is responsible for supervising the strategy of the executive board and the general course of affairs in the healthcare organization (Brancheorganisaties Zorg, 2017). The supervisory board appoints, suspends and dismisses the members of the executive board. The supervisory board fulfills its supervisory, approval, advisory and employer functions in a balanced manner, focusing on the interests of the care organization, from the perspective of realizing the social objective of the care organization. The supervisory board also assesses whether the executive board has carefully balanced the relevant interests of the stakeholders involved in the care organization (Brancheorganisaties Zorg, 2017).

As mentioned earlier, the incidents in the semi-public sector raise doubts whether the supervisory board model is (always) suitable as a governance model in the semi-public sector (WRR, 2013). Research showed a number of problematic aspects of the current structure of internal supervision within these organizations, such as ambiguity about the purpose of supervision and about the relationship between internal and external supervision, information asymmetry between management and supervision, a lack of checks and balances and countervailing power of supervision, and an insufficient control and accountability of supervision itself (Goodijk, 2012; WRR, 2013). The government's growing attention for 'supervision of internal supervision' prompted further professionalization of internal supervision. This has led, among other things, to a debate and a resulting policy letter on the relationship between internal and external supervision (NVTZ, 2018; see also chapter 5).

Now that I have described how this thesis is embedded in the debate about the societal developments regarding the semi-public sector in the Netherlands and how regulation of good governance has become increasingly important – I will now describe how this thesis is embedded in regulatory governance theory.

### **1.3 REGULATORY THEORY**

In a broad sense, regulation can be defined as 'influencing the flow of events' (Drahos & Krygier, 2017). A more framed and most widely cited definition is given by Selznick who defines regulation as '*a sustained and focused control exercised by a public agency over activities that are valued by the community*' (Selznick, 1985, p. 363; Stoopendaal et al., 2016). Governments may want to regulate for a number of reasons but assuming that a government is acting in the pursuit of interests that are valued by the community, '*the whole point of regulation is that government needs to intervene, (...) when market forces and private incentives do not naturally combine to serve the public interest.*' (Sparrow, 2020,

p. 5; Baldwin & Cave, 2012). Although, in this definition, regulation is reserved for state actors, this is disputed. What is also disputed is whether, to be considered regulation, influencing should be limited strictly to rule enforcement or may involve other means of influencing (like nudging), whether the influenced are social actors as well as governments (Levi-Faur, 2011), or what activities are valued by the community (De Kam, 2020).

Building on the definition of Selznick, Black (2002, p. 170) defined regulation as ‘...a process involving the sustained and focused attempt to alter the behaviour of others according to identified purposes with the intention of producing a broadly identified outcome or outcomes which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.’ In addition to Selznick’s definition, in Black’s definition, regulation can be undertaken by public and private actors. Hence, Black’s definition offers scope for both internal and external supervisors who are part of *a process involving the sustained and focused attempt to alter the behaviour of executives or managers governing healthcare providers, with the intention of producing a broadly identified outcome*; in this case, good governance. Second, Black’s definition is not limited to the use of legal mechanisms, thereby acknowledging regulatory instruments encompassing a broader scope than just legal instruments, which are available to internal and external supervisors.

Black’s definition also avoids the discussion of how to determine which ‘activities are valued by the community’, which was part of Selznick’s definition. After all, with regard to good governance, it is clear that the ‘community’ probably likes healthcare providers to be well managed, but it is not clearly defined which activities contribute to good governance and which detract from it. And as we will show in chapter 2 on public interests in the health care sector, when giving substance to public interests in practice, it appears that public interests can be mutually contradictory and depend on the context and the action perspective. Accepting that it is not possible to precisely define activities that are valued by the community Black’s definition captures the concept of regulation as it is applied in this thesis.

### **1.3.1 Command and control**

The traditional approach of public regulation has been ‘command and control’, explicated by Parker as the substitution of decisions of democratically elected legislatures and administrative agencies for the decisions of corporate management, in certain circumstances defined by law (Parker, 2002, p. 8). The – typically public – regulator *commands* the regulatee to take prescribed actions or to meet performance standards either directly through legislation or indirectly through delegated authority (Sinclair, 1997; Gilad, 2010; Gunningham & Sinclair, 2017). Traditional prescriptive standards tell regulatees precisely what measures to take, while performance standards specify outcomes

or the desired level of performance (Gunningham & Sinclair, 2009). The public regulator *controls* the regulatee through the (threat of) imposing deterrent and / or punitive legal sanctions when non-compliance is detected (Sinclair, 1997; Etienne, 2012).

As regulatory practices and scholarship progressed, criticism of the traditional command and control approach increased. It was accused of being costly and inefficient, inflexible – as it is not easily adapted to developments such as innovations and emerging problems (Rutz, 2017) – and leading to regulatory unreasonableness and regulatory unresponsiveness (Sinclair, 1997; Parker, 2002; Gilad, 2010). Searching for new regulatory practices to replace or complement command and control regulation, a range of alternatives surfaced, such as ‘responsive regulation’ (and its descendants), focusing on *who* is regulated and paying attention to the regulator – regulatee relationship (Ayres & Braithwaite, 1992) and ‘process-oriented regulation’, focusing on *what* is regulated (Sinclair, 1997; Gilad, 2010; Gunningham & Sinclair, 2017; De Kam, 2020).

### 1.3.2 Responsive regulation and the regulatory relationship

Under a command and control approach, private organizations are the object of regulation and the relationship between regulator and regulatee is hierarchical (Lobel, 2004). In response to the criticism of the command and control approach, there is a significant body of literature exploring this regulator – regulatee relationship (Ayres & Braithwaite, 1992; Nielsen & Parker, 2008; J Braithwaite, 2011; Black; Grabosky, 2013; Etienne, 2012; Mascini & Van Wijk, 2013; Pautz et al., 2017). Important findings from these studies have demonstrated that compliance is negotiated in repeated interactions between regulator and regulatee (Lewin, 2016; Black, 2002), and that regulation is considered to be more legitimate and effective when it is more ‘responsive’, i.e., taking notion of the influence and involvement of non-state actors (Ayres & Braithwaite, 1992; Black, 2001a; Crawford, 2006). It is through communicative interactions that issues are defined and redefined, identities constructed, interdependencies and inter-linkages recognized, and formed (Meidinger, 1987; Hedge et al., 1988; Black, 1997; Hutter, 1997; Fineman, 1998; Black, 2002; Pautz, 2009; Pautz et al., 2017).

As mentioned, the intervention pyramid that is used by the NZa and the Inspectorate is based on the pyramid representing the responsive regulation theory of Ayres & Braithwaite. At the heart of their theory is the response of the regulator to the conduct of regulatees, in ways that are sensitive to the conditions in which regulation occurs and the capacity of the regulated for self-regulation. The choice between different intervention tools is an alternative to the rigid punitive nature of a command and control regime (Ayres & Braithwaite, 1992; Crawford, 2006). Ayres & Braithwaite presented their model of responsive regulation in the form of a pyramid. In the regulatory pyramid, persuasion

precedes punishment, both temporally and in terms of seriousness. Only when dialogue and voluntary compliance fail, does the regulator escalate up the pyramid. And when reform and repair are forthcoming, the regulator de-escalates down the pyramid (Ayres & Braithwaite, 1992; J Braithwaite, 2011).

When responsive regulation was applied in empirical studies, it turned out that inspectors appeared to employ a combination of regulatory styles, depending on the situation and regulated firm (Pautz et al., 2017). Although Ayres & Braithwaite's theory suggests that a regulator chooses the best approach given the specific regulatory context, Mascini & Van Wijk (2008 and 2009) point out that individual inspectors do not always agree on what is the best approach, and that the intentions of individual inspectors are regularly perceived differently by regulatees evidently affecting the end results of the regulatory approach. It appears to be difficult for regulators to accurately communicate their (co-operative) intentions or for regulatees to recognize those intentions (Mascini & Van Wijk, 2009; Pautz et al., 2017). There is still a lot unknown about the regulator-regulatee relationship (Pautz et al., 2017) and studying such interactions by paying close attention to the exercise of power within and over regulatory conversations would facilitate a more fine-grained analysis of the hierarchical or heterarchical nature of the regulatory arrangements (Black 2002, p. 193). Gaining an insight into these regulatory practices is particularly relevant in the advance of process-oriented regulation (paragraph 1.3.3), as such systems which no longer only rely on rule-following behaviour but are concerned with the willingness and capability of organizations (and their leaders) to improve performance (Kok et al., 2020, p. 8).

With regard to the responsive regulatory approach of the NZa and the Inspectorate, De Waal (2020) points to the applicability of responsive regulation in the relationship between external and internal supervision. De Waal shows that internal supervision has a stronger influence and more power in relation to decision-making within an organization than external supervision. She argues that 1) internal supervisors and external supervisors should build a complementary relationship and 2) external supervisors should help strengthen internal supervision so that it can exercise its potential influence effectively (De Waal, 2020). If internal supervision is insufficiently effective, external supervisors should intervene; if internal supervision is effective, external supervisors should be cautious about their own actions, in order to avoid crowding out the influence of internal supervision in areas that are the primary mandate of internal supervisors (De Waal, 2020). Hence, she advises external supervisors to be responsive to the performance of internal supervision, in other words, to adjust their own response accordingly.

These previous studies of the regulator-regulatee relationship raised interesting questions that guided my research for this thesis, such as how do both regulators deal with building a new regulatory relationship? How do both supervisors collaborate on regulatory design and implementation to coordinate their supervisory tasks (Black, 2001a; Crawford, 2006; Halpern, 2008), for instance to discuss and coordinate which areas are the primary mandate of internal supervisors and which are not? How do interactions between external and internal supervisors determine the outcome that a regulator is aiming for (Pautz et al., 2017, p. 101; see also Hedge et al., 1988; Black, 1997; Hutter, 1997; Fineman, 1998; Pautz, 2009)? What regulatory relationship style is perceived as appropriate by both external and internal supervisors in the given context (Lobel, 2004; Black, 2001a; Etienne, 2012)?

### 1.3.3 Process-oriented regulation and the tiers of Gilad

Process-oriented regulation can be described as regulation that ‘*combines prescriptive, technology-based and outcome-oriented regulation into a hybrid model of regulation that monitors the design, management and working of the internal quality and safety systems of an organization*’ (Stoopendaal et al., 2016, p. 396). Process-oriented regulation is considered an alternative to the prescriptive character of command and control regulation, when regulatees operate in markets that are heterogeneous or volatile or both and it is difficult or costly for regulators to observe and measure outcomes (Gunningham & Sinclair, 2009; Gilad, 2010). It contains forms of regulation that are not so much aimed at determining whether a regulatee complies with the law, but whether regulatees have organized their internal processes in such a way that compliance with the law is embedded in their internal management systems (Gilad, 2010). Examples of process-oriented regulation are ‘enforced self-regulation’ (J Braithwaite, 1982), ‘management-based regulation’ (Coglianese & Lazer, 2003), ‘systems-based regulation’ (Stoopendaal et al., 2016) and meta-regulation (Gunningham & Sinclair, 2009; Gilad, 2010).

Management-based regulation (Coglianese & Lazer, 2003; Gilad, 2010) and systems-based regulation (Gunningham & Sinclair, 2009; Stoopendaal et al., 2016; Drahos & Krygier, 2017) refer to regimes in which regulators ‘*set (and monitor) general criteria to guide organizations’ analysis of the risks that their operations pose to regulatory objectives, and their design of internal controls to mitigate and monitor these risks*’ (Gilad, 2010, p. 488). In an enforced self-regulation regime, it is the regulatee who devises its own criteria, instead of the public regulator, while the public regulator authorises organizations’ rule books and audits their compliance with these internal rules (J Braithwaite, 1982; Gilad, 2010).

Process-oriented regulation can become a form of ‘meta-regulation’ when public regulators, rather than regulating directly, can risk-manage the risk management of individual regulatees (Gunningham & Sinclair, 2009). Meta-regulation is the ‘regulation of self-regulation’ and stems from the notion that regulation can be delegated and that such delegation can be monitored by the state (Ayres and Braithwaite, 1992; Sørensen & Torfing, 2011). The public regulator’s role is to 1) stimulate and facilitate regulatees to set up rules and management systems and 2) to monitor the quality of regulatees’ self-assessment of the association between these systems and perceived outcomes and on the actions that they take in light of these assessments, instead of merely checking on compliance with criteria (Parker, 2002; Gilad, 2010; Stoopendaal et al., 2016; Rutz, 2017).

For this thesis, the distinction made by Gilad (2010) may be helpful, as it links the foci of regulation to types of regulation. Gilad (2010, p. 489) proposes ‘*to think of regulation as concerning one, two, or all of three layers of organizations’ operations*’ (see Table 1.1 below).

**Table 1.1:** Tiers of regulation (Gilad, 2010, p. 490)

<b>Tier of regulation</b>	<b>Focus of regulation</b>	<b>Regulatory standards</b>	<b>Type of regulation</b>
<b>First</b>	Organizations’ core production and operations	Prescribed actions, output specifications, or principles that control and constitute firms’ production processes	Prescriptive or outcome oriented regulation
<b>Second</b>	Organizations’ compliance systems	System-oriented specifications that direct organizations’ governance and control of their compliance with first-tier specifications	Controls-based regulation
<b>Third</b>	Organizations’ self-evaluation	Process-oriented specifications that guide organizations’ analysis of the risks that their operations pose to regulatory objectives and their setting of first-tier and second-tier specifications	Process-oriented regulation (management-based regulation, enforced self-regulation, or meta-regulation)

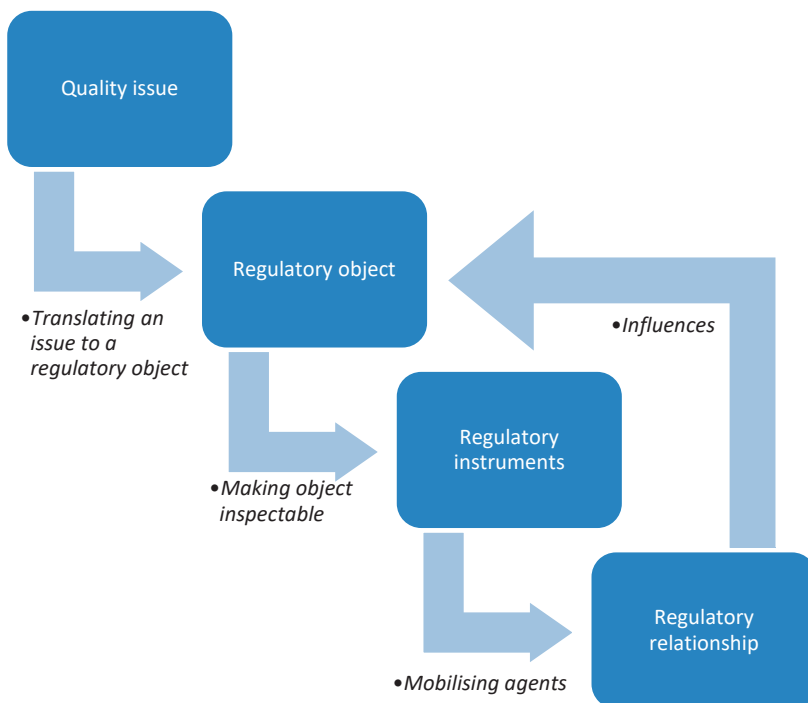
The first tier, or ‘layer’, of regulation is detailed prescriptive or outcome-oriented regulation that focuses on the core production and operations of organizations (Gilad, 2010). For example, in the case of Dutch regulations on the quality of healthcare, the law states that healthcare providers offer good healthcare while further rules and field standards specify what should be understood by this. The second tier of regulation comprises prescriptive or outcome-oriented regulation that focuses on the governance and control structures of regulators through which regulatees monitor compliance with first tier regulatory requirements (Gilad, 2010). The third tier of regulation directs regulatees’

evaluation, design, and readjustment of the first-tier production and second-tier controls (Gilad, 2010). In the example of the quality of healthcare, in the second and third tier, the provided healthcare is no longer the prime object of regulation, but the quality of the governance systems and the management itself is.

In practice, regulators often adopt a hybrid regulatory approach, in which different forms of regulation can act as a substitute for each other, as well as complement and co-exist (Gilad, 2010; van de Bovenkamp et al., 2014; De Kam, 2020). In the final chapter, I use Gilad's distinction between the three layers of regulation to analyse how the NZa and the Inspectorate construct 'good governance' as a regulatory object, which of the layers of regulation their approach focuses on and what this entails for the relation between the external and internal supervisor. I also use the De Kam's definition of the 'regulatory object', which I explain in the next section.

### 1.3.4 The regulatory object

I now turn to De Kam's view (2020), explicating how an object of regulation, the instruments chosen to regulate, and the relationship between regulator and regulatee are interlinked (illustrated in figure 1.2).



**Figure 1.2:** Simplified illustration of the regulatory object, instrument and relationship



Building on the work of Dahler-Larsen (2019), on regulating quality, De Kam sees regulation as the institutional embodiment of defining and assessing the quality of a public matter. For De Kam (2020), regulation unfolds through the construction of what he calls a 'regulatory object'. A regulatory object defines a certain quality issue as the (legitimate) object of regulation; for instance, the 'quality and safety of healthcare'. Before the 'quality and safety of healthcare' can be regulated, a series of translations must be made that lead to the 'regulatory object', whereby a relationship is established between the quality that is at stake in the object and behaviour that will be regulated. The emerging attention to good governance shows that the regulatory object is shifting and that 'good governance', i.e. the quality of the organizational governance of a health care provider, has entered the scope of the external supervisor (Gilad, 2010).

Once the regulatory object has been defined, the regulator invites 'agents' to behave in a way that contributes to the quality of the regulated object (Dahler-Larsen, 2019; De Kam, 2020). Agents can be representatives of the regulatee or other stakeholders who are able to influence the regulatory object (Lascoumes & Le Gales, 2007; De Kam, 2020). That 'invitation' can be more or less powerful given the legal mandates that apply to it, its support and the consequences of declining the invitation (De Kam, 2020). The regulator can assess how an agent is performing on the quality of the regulated object by making the behaviour of the agent inspectable. Therefore, regulators depend on regulatory instruments to make the performance of an agent tangible. Again, this entails a series of translations through which the regulatory object becomes inspectable (De Kam, 2020; Gilad, 2014).

For the purpose of the regulatory object, using the regulatory instrument that makes the expected behaviour explicit, the activity of regulating establishes a relationship between a regulator and a regulatee (De Kam, 2020; Stoopendaal & Bouwman, 2017; Spronk et al., 2019). The effects of regulation that a regulator obtains are largely determined by the nature of their regulatory interactions with regulatees (De Kam, 2020; Pautz et al., 2017; Hedge et al., 1988; Black, 1997; Hutter, 1997; Fineman, 1998; Pautz, 2009). Hence, the shift in regulatory object – the new focus on 'good governance' – might also require a new vision on how an external supervisor relates to an internal supervisor and vice versa. For the external supervisor, the internal supervisor is not a traditional counterpart, but a stakeholder that also exercises supervisory influence over the regulatee that was previously not part of the external supervisor's set of regulatory instruments.

In summary, to understand the new to be build relationship between external and internal supervisors, I seek to understand the context in which the relationship is embedded. Following the notions about the construction of regulatory objects, regula-

tory instruments and regulatory relationships, as described above, four sub-questions complement the main research question:

1. How do external supervisors construct the quality of organizational governance ('good governance') as a new regulatory object?
  - a. If the aim of collaboration between external and internal supervision is to contribute to the better safeguarding of public interests – is it actually clear what public interests are or is this a shifting goal (chapter 2)?
2. How do external supervisors mobilize internal supervisors as agents in their effort to make good governance inspectable?
  - a. How does the NZa work from a vertical to a more horizontal, collaborative supervisory practice that involves interaction with internal supervisors (chapter 5)?
3. How does the way in which the external supervisors approach good governance as a regulatory object and mobilize internal supervisors, affect the relationship between them and internal supervisors?
  - a. How do external supervisors give shape to a relationship with internal supervisors (chapter 3)?
  - b. Is contact between external and internal supervisors useful and feasible in the eyes of the internal supervisors (chapter 4)?
  - c. How do external supervisors obtain voluntary cooperation of internal supervisors (to alter organizational governance practices) (chapter 6)?
4. What can we learn from the experiences in a good governance context about a future relationship between external and internal supervisors?

I use De Kam's definition of the regulatory object and Gilad's distinction between the three regulatory layers to investigate in the final chapter how the NZa and the Inspectorate construct good governance as a new regulatory object, on which of the regulatory layers their approach focuses and with what regulatory instruments they want to do this. By studying good governance as a new regulatory object, the theory of responsive regulation helps to clarify how the relationship between external and internal supervisors is formed at the different layers of regulation.

## 1.4 METHOD

The leading question in this thesis lends itself to qualitative and explorative research, because it is about getting insights into the grain of the relationship between external and internal supervisors. Because little is known about this relationship – neither in practice nor in the literature – and because the aim of the research is to find out how external and internal supervisors can complement, reinforce or substitute each other

in their goal of supervising organizations, the exploration of building this relationship ‘from within’ is described through interviews and ethnographic research. Although many studies describe the regulatory relationship either from the regulator’s perspective – with research aimed at its regulatory style – or from the regulatee’s perspective – with research aimed at compliance motivations (Pautz et al., 2017; Li & Van Rooij, 2021), by definition a relationship is something to enter into *together*. Therefore, in this thesis I have chosen to study the relationship from both the external supervisors’ and the internal supervisors’ perspective by examining the experiences and opinions of both parties of the relationship.

The foundation of the research was laid by a literature study into the roles of external and internal supervisors in safeguarding public interests in health care in order to gain a better understanding of where their tasks and responsibilities meet in the dynamics of safeguarding public interests.

Subsequently, the relationship was broadly explored through interviews with external supervisors from various sectors and internal supervisors in the healthcare sector who had interacted with external supervision in various ways.

I then attempted to gain more in-depth knowledge about the relationship by conducting two additional studies. The first of these two studies involved an ethnographic study in which I was given the opportunity to participate in and observe the NZa Good Governance project. The second was an in-depth case study in which in three cases the interaction between external and internal was analysed after studying 1) the relationship style as evidenced by the behaviour of external and internal supervisors during their interaction and 2) the subjective relationship style as intended or perceived by external and internal supervisors.

A detailed description of the research design and methods can be found in each separate chapter.

## **1.5 OUTLINE**

This thesis contains five research studies. Each research study contributes to the research aim in a different way, making use of different research methods. Together the studies provide for an in-depth understanding of the construction of good governance as a new regulatory object and the construction of the related new relationship to be built between external and internal supervisors.

Since the aim of interaction between external and internal supervision is to contribute to the better safeguarding of public interests (Ministry of Economic Affairs, 2014; Ministry of Health, 2015; Ministry of Health, 2016), the first study, *'Public interests in healthcare. How to safeguard and determine them?'* (chapter 2), seeks answers to the following questions: Which public interests can be distinguished with regard to health care?; How are these public interests safeguarded within the Dutch healthcare system?; Who plays what role in safeguarding public interests?; What has the search for better safeguarding of interests yielded so far? I found that public interests cannot be defined precisely for they are case and time sensitive, and that internal supervisors cannot be expected to safeguard the public interests. To better secure public interests, government and health care providers could explore possibilities to cooperate. Opportunities of experimentalist governance are a promising starting point for such cooperation, to explore and pursue public interests together.

In the second study *'Involving internal supervisors into the practice of external supervision'* and third study *'Interaction between external supervisors and internal supervisors. Cooperation in case of incidents in healthcare provision'* (chapter 3 and 4) we studied the views of external and internal supervisors on a relationship between internal and external supervision and what they believe are opportunities and obstacles for interaction. In chapter 3, we report on the experiences of eight different external supervisors with interacting with internal supervisors. In chapter 4, we report on the views of internal supervisors of eight different health care providers on their experience with interaction with the NZa and the Inspectorate. From these studies, it emanated that all supervisors agreed that interaction could help share their vision of potential problems and coordinate who has which task and responsibility. Getting to know each other in good times could help solve problems when the pressure is on. When internal supervisors solve a problem, some external supervisors adjust their role accordingly. Despite these possibilities, there was still hardly any contact between both parties. External supervisors were concerned collaboration could lead to becoming too closely involved in seeking a solution with the supervisory board, running the risk of capture. The hesitancy of internal supervisors mainly emanated from their awareness that they must take care not to encroach on the role of the executives. Because of their shared discomfort, the relationship between external and internal supervisors was at best tentative, in practice, and more often than not absent. The research shows that internal supervisors are gradually gaining a place in the supervisory practice of external supervisors, but structural policy is still scarce.

In the fourth study, *'Exploring the start of collaboration between internal and external supervisors. Insights from a practitioner's perspective.'* (chapter 5) we report on the pro-

cess of the NZa to work from a vertical to a more horizontal, collaborative supervisory practice that involves interaction with internal supervisors. In this study, we analyse this transition from a practitioner's point of view, observing the NZa Good Governance project. Using insights from regulatory governance theory on collaboration, we analyse how the NZa differentiated and aggregated its activities to control its task to collaborate and to grow curiosity and hospitality to get to know internal supervisors.

The fifth study (chapter 6) builds on the ideas for future research that emerge from the research described in chapter 5. In this study, '*Ambiguous signaling in regulatory conversations. How miscommunication and hierarchy hamper voluntary regulatee cooperation*' we analyse governance conversations between external and internal supervisors in three cases where the good governance of a health care provider was disputed. We focused on the actual interactions between both supervisors during these conversations and how external supervisors in the healthcare sector tried to obtain voluntary cooperation from internal supervisors, to alter organizational governance practices. The conversations examined were characterized by ambiguity: there was a discrepancy between the goal that external supervisors wanted to achieve and the relational signals they sent during conversations, and a discrepancy between the views of the external supervisors and the internal supervisors about the type of relationship they were involved in. These discrepancies lead to irritation among the conversation partners; a good relationship has not yet been built up. We suggest inspectors adopt a more 'decentralized' understanding of their role in that context and involve internal supervisors in reflective dialogues about each other's position in their (supervisory) relationship.

In the final chapter, I synthesize all research findings in order to answer the main question guiding this thesis: *How can external and internal supervisors complement, reinforce or substitute each other in their goal of supervising organizations*. I will also reflect on the scientific contributions of this research and the possible avenues for future research. Finally, I will reflect on actionable insights resulting from the research which are conducive to effective supervisory practices of external supervisors and internal supervisors, who aspire to (jointly) build a relationship that is supported by both parties.







# 2

## **Public interests in healthcare** *How to safeguard and determine them?*

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## **ABSTRACT**

The government is actively looking for better safeguarding of public interests by semi-public organizations after several incidents in the semi-public sector. By zooming in on safeguarding public interests by healthcare providers, this chapter brings into focus the discussion of serving public interests. Building on the government's search for clear definitions and the division of responsibilities of public interests and strengthening the governance of semi-public organizations, and the work of earlier research, this chapter provides an impetus for exploring the pursuit of public interests by government and healthcare providers jointly.

## 2.1 INTRODUCTION

*‘Internal supervisors [of semi-public organizations] primarily serve the public interest and the service to the citizen, not the organizations’* is the position of the Ministerial Committee on Renewal Public Interests (Ministeriële Commissie Vernieuwing Publieke Belangen), which has been adopted by the Dutch government (Ministry of Economic Affairs, 2014). The Ministerial Committee on Renewal Public Interests was founded after a number of incidents with semi-public organizations, including Meavita, Amarantis and Vestia (Ministry of Health, 2015b). The statement of this Ministerial Committee plays a role in the government’s quest to find how semi-public organizations can better safeguard public interests. This quest brings us to a series of questions: What exactly are public interests? Who is responsible for which interest? What should (internal supervisors of) semi-public organizations do when different public interests collide?

The Ministerial Committee on Renewal Public Interests has been asked to answer the question of how semi-public organizations can better safeguard public interests. To this end, the Good Governance Committee (also known as the ‘Commissie Halsema’) has been set up. The Good Governance Committee indicated, among other things, that better safeguarding starts with a clear and precise definition of the ‘public interest’. A more precise and concrete description should be given of which tasks semi-public organizations should and should not take responsibility for (Halsema et al., 2013, p. 11). Now, three years later, various ministries, for different sectors, have tried to define what needs to be adjusted in (the supervision of) the various sectors in order to achieve better safeguarding of public interests.<sup>7</sup> The ministerial documents show that the government is still struggling with a clear definition of the public interests and its expectations of semi-public organizations. Earlier research also pays attention to ways in which public interests can be safeguarded. In the literature, forms of governance have been explored as an alternative to a market model or a model of regulation and enforcement, for example under the heading of ‘experimental governance’ (Fierlbeck, 2014).

This chapter aspires to contribute to the debate about serving the public interest by zooming in on safeguarding public interests by healthcare providers. The chapter deals with four questions to which an answer is sought by means of a literature study and two case studies. First, which public interests can be distinguished with regard to health care? Second, how are these public interests safeguarded within the Dutch health care

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7 For example, in the healthcare sector: Ministry of Health, 2015a, Ministry of Health, 2015b, Ministry of Health, 2016a; the education sector: Ministry of Education, 2015; and the housing sector: Housing Act 2015 (Woningwet 2015).

system? Third, who plays which role in safeguarding public interests? And finally, what has the search for a better safeguarding of interests yielded so far? The outcome of the study provides a basis for further research into the way in which healthcare providers – and possibly other semi-public organizations – can serve public interests.

In his article ‘Proxy-toezicht’ (supervision by proxy), in the journal *‘Tijdschrift voor Toezicht’*, Ko de Ridder discussed interaction between external and internal supervision (De Ridder, 2013). De Ridder defines the ‘supervision by proxy’ as the supervision whereby an internal body within an organization takes over the safeguarding of a public interest, in whole or in part, from an external supervisor (De Ridder, 2013, p. 23). In the light of the discussion described above about safeguarding public interests by semi-public organizations, this description of supervision by proxy raised the question of whether and how a healthcare provider can safeguard public interests. The study in this chapter, lays a foundation for research into this question of whether and how an internal supervisor within a healthcare organization can take over the safeguarding of a public interest, in whole or in part, from an external supervisor.

## 2.2 PUBLIC INTERESTS IN THE HEALTHCARE SECTOR

Public interests are interests that benefit society and transcend individual interests. Public interests are established by the government in a democratic process and are represented by the government that carries out this task itself or outsources it (WRR, 2000). The conception of which interests are public interests can shift over time. The more generally formulated, the more resistant to time a public interest will prove. What public interests does the government currently have in mind in the Dutch health care system? The primary goal of government policy is ‘health’. The motto of the Ministry of Health is ‘The Netherlands healthy and well’.<sup>8</sup> A secondary objective is ‘healthcare’, as one of the elements necessary to achieve the main goal: health. Health is also achieved through the environment, education, et cetera. In this chapter, we limit ourselves to healthcare.

The government considers it their responsibility to ensure that necessary good quality healthcare is accessible to all Dutch people, regardless of their age, health condition or income position. In short, the government pursues three interests in health care: quality, accessibility and affordability of health care (Ministry of Health, 2001; Ministry of Health, 2005).

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8 <https://www.rijksoverheid.nl/ministeries/vws#ref-minvws>. Accessed on 12 February 2016.

In the current system, the government is responsible for the health care system, which is established in four laws that together largely determine the distribution of resources and the relationship between patients/insured persons, care providers, health insurers and the government. These laws are the Healthcare Market Regulation Act, the Long-term Care Act (Wet langdurige zorg, Wlz), the Health Insurance Act and the Social Support Act (Wet maatschappelijke ondersteuning, Wmo). The entire healthcare system has been elaborated in numerous laws through which the government formulates frameworks and rules for healthcare and monitors compliance with them. The three public interests are briefly discussed below.

### *Quality*

Quality of care is about safety, customer focus and efficiency (Ministry of Health, 2006). The government has introduced a large number of laws to guarantee the quality of care. The Complaints and Disputes Act (Wet Kwaliteit, Klachten en Geschillen Zorg, WKKGZ) sets the general standard by prescribing that the care provider offers good care. Good care is understood to mean care of good quality and of a good standard: which is in any case safe, effective, efficient and client-oriented, is provided in a timely manner, and is tailored to the real needs of the client, whereby care providers act in accordance with their responsibility, arising from the professional standard and whereby the rights of the client are carefully looked after and the client is treated with respect.<sup>9</sup>

Healthcare providers are responsible for the quality of the care they provide. When there is a threat that the quality of care at a care provider is going to fall below the minimum standards, the Inspectorate intervenes. The Zorginstituut (National Health Care Institute) is responsible for jointly drawing up field standards for quality and measuring instruments and has the task of making understandable and reliable information about the quality of care accessible to everyone. With this information, health insurers and health consumers can choose where they want to buy or purchase their care.

### *Accessibility*

Financial accessibility of care is guaranteed with the Health Insurance Act. This law regulates, among other things, compulsory health insurance, an acceptance obligation for health insurers, the equalization system and the duty of care of health insurers, making it an important instrument for sharing risks and securing access to medical care for people who need care (Ministry of Health, 2004). Financial accessibility is also guaranteed because health care that is medically necessary is included in the package of the compulsory basic insurance and in the Long-term Care Act.

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9 Article 2 Complaints and Disputes Act.

Financial accessibility of healthcare is not sufficient to guarantee access to healthcare; care must also be physically accessible. Physical accessibility means that people have access to the right care within a reasonable travel distance and within a reasonable period of time (NZa, 2007). The Health Insurance Act, Long-term Care Act and the Social Support Act are laws that promote physical accessibility to care.

### *Affordability*

Affordability can be viewed at the micro level from the individual, or at the macro level, from the collective. Care is affordable for an individual if the health insurance premium and the personal payments can be paid for the basic care. Collective affordability concerns the relationship between the costs of health care and the available resources.

The government regulates the supply of healthcare and healthcare providers to curb spending so that quality healthcare is and remains affordable for everyone (Maarse, 2011). Every year, politicians decide how much of the collective resources they want to use for healthcare. The minister is responsible for monitoring the health care budgetary framework (Ministry of Health, 2005). Health insurers are responsible for agreements on the price of care with health care providers and for the lowest possible insurance premium (Maarse, 2011).

### *Tension between public interests*

Public interests can be inherently conflicting. Two examples from the practice of the NZa illustrate this field of tension.

#### Example 1: Declare correctly

Healthcare providers must declare healthcare in accordance with the rules of the NZa. If healthcare providers deviate from the rules, the NZa can impose a fine. In the cases in which the NZa impose a fine, healthcare providers almost always gain a financial advantage by deviating from the rules.<sup>10</sup> Enforcing rules prevents such behaviour and thus improves the affordability of care. Recent research by Kerpershoek into the causes of deviant declaration behaviour shows that in a number of cases financial gain was the result but not necessarily the objective of the medical professionals who overclaimed or declared incorrectly (Kerpershoek, 2015). The underlying objective was that the physician deemed more health care, or a better combination of care, necessary for the patient than he was allowed to declare according to the system. This tension was palpable in the

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10 See the decisions of the NZa in the cases Stichting Altrecht, Stichting Zorginstelling More, Stichting Antonius Ziekenhuis, BePerfect Clinics BV and Eurosmile BV (for extensive references, see the Reference list).

case of the fine by the NZa for the St. Antonius Hospital. The hospital itself gave several reasons for its incorrect declarations:<sup>11</sup>

*‘Our hospital fulfills a national expertise function in the field of care for Rendu-Osler-Weber patients. One of the symptoms of this disease is a nosebleed that is difficult to control. (...) At first no suitable DTC [diagnosis-treatment combination] was available that did justice to the effort for this specific patient group. This has been raised with DTC Maintenance [the organization that maintains the DTC system under the responsibility of the NZa]. DTC Maintenance has instructed the Beroeps Belangen Commissie van de Vereniging van KNO-artsen [the Professional Interests Committee of the Association of ENT doctors] to register the treatment referred to here as “diagnosis: tumor nose in combination with septal correction procedure”. By registering the treatment in this way, a DTC can be declared, which does justice to the efforts of the doctors. However, this diagnosis is not in accordance with reality and therefore factually incorrect.’*

The hospital had misinterpreted or misapplied rules, followed old rules while there were already new rules and – in line with Kerpershoek’s research (Kerpershoek, 2015) – it also misclaimed to obtain reimbursement for needed care that the system did not provide. Where incorrect declarations are made to obtain reimbursement for necessary care, while the system does not provide for a correct way to obtain reimbursement for that care, the rules for the *affordability* of care may conflict with the *quality* of care that a patient needs.

#### Example 2: Transgender care

The second example concerns the tension between affordability and accessibility of care. At the end of 2013, the VUmc announced a ‘patient stop’ for transgender care. The hospital and health insurers failed to reach an agreement on the budget (NZa, 2014). The VUmc is the only hospital in the Netherlands that offers this care integrally. The VUmc stated that more money was needed because more and more patients are registering for this form of care. Health insurers indicated that they had offered sufficient money for 2014.

In this case, the public interest in the accessibility of (transgender) care appears to be under pressure. The VUmc puts the importance of getting its costs reimbursed above the

11 <https://www.antoniusziekenhuis.nl/overstantonius/pers/declaraties/faq/extern-onderzoek>. Accessed on 30 October 2015.

interest of accessibility. Health insurers put the importance of affordability of care on a macro level above the importance of accessibility of transgender care.

In both examples, there is a contradiction between public interests. The interests are legitimate on both sides of the conflict, but which interest should prevail? The next section discusses the mechanisms that the government has at its disposal to steer the healthcare provider and safeguard public interests.

## **2.3 SAFEGUARDING PUBLIC INTERESTS THROUGH FOUR CONTROL MECHANISMS**

The public interests in health care formulated above are very general concepts. There are various ways in which the government can arrange that care is of good quality, accessible and affordable. The government can provide the care itself or it can outsource it to others. In the Netherlands, the government is responsible for (the design of) the system of the healthcare system, while healthcare is provided by private healthcare providers (Zuiderent-Jerak et al., 2010, p. 221). The government then has a number of mechanisms at its disposal to direct these private care providers in such a way that they, individually and all together, pursue the public interests in care determined by the government.

Various control mechanisms are distinguished in the literature to bring order to the way in which public interests can be safeguarded. Four control mechanisms are often referred to (WRR, 2000; Maarse, 2011):

### **1. Safeguarding by laws and regulations and hierarchy**

Viewed from the point of view of safeguarding by laws and rules and hierarchy, healthcare providers must comply with the restrictions and prohibitions imposed on them by the government through laws and regulations. Laws and regulations tell care providers under which conditions care may be provided and how they should behave. External supervisors such as the NZa, the Inspectorate and ACM monitor compliance with these rules.

### **2. Safeguarding through market forces**

Within the statutory conditions, it is up to the care provider itself to determine which care it wishes to provide and to whom. The healthcare provider cannot ignore the opinion of the healthcare insurer and healthcare consumer: the healthcare system is designed in such a way that dissatisfied customers are expected to switch to a competing healthcare

provider. This system of regulated market forces must ensure that healthcare providers respond flexibly to the demand of healthcare consumers, that they provide care efficiently and that they experience permanent pressure to be cost-conscious (Ministry of Health, 2001).

The line between what the government still wishes to regulate itself and what it leaves to the market has not yet been drawn and is regularly the subject of political debate. Acquired freedoms are nevertheless curtailed when politicians find that market forces have logical, but undesirable, outcomes (Ministry of Health, 2009, p. 4). For example, in response to the strong position of health insurers established by the law, a trend has been visible for a number of years of more and more mergers between health care providers. The market system provides the incentive for this trend, but politicians find it so undesirable that a law was passed in 2013 with an extra merger control for healthcare providers. And in 2014, the law that would strengthen the purchasing role of health insurers and enable profit for hospitals was rejected by the Senate. The extent to which healthcare is regulated and the extent to which it is left to market parties are regularly sliding panels.

### 3. Assurance through professional management

The control mechanism 'professional management' is decisive for the provision of responsible care at both the individual and macro level. The care professionals jointly determine the standards for responsible care and establish the guidelines that individual healthcare providers must comply with. The care providers then determine which care is justified for each patient.

### 4. Safeguarding through network control

Many healthcare providers work together with other healthcare providers, for example to offer integrated care, to guarantee the accessibility of healthcare at night or to manage patient flows towards primary care instead of secondary care. The government can also be an involved party in network control. If the government is not satisfied with the results of this market-oriented system, it will try, for example, to adjust the results through network management, through covenants with healthcare providers and/or health insurers.

Looking at the developments in science, in the field of safeguarding public interests through experimental governance, these developments are closest to the latter control mechanism. These alternatives, which are explored in the literature under the heading of 'experimental governance', have in common that they describe processes in which different stakeholders work together to achieve a common goal (Fierlbeck, 2014). Sabel



and Zeitlin articulate the situations in which these experimental forms of governance can be useful: *'In a world where 'principals' are uncertain of what precisely their goals should be and how best to achieve them, they must be prepared to learn from the problem-solving activities of their 'agents'. Hence 'principals' can no longer hold 'agents' reliably accountable by comparing their performance against predetermined rules, since the more successful the latter are in developing new solutions, the more the rules themselves will change.'* (Sabel & Zeitlin, 2012, p. 176-177).

Sabel and Zeitlin therefore argue that precisely because public interests are difficult to identify, private actors should be given the space to formulate them. When they subsequently account for the way in which they formulate public interests, these interests can be further formulated at central government level. In line with the aforementioned argument by Sabel and Zeitlin, Stam, Stellinga and de Vries have argued for the centralization of learning processes that interact in the public and private spheres (Stam et al., 2010). They argue that the market and government are intertwined and that public interests are neither market nor political, but must be discovered, and that therefore one should speak in terms of problems and learning processes rather than goals and means. The learning process envisioned by the authors consists of a working method in which it gradually becomes clear how governments, markets and other organizations are given shape and content and how the safeguarding of public interests can be achieved or hindered in that process. The last section of this chapter examines the development of experimental governance in the healthcare sector in the Netherlands in more detail.

Each of the aforementioned control mechanisms steers the healthcare provider in a certain direction because each serves the public interests in its own way. Public interests can run parallel – for example, when it comes to quality of care and the safety of care – but due to the various incentives from the four different control mechanisms, it will also regularly occur that the different public interests collide (RVZ, 2009). The two examples introduced in the previous section are illustrative. Let us see how those conflicts work out in these cases.

#### Example 1 – *continued*: Declare correctly

In this example, the rules for affordability are at odds with the quality of care. The macro-affordability is guaranteed by the legal obligation to declare correctly. The NZa, but also health insurers and the hospital's internal auditors and compliance officers give voice to the view that declarations must be made in accordance with the rules. Kerpershoek refers to these parties as the public and private system managers (Kerpershoek, 2015). The quality of care that the patient needs according to the doctor is guaranteed by the professional management of the doctor, who indicates that he or she deviates from the

rules in order to be reimbursed for the necessary care that is provided. Kerpershoek argues that for doctors, the deviating way of claiming can be instrumental in avoiding outcomes for patients that they see as undesirable because they are not in line with ideas, norms, values and standards of the medical profession. In those cases, enforcing the legal obligation to declare correctly can be at the expense of the care required for the patient. Not enforcing the law, on the other hand, affects the transparency and uniformity of the system and the macro-affordability of care (Kerpershoek, 2015, p. 231).

#### Example 2 – *continued*: Transgender care

There is no legal obligation on healthcare providers to provide transgender healthcare. On the other hand, health insurers have a legal obligation: they are obliged to purchase sufficient care that is admitted to the basic package, including transgender care, for their insured persons. This purchase comes about through market forces, i.e., the game between supply and demand. Here's the hitch: supply and demand do not match. The (almost) only provider, VUmc, is not prepared to provide the requested care at the price offered; the health insurers think the offer is high enough. The guarantee of accessibility of transgender care through the statutory duty of care is insufficient here because it is based on the idea that access is guaranteed through market forces, while the market is failing here. Supply and demand result in more limited access to transgender care than is considered socially desirable (*compare* Van 't Riet & Van der Wiel, 2012).

## 2.4 WHO SAFEGUARDS THE PUBLIC INTERESTS?

In the examples of correct declaration and transgender care, different parties stand up for different public interests and different control mechanisms are active to safeguard public interests. If care providers, health insurers and patients/insurers fulfill the role assigned to them by the government in the health care system, this will, in theory lead to a balanced system in which care is of good quality, accessible and affordable. If it is not possible to fulfill these roles, external supervisors must intervene. However, the Good Governance Committee has pointed out that in a number of incidents in recent years, the division of responsibility between employees, management, supervisor and inspectorate was shifted back and forth until it eventually threatened to disappear into a black hole (Halsema et al., 2013). The committee therefore states that in addition to a clear description and delineation of public interests and tasks, a clearer delineation of responsibilities is also necessary. The role of various parties with regard to public interests and control mechanisms was briefly discussed in the previous section, but who is responsible for what?

The Minister of Health is responsible for the health care system: the Minister therefore bears ‘system responsibility’ (RVS, 2016). The system primarily assigns the responsibility for the provision of care to the care providers. If the board of a healthcare provider fails, external supervision is the capstone of the healthcare system, according to the Minister (Ministry of Health, 2001, p. 33; Ministry of Health, 2016a). In regard to this division of roles, the Minister says the following: *‘The executive board and the internal supervisor must identify, prioritize and resolve risks themselves. The primacy here lies with the management. Executives must be encouraged by their internal and external stakeholders to organize care as optimally as possible and to remove bottlenecks by means of a systematic set of checks and balances. External supervision is the capstone in this chain; it springs into action if the internal supervisor, the employee representation and the external stakeholders are unable or unwilling to bring about change.’* (Ministry of Health, 2016a, p. 6).

Sector organizations of healthcare providers have drawn up the ‘Zorgbrede governance code’, a healthcare-wide governance code (Brancheorganisaties Zorg, 2010). The basic principle of this code is that a care provider is a social enterprise with its main objective being to provide responsible care. The Healthcare-wide governance code states that (Brancheorganisaties Zorg, 2010, p. 15):

*‘The social objective and responsibility of the healthcare organization is apparent from the application of (at least) the following principles:*

- a. the care organization puts the client and his justified wishes and needs at the centre of care provision;*
- b. the care is provided in such a way that the available resources are used as effectively and efficiently as possible;*
- c. the care provided by or from the care organization meets contemporary quality requirements;*
- d. payments of financial resources only take place within the social objective and responsibility of the care organization’.*

These principles are in line with the public interests as formulated by the Minister. The interests of quality and affordability can be found directly while accessibility is indirectly promoted by the principle that care is provided in such a way that the available resources are used as effectively and efficiently as possible. The healthcare-wide governance code holds the executive board and the internal supervisor responsible for achieving these goals: they are responsible for the governance structure of the healthcare provider as a social enterprise and for compliance with the healthcare-wide governance code. The management of a healthcare organization is responsible for achieving the objectives

of that organization, the strategy and policy and the resulting development of results and for the quality and safety of the healthcare. The board is accountable for this to the internal supervisor. According to the healthcare-wide governance code, the internal supervisor is responsible for supervising the executive board and the general course of affairs in the healthcare organization as a social enterprise. To this end, the internal supervisor must weigh up the relevant interests of the stakeholders involved in the care organization.

According to the minister, external supervision is exercised by the Inspectorate, the Youth Care Inspectorate and the NZa. Previously, the minister also referred to ACM as an external supervisor with a role in healthcare (Ministry of Health, 2009; Ministry of Health, 2016a; Ministry of Health, 2016b). The Inspectorate monitors and promotes the safety and quality of care by means of supervision, enforcement and investigation of criminal offences.<sup>12</sup> The Youth Care Inspectorate, in collaboration with the Inspectorate and the Security and Justice Inspectorate, monitors compliance with legal requirements for youth care providers and the obligations that apply to responsible youth care, youth protection and youth rehabilitation, and is also tasked with investigating the quality of this care.<sup>13</sup> According to its mission statement, the NZa also contributes to the quality of care, but the emphasis of the NZa supervision is on guaranteeing the accessibility and affordability of care. The NZa is charged with, among other things, market supervision, market development and tariff and performance regulation in the field of health care, the supervision of health insurers and health care providers.<sup>14</sup> ACM is not specifically charged with guaranteeing quality, accessibility and affordability of care, but is charged with tasks for the implementation of the Competition Act (*Mededingingswet, Mw*). The Competition Act regulates the rules and regulations with regard to competition agreements, dominant positions and mergers of companies. The Competition Act was established with the aim of improving the functioning of the goods and services markets in the Netherlands (Ministry of Economic Affairs, 1996).

More government organizations are charged with safeguarding public interests. For example, the Zorginstituut provides a basic package for health insurance in which quality, accessibility and affordability are in balance, it manages the health care funds, carries out risk equalization. The Quality Institute (*Kwaliteitsinstituut*), which is part of the Zorginstituut, stimulates improvement and transparency of the quality of care. However, the Zorginstituut is not charged with supervisory or inspection tasks as known

12 <https://www.igz.nl/organisatie>. Accessed on 12 February 2016.

13 <https://www.inspectiejeugd zorg.nl/inspectie/>. Accessed on 12 February 2016.

14 Article 16 Healthcare Market Regulation Act.

by the Inspectorate, NZa and ACM and for this reason has probably not been designated by the Minister as being part of the ‘capstone’ of the healthcare system.

Supervision in healthcare is fragmented over many parties. This can have the advantage that supervisors keep each other on their toes. If the mutual discussion is conducted openly and sharply, none of the public interests that the regulators look after will be easily overlooked. Fragmented supervision has the disadvantage that supervision becomes cluttered more quickly and that in the grey areas where powers overlap, no one may act because each expects that the other will do so. Fragmented supervision also presents an additional challenge in the search for better safeguarding of public interests. More supervisors means a more complex system; it means more aspects to take into account in the search for a clearer description of public interests, tasks and responsibilities. This search with regard to care is briefly described below.

## **2.5 THE QUEST FOR BETTER SAFEGUARDING OF PUBLIC INTERESTS**

### **2.5.1 The quest by the government**

The Good Governance Committee indicates that better safeguarding of public interests starts with a clear and precise definition of the public interest. A more precise and concrete description should be given of which tasks semi-public organizations should take responsibility for and which not (Halsema et al., 2013). The Netherlands Scientific Council for Government Policy (Wetenschappelijke Raad voor het Regeringsbeleid, WRR) recently established that there is as yet no clear description or division of responsibilities (WRR, 2015).

In various letters to the House of Representatives on governance in the healthcare sector, the Minister of Health has explained how she intends to shape the recommendations of the Ministerial Committee on Renewal Public Interests, based on the principle that internal supervisors should monitor the public interest rather than the organizational interest (Ministry of Health, 2015a; Ministry of Health, 2015b; Ministry of Health, 2016a). In these letters, the Minister identifies four points that need attention: tightening up the mutual responsibilities of directors and internal supervisors, strengthening external supervision and tackling mismanagement and mismanagement, optimizing checks and balances through employee participation and encouraging (the debate on) good governance (recently confirmed in Ministry of Health, 2016a, p. 2). The letters do not outline what public interests need to be served, but do indicate what the Minister expects of executives and internal supervisors of health care providers. The recommendations aim to strengthen the governance of healthcare providers, for example by developing

mandatory accreditation for internal supervisors and establishing a register for directors and supervisors. It is important that the government is clear on how it wants semi-public organizations to be managed, but these letters do not provide the clarity that the Good Governance Committee deems necessary. In the most recent letter regarding the policy framework of January 2016, the Minister does pay more attention to the various responsibilities of external supervisors and healthcare organizations. The Minister announces that the Inspectorate and the NZa will publish a joint supervisory framework for good governance, in which they will, among other things, elaborate on the differences in responsibilities between the (internal supervisors of) healthcare providers and the external supervision (Ministry of Health, 2016a).

Attention must not only be paid to clear definitions and the division of responsibilities, attention is also required for the multitude of interests that play a role in the semi-public sector. The Good Governance Committee calls it a *'cacophony of values'* and states: *'For example, the service must be of good quality, affordable and also delivered on time; at the same time, there is often a need to compete with other organizations and ensure the financial future of the organization. In short, administrators and professionals are faced with the task of balancing different interests, and there is no simple hierarchy within this.'* (Halsetma et al., 2013, p. 10). The consideration of which public interest should prevail in the event of a collision should be tailor-made. Standards for assessing whether (an internal supervisor of) a healthcare provider has allowed the right public interest to prevail to the right degree are difficult to capture in an assessment framework. A good example of balancing conflicting public interests is the merger between Walcheren Hospital and the Oosterschelde hospitals.<sup>15</sup> While the NZa feared that the merger would pose a risk to the affordability and accessibility of care, the Inspectorate considered the merger necessary for the quality and accessibility of the same care.<sup>16</sup> The Dutch Competition Authority (predecessor of the ACM), the external supervisor ultimately responsible for approving or disapproving the merger at the time, thought that the merger would restrict competition, but nevertheless gave the quality arguments of the Inspectorate the most weight and approved the merger under complex, strict conditions.<sup>17</sup> The weighing of interests appears to be complicated for the external supervisors and is therefore also complicated for healthcare executives and internal supervisors of healthcare providers who have to decide on a merger. A justification can be given for each outcome – whether to merge or not to merge – in which one public interest is safeguarded while another is placed at risk. Public interests are fluid: which interest can be qualified as a public interest, and which

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15 ACM, Ziekenhuis Walcheren – Oosterschelde ziekenhuizen.

16 NZa, Stichting Oosterschelde ziekenhuizen en de Stichting Ziekenhuis Walcheren.

17 ACM, Ziekenhuis Walcheren – Oosterschelde ziekenhuizen.

one should prevail depends on the context, on the action perspective. In order to give direction to a better identification and consideration of the public interests involved in healthcare mergers, the Minister has created a healthcare-specific merger test that does not define the content of the interests involved, but which offers a procedural vehicle to make the interests at stake transparent and open to discussion (Ministry of Health, 2012a).

Since 1 January 2014, the healthcare-specific merger test has stipulated that permission from the NZa is required for a healthcare merger.<sup>18</sup> In order to obtain permission for a healthcare merger from the NZa, healthcare providers must submit an impact assessment that includes the consequences of the merger for the public's interests. This report must be presented by healthcare providers to stakeholders, including clients and staff, and their opinion must be taken into account by the director in the final decision.<sup>19</sup> The NZa tests are solely procedural. It does not judge whether the merger is useful and does not substantively discuss the input of clients or staff. The aim of the merger test is therefore not to hold healthcare providers accountable for their weighing up of interests. By making the weighing of interests transparent, the healthcare-specific merger test encourages that healthcare providers, together with all those involved, to think carefully about the benefits and risks and its consequences for public interests in advance of a merger.<sup>20</sup> Stakeholders can provide administrative counterforce in case of insufficient attention to public interests affected by the merger (*compare* Halsema et al., 2013). In this way, the government does not provide a framework for assessment, but does provide legal guidance to healthcare providers in the form of procedural regulations for balancing interests in the event of a merger, and an external supervisor ensures that these regulations are followed.

In short, with the four focal points for governance in healthcare, the Minister is focusing on attention to the professionalism of management and supervision of healthcare providers. The quest for better safeguarding of public interests through clear definitions and a clear division of responsibility is still in full swing and which public interest should

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18 If healthcare providers meet the notification thresholds of article 49a of the Healthcare Market Regulation Act. Mergers that meet the notification thresholds of the Competition Act are also subject to merger control of the ACM. The minister has announced that healthcare-specific merger control will be transferred from the NZa to ACM (Ministry of Health, 2015d).

19 Articles 49b and 49c Healthcare Market Regulation Act. This test is in line with the rights that staff and clients already have on the basis of the Works Councils Act (*Wet op de ondernemingsraden*) and the Clients in Healthcare Institutions Participation Act (*Wet medezeggenschap cliënten zorginstellingen*). In addition, the NZa assesses whether a merger does not jeopardize the provision of 'crucial' care.

20 <https://www.nza.nl/zorgonderwerpen/dossiers/fusies/>. Accessed on 8 March 2016.

be given priority in the event of conflicting interests will remain open to discussion. The healthcare-specific merger test is an example that shows that the government can steer this discussion through procedural regulations. This steering can ensure that stakeholders, each focused on their own role, have a voice in the balancing of interests. It also enables the board and supervisors to take cognizance of and discuss the relevant aspects of a balancing of interests (WRR, 2015). In this way, the board can do justice to its task to achieve the objectives of the healthcare organization and the internal supervisor can take responsibility for supervising the board and the general course of affairs in the healthcare organization as a social enterprise. The internal supervisor can take into account all interests of the stakeholders involved in the health care organization. Because the interests involved will differ in every merger, such a procedural vehicle may provide more guidance for the parties involved in the merger than a substantive determination of the public interest.

### 2.5.2 A scientific quest

In the literature, a tendency is visible from the formation of theories about ‘experimentalist governance’ as discussed above, towards concrete ideas about the application of ‘experimentalist governance’ in healthcare practices.

In a case study into market instruments for hospital care and for long-term care, Zuiderent-Jerak et al. build on the ideas of an experimenting government (Zuiderent-Jerak et al., 2010). They note that due to the variability of the interpretation of ‘public interests’ and of the functioning of the market, the mechanisms by which the government wishes to safeguard public interests in healthcare practice often turn out very differently than intended. Health care organizations will give their own interpretation to the rules and tasks, which means that the government will have to take an active stance if it is to safeguard the public interests it has in mind. The researchers advocate a government that, together with the healthcare sector, is looking for – and experimenting with – a good composition of public interests. They state, ‘*An experimenting state does not see market instruments as the operationalization of policy goals, but as an experimental set of instruments whose aim is to arrive at a good composition of public interests*’. To illustrate this, they refer to the public interest of ‘quality’. The research shows that this interest in healthcare procurement is primarily fulfilled in a financial way. This could be a reason for the government to conduct research into non-price competition, for example, in the A-segment<sup>21</sup> of hospital care. By experimenting with the composition of public interests, the government can not only direct but also assist healthcare providers. Healthcare pro-

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21 Fixed prices apply in the A segment of hospital care, in contrast to the B segment, where prices are free.



viders and the government then work together to pursue public interests and constitute them jointly.

With their research into the applicability of system based regulation by the Inspectorate, Stoopendaal et al. go further than a theoretical exploration of experimental governance (Stoopendaal et al., 2014). The authors describe an experiment conducted in 2012 and 2013 at the Inspectorate. The aim of the experiment was to study whether system based regulation is a useful instrument to supervise developments in the governance of healthcare providers. When applying system-oriented regulations, the Inspectorate has reassessed the division of tasks and responsibility of the Inspectorate and of healthcare providers in safeguarding the public interests of quality and safety of healthcare. The experiment described concerns a series of activities, from developing a concept method for system based regulation to conducting pilot inspections and joint evaluation (and adjusting) of the concept method. During all phases of the research, experts in the field of system based regulation in other sectors, such as experts from the Inspectorate and executives of healthcare organizations, contributed ideas in order to be able to adjust the experiment where necessary. The authors stated, *'Healthcare organizations provided meaningful feedback on intermediate products and concepts. Observational research has fostered reflection during the process and led to stronger conceptualization. For example, experimental governance means "institutional learning" takes place in a fruitful collaboration among both inspectees and inspectors. (...) Instead of large-scale changes in monitoring methods, this experimental approach makes it possible to improve incrementally and thus avoid the undesired effects of a large-scale and suddenly implemented change.'* (Stoopendaal et al., 2014, p. 46). While such an experimental approach can work well for an exploration of new supervision methods to safeguard quality and safety, this approach could also inspire a joint exploration of ways in which external supervision and healthcare providers can safeguard other public interests.

In the aforementioned examples from the NZa supervisory practice, cooperation between external supervisor and healthcare provider can also be a way to better safeguard public interests. We elaborate on that below.

#### Example 1 – *continued*: Declare correctly

The example of correct declaration shows that the provision of responsible care is sometimes a reason for incorrect declaration. Mere enforcement action will not suffice to address the underlying problem. Kerpershoek recommends mapping out the conflicts in those cases and, after discussion, agreeing on how to make declarations in the future (Kerpershoek, 2015). In the light of experimental governance, the NZa and healthcare providers could discuss rules that, in the eyes of the medical specialist, provide the care

required for patients. The merger between the NZa and DTC Maintenance in 2015 offers interesting opportunities in this regard. The example already showed that declarations made by the St. Antonius Hospital in accordance with the agreements with DTC Maintenance were later fined by the NZa. Now that the NZa and DTC Maintenance are one organization, the knowledge from DTC Maintenance about conspicuous declarations can possibly be used by the NZa to enter into a dialogue with healthcare providers and a suitable, legally sustainable solution can be sought together. The advantage of collaboration is that healthcare providers and the NZa can pool the knowledge to identify where there is light between responsible care and the options for declaration, so that the NZa can adjust regulation where necessary. The disadvantage is that collaboration can lead to the NZa feeling too attached to the care provider and letting go of the critical attitude that comes with an independent supervisor. If the relationship between the care provider and the NZa is too warm, this may create a barrier for the NZa to take further sanctions if necessary (compare Pollmann & Raaijmakers, 2009). In collaboration, everyone's role should therefore be clear at all times. The parties can jointly investigate which rules are best suited to the desired care, although the NZa draws up the rules and enforces them when necessary.

#### Example 2 – *continued*: Transgender care

In the example of transgender care, the NZa prefers joint safeguarding of public interests over enforcement action. The NZa reports: *'During our study, the health insurers and VUmc reached mutual agreement about the financial compensation for transgender care. As a result, the patient freeze has been lifted and new patients have access to this care again. The problem has been resolved for now (and expected for a long time to come). At the moment, the NZa will not take any formal measures towards VUmc and health insurers. We do expect VUmc and the health insurers to make sufficient efforts to prevent a similar situation in the future. We also expect parties to take steps to make transgender care more accessible to (new) patients. Among other things, by creating more distribution of this care.'* (NZa, 2014, p. 42-43).

Not only the VUmc is expected to contribute to accessibility, the NZa also seems to expect care providers not involved in this case to contribute to the accessibility of transgender care with its call for the creation of more distribution of transgender care. However, the regulator has no authority to persuade other healthcare providers to come up with a solution. With the call for more distribution, the NZa is calling for cooperation to better safeguard the accessibility of transgender care. The NZa will monitor the developments.

## 2.6 CONCLUSION

The aim of this chapter is to contribute to the discussion about serving the public interest by zooming in on safeguarding public interests by healthcare providers. The public interests that the government takes on in health care concern the quality, accessibility and affordability of care. As we have shown, the practical elaboration of these interests not only shows that they often clash, but that it is also not possible to determine unambiguously who is responsible for which interest or which control mechanism can be used. An unambiguous interpretation of the public interest—as argued by the Good Governance Committee and the Ministerial Committee on Renewal Public Interests—does not appear to be easy to achieve.

In the meantime, the healthcare-specific merger test, the examples of correct declaration and transgender care and the experiment with setting up system based regulation by the Inspectorate testify that the government can certainly give further substance to public interests in concrete cases and provide guidance when interests conflict. In the examples mentioned, better safeguarding was constructed through collaboration: cooperation between external supervisor and regulatees or cooperation between executive board, internal supervisor and other stakeholders. The board, internal supervisors, stakeholders and external supervisors can share their knowledge, while retaining their own role. They should also be enabled to do so by the government. Better equipping the parties to fulfill their role is exactly what the Minister intends to do with her points of attention in the letters about governance in healthcare (Ministry of Health, 2015a; Ministry of Health, 2015b; Ministry of Health, 2016a). A next step in safeguarding public interests could consist of exploring more cooperation between government and healthcare providers to jointly explore and pursue the public interest. The forms of experimental governance mentioned in the literature offer a promising starting point for such cooperation.

The road along cooperation is interesting for several reasons. It meets the government's wish that healthcare providers serve the public interest. It does not place healthcare providers in the impossible position to make a trade-off for which it is not clear which interests should be taken into account nor how much weight interests should have. In addition, it combines the power of the market with the power of government to articulate public interests, with the result that public interests are better served through cooperation. The findings also present us with an interesting scientific challenge and offer a perspective for further (empirical) research into the joint implementation of public interests, into the division of tasks and roles in this constellation, and into the question

whether conceptual tools can support the collaborative process, not only in healthcare, but also in other semi-public sectors.





# 3

## **External supervisors' practices regarding interaction with internal supervisors**

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**ABSTRACT**

Dutch politicians and scientists agree that external supervision and internal supervision could improve if they complement and reinforce each other. Yet, internal and external supervisors rarely speak to each other. This chapter maps how external supervisors include internal supervisors in their supervision practices. Research shows that interaction between the two supervisors is slowly emerging, but a well thought-out policy outlining cooperation is still lacking. Insights from the literature on the interaction between internal and external supervisors and the practice of external supervisors make it possible to better substantiate the choices made in shaping the relationship between internal and external supervision.

### 3.1 INTRODUCTION

In the past few years, external supervisors have taken an interest in the good governance of regulatees (WRR, 2015). External supervisors, particularly in the housing, health care and education sectors, are instructed by politicians to focus on promoting good governance and internal supervision. And rules are being drawn up to enable external and internal supervision to complement and reinforce each other. External supervisors can show restraint with their own supervision if the internal supervision by the supervisory boards of regulatees functions well.<sup>22</sup> External supervisors have been looking for ways to implement this political instruction. In 2013, due to the need to exchange ideas, the topic 'Inventory of the ways in which internal supervisors [and external] supervisors can reinforce each other' was put on the agenda of the Market Regulators Council.<sup>23</sup> Information on the subject turned out to be scarce: the scientific literature offered few ideas and empirical experience descriptions were almost completely lacking. It was not easy to give shape to a relationship between external and internal supervisors. In 2017, four years later, few supervisors had a clear-cut policy regarding interaction with internal supervisors and were still searching for ways to construct a relationship. This chapter contains a reconstruction of this search and the experiences of regulators.

This chapter aims to contribute to knowledge about the relationship between external and internal supervision from the perspective of external supervisory practices. In doing so, it seeks to bridge the gap between theory and practice on this subject. To answer the question of which points of view, with regard to the relationship between external and internal supervision, are propagated in the scientific literature and in policy documents, we conducted a literature study and a document analysis. Our analysis shows a shared expectation from scientists and politicians that external and internal supervision can reinforce and complement each other, but it also shows that little is known about this relationship in practice. The question of how the relationship between internal and external supervision is shaped in practice has been constructed by analysing policy documents containing the viewpoints of external supervisors on the relationship with

22 For example, the education sector: Ministry of Education, 2011, par. 4.2 and Ministry of Education, 2016. Social housing sector: Ministry of the Interior and Kingdom Relations, 2011 and Ministry of the Interior and Kingdom Relations, 2015. Health care sector: Ministry of Health, 2012b and Ministry of Health, 2016a.

23 The members of the Market Regulators Council (Markttoezichthoudersberaad) are: ACM, The Dutch Authority for the Financial Markets (AFM), The Dutch Data Protection Authority, De Nederlandsche Bank (DNB), The Netherlands Gambling Authority (Kansspelautoriteit) and the NZa. The agenda of the 2013 meeting is made public at several members' websites, for instance: <https://www.acm.nl/nl/publicaties/publicatie/11362/Agenda-Markttoezichthoudersberaad-2013/>. Accessed on 20 June 2017.



internal supervision and by interviewing external supervisors and asking them about their experiences with including internal supervisors.<sup>24</sup>

This chapter contributes to the further development of theories about a relationship between external and internal supervision by bringing together scientific knowledge, political expectations and practical experiences. The insights provided by this research might enable better substantiated choices regarding the shaping of a relationship between internal and external supervision.

### 3.2 THEORETICAL NOTES

The relationship between external and internal supervision is not a much-discussed topic in scientific literature. When it is discussed, it is often concluded that more research is needed. And when the relationship between external and internal supervision is discussed, it is not always made explicit which responsibility and supervisory tasks are assigned to which supervisor. To be able to make a clear contribution to the debate, this chapter therefore distinguishes three variants of how the relationship between external and internal supervision can be shaped, from the perspective of the external supervisor. When discussing the literature, policy documents and practical experiences in this chapter, we indicate where the relationship between external and internal supervisors can be placed within the framework of these three variants.

We call the first variant that can shape the relationship between external and internal supervision the substitution model: internal supervision replaces external supervision. The latter withdraws completely and is no longer responsible for the tasks and responsibilities transferred. In this variant, internal supervision is not part of external supervision, but that does not mean contact between the two supervisors is superfluous. They can seek coordination in those areas where tasks and interests coincide. From a government perspective, this does not only concern the question whether the internal or external supervisor is responsible, but also whether overall supervision suffices (Legemaate et al., 2013). In the second variant, internal supervision complements external supervision. The external supervisor remains fully responsible, but where possible makes use of work performed by an internal supervisor in its own supervision so that supervisory tasks are not duplicated. In the third variant, internal and external supervision can reinforce each

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24 The following external supervisors were interviewed: AFM, the Tax Authority, DNB, the Inspectorate, the Human Environment and Transport Inspectorate (ILT), the Dutch Food and Consumer Product Safety Authority (NVWA), NZa and the Education Inspectorate.

other, for example by sharing information that can aid them in their own supervisory task(s) or by reflecting on each other's supervision. Everyone is still responsible for their own duties and performs their own tasks – even if that means that supervision tasks are carried out twice.

**Table 3.1:** Relationship between external and internal supervision

<b>Relationship between external and internal supervision</b>	<b>Internal supervisors take over the responsibilities of external supervisors</b>	<b>Internal supervisors take over the performance of supervisory tasks from external supervision</b>	<b>Internal and external supervisors exchange information and reflect on each other's work</b>
<b>Variant 1</b> Internal supervisor replaces external supervisor (Substitution model)	Yes	Yes	No
<b>Variant 2</b> Internal supervisor complements external supervisor	No	Yes	Yes
<b>Variant 3</b> Internal and external supervisors reinforce each other	No	No	Yes

In the literature, De Ridder, in particular, addresses the question to what extent a fruitful interaction is possible between external and internal supervision (De Ridder, 2013). He has investigated the conditions under which internal supervisors could internalize a public interest, a supervisory task or a specific interest within an organization that is subject to supervision by an external supervisor as well. Internalising means that the governance of an organization is designed in such a way that the relevant tasks or interests are systematically considered in the decision-making process within the organization (De Ridder, 2013). More specifically, that an internal supervisor is charged in particular with looking after the interests of the external supervisor. If (part of) the supervisory tasks are internalized, shifting from an external supervisor to an internal supervisor, then De Ridder calls this 'supervision by proxy'. The assumption here is that the external supervisor can show restraint with its own supervision (at least to a certain extent) because the relevant interest is safeguarded by the regulatee. The substitution model, as distinguished in Table 3.1, shows the situation in which an external supervisor actually withdraws and internal supervision replaces external supervision. If the external supervisor only withdraws 'to a certain extent', then De Ridder regards this as the second variant, as distinguished in Table 3.1, the variant in which internal supervision complements external supervision.

This definition of supervision by proxy shows similarities with the definition of system based regulation. System based regulation stipulates that an external supervisor makes use of the business processes or quality and safety systems of regulatees (De Bree, 2010). In the first instance, executives and internal supervisors themselves are responsible for the output of their organization, whereby they ensure compliant behaviour, appropriate procedures and an appropriate culture. With system based regulation, the assumption is that if regulatees live up to this responsibility, the external supervision of compliance can be limited to supervision of (the functioning of) the system set up by the regulatee (Stoopendaal et al., 2014). The external supervisor then assesses whether processes, strategies and procedures aimed at safeguarding social interests are present and functioning properly (De Bree, 2010, p. 51). With proxy supervision, the external supervisor would not focus on the system, but on the extent to which the internal supervisor is able to safeguard certain interests.

Several authors identify possibilities where the interaction between external and internal supervision can lead to a complementary or reinforcing relationship, with both supervisors working from their own objectives, position and expertise (Minderman, 2012; Goodijk, 2012; Ottow, 2009). The way in which this could be done is most elaborated by the WRR (WRR, 2015). The WRR notes that internal and external supervisors can help each other by reflecting on each other's work and learning from each other. Supervisors could exchange knowledge to identify bottlenecks in supervisory practices, share good and bad examples and benchmark data. They could also exchange experiences on how to effectively exert and organize counterforce within the governance of organizations, work on social accountability and they could monitor supervision in situations in which there is an abuse (WRR, 2015). While in practice, the external supervisor often bypasses internal supervision in the event of an imminent or actual violation (Goodijk, 2012), the WRR concludes that in such cases contact between internal and external supervision might be appropriate (WRR, 2015). In addition, external and internal supervisors could jointly try to prevent incidents by working together to develop standards, reflection and learning processes at the sector level.

These examples from the WRR mainly concern ways in which internal and external supervision could possibly reinforce each other, as we have distinguished in the third variant in Table 3.1, in line with the WRR's view that internal and external supervisors are not 'communicating vessels' because they play different roles and have separate responsibilities (WRR, 2015). It is therefore clear that the WRR is not in favor of a substitution model – variant 1, in Table 3.1 – whereby internal supervision replaces external supervision. The use of the words 'communicating vessels' suggests that the WRR is neither of the opinion that internal and external supervision could not complement

each other, as described in the second variant of Table 3.1. However, because the WRR motivates this suggestion by pointing out the separate responsibilities, and the second variant in Table 3.1 also assumes separate responsibilities, the WRR may not exclude such a relationship.

### *Preconditions*

External and internal supervision can only complement or reinforce each other if everyone's duties are clearly defined (Goodijk, 2012). However, it has been observed several times that the division of tasks between internal and external supervision is not clear nor to what extent these tasks are complementary (Goodijk, 2012; Halsema et al., 2013). In addition, should the internal supervisor take over safeguarding public interests in the sense of supervision by proxy, the internal supervisor must also be publicly accountable for the way in which it represents the public interest and its work must be supported by a strong external supervisor (De Ridder, 2013).

De Ridder expects supervision by proxy to be difficult to achieve because the core function of an organization is central to its governance, while supervision by proxy assumes that a specific interest takes precedence over other interests. In addition, supervision by proxy will be difficult to achieve because, as we have previously shown, public interests cannot be easily and unambiguously defined. Public interests are context dependent and may vary over time and according to circumstances. We therefore do not expect an internal supervisor to take over responsibility for safeguarding a public interest. However, we do expect that both internal and external supervisors could have a meaningful dialogue about which supervisor guarantees which public interest (see also chapter 2 of this thesis).

Other preconditions mentioned in the literature are, first, the requirement for tailor-made solutions. When an external supervisor invites an internal supervisor to collaborate, the invitation must be appropriate to the circumstances in the market concerned, the nature of the risks and the characteristics of the regulatee (Ottow, 2009). Second, the choice to involve internal supervision must be substantiated with sufficient legal safeguards. The external supervisor must legitimize its choice for this supervisory style and maintain its independence (Ottow, 2009; see also chapter 4 of this thesis). Finally, the external supervisor must be aware of the relationship between the executives and the internal supervisor. This relationship may come under pressure from contacts between internal and external supervision. When interacting with external supervisors, internal supervisors might fear that they are jeopardizing their relationship of trust with the executives and professionals of their organization (WRR, 2015; see also chapter 4 of this thesis).

### 3.3 METHODS

We used two methods to study the relationship between internal and external supervisors in practice: document analyses and interviews.

Based on two document analyses, the vision of the Dutch government on the relationship between internal and external supervisors has been mapped. The first analysis concerns documents from ministries and overarching government bodies such as the Court of Audit (Algemene Rekenkamer), the Council for Health and Society (Raad voor Volksgezondheid en Samenleving (RVS)) and the Council of State (Raad van State). These documents outline the policy context. For information from the ministries, all parliamentary documents and parliamentary questions with answers from the Senate, Lower House, and United Assembly were collected in which the following words occurred: 'intern toezicht' (internal supervision), including, for example, the words 'interne toezicht' or 'interne toezichthouder' (internal supervision or internal supervisor). The search area was limited to documents from within the period from 1 January 2010 to 12 June 2017. This search yielded 846 published documents. Subsequently, all documents were reviewed and we filtered out those documents in which statements were made about a relationship between internal and external supervision and / or the safeguarding of public interests by internal supervisors. This search yielded 49 relevant documents. Documents from government bodies such as the Court of Audit have been collected by consulting their website. For documents from government bodies, the search area was not limited to documents from a defined period.

The second analysis concerns the policy documents of the external supervisors that were included in our research. These documents were also collected by consulting their websites, where we searched for documents describing the views of external supervisors on (the involvement of) internal supervisors in the supervisory practice of the external supervisor. The websites were searched by following logical paths<sup>25</sup> and by using the search function. When using the search function, the words *intern toezicht*, *raad (raden) van toezicht*, *raad (raden) van commissarissen*, and *goed bestuur* (internal supervision, supervisory board(s), supervisory board(s), and good governance) were searched for

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25 An example of a logical path is: [https://www.ilent.nl/onderwerpen/autoriteitwoningcorporaties/financieel\\_toezicht/governance\\_toezicht/](https://www.ilent.nl/onderwerpen/autoriteitwoningcorporaties/financieel_toezicht/governance_toezicht/). A tab to 'toezicht' has been placed on the ILT website under 'autoriteit woningcorporaties'. Under 'toezicht' there is a short explanation that refers to information about supervision of the quality of management and internal supervision, with a link to 'governancetoezicht' and to the Contours Memorandum under the link 'Aw: governance centraal in toezicht op woningcorporaties'.

and the relevant links were clicked through the snowball method. No limit has been set for the period studied.

In addition, semi-structured interviews were held with a total of ten employees from eight external supervisory agencies. These employees are supervisors of the Dutch Authority for the Financial Markets (Stichting Autoriteit Financiële Markten, AFM), the Tax Authority (Belastingdienst), De Nederlandsche Bank (DNB), the Inspectorate, the Housing Associations Authority (Autoriteit woningcorporaties, Aw) residing under the Human Environment and Transport Inspectorate (Inspectie Leefomgeving en Transport, ILT, together also ILT/Aw), the Dutch Food and Consumer Product Safety Authority (Nederlandse Voedsel- en Warenautoriteit, NVWA), the NZa and the Education Inspectorate (Onderwijsinspectie). These eight agencies were selected as follows. Firstly, we identified all Dutch, nationally active public supervisors that supervise private organizations on the basis of statutory powers of supervision and enforcement. From this list, a targeted sample was selected for interviewing, namely the external supervisory agencies that are active in a sector that was the subject of a political debate regarding the relationship between internal and external supervisors (the supervisors in the residential, health-care, education and financial markets sectors). Two employees of external supervisory agencies were also interviewed, with virtually no political discussion going on about the relationship between internal and external supervision (the Tax Authority and the Dutch Food and Consumer Product Safety Authority). In our request to hold the interview, we asked to be allowed to interview the employee(s) who is/are most aware of any relationships between the external supervisor and internal supervisors (hereafter: the expert).

It was included in the request for the interview that the names of respondents or the name of their organization would not be made public, unless respondents indicated that this was not a problem and mentioning names would have added value to the research. After drafting the chapter, the authors felt that naming the organizations would clarify the text. That is why we did a member check (Mortelmans, 2013). Respondents were asked to respond to both the interview reports and the draft text of this chapter, requesting that their organizations would be named in the suggested manner. With the exception of one respondent, respondents gave their permission. Three of them have requested that one or a few words in quotations be amended. Because this did not change the message of the relevant text, the authors made the proposed changes. The quote from the respondent who did not give permission has been removed from the text.

### 3.4 POLITICS AND POLICY: A DOCUMENT ANALYSIS

For the analysis of public sector documents of the central government, and for the analysis of documents of the external supervisors, an inventory was made of documents containing statements on the relation between external and internal supervision.

#### 3.4.1 Analysis of public sector documents

It would be impossible to elaborate on all the documents found. To present a summarized overview of the positions of various authorities within the central government in this area, we will discuss the documents that most explicitly deal with the relationship between external and internal supervision. The documents studied show that ministers and parliament focus in their debate on the relation between external and internal supervision in the education, care and housing sectors. Sometimes, they also discuss how internal supervision can be strengthened in other sectors – for example, by legally granting more approval rights to internal supervisors in the financial sector (Ministry of Social Affairs and Employment, 2012) – but this debate was almost never about a relationship between external and internal supervisors.

As early as 2008, the Court of Audit noted that various ministers expected ‘exchange’ between internal and external supervision (Algemene Rekenkamer, 2008). In the education, care and housing sectors, ministers expected that external supervisors can make use of the work of internal supervisors: If the external supervisor would observe that internal supervision is well organized, this could lead to a reduction in external supervision. The Court of Audit agrees with the view of the ministers, on the condition that the opinion of the internal supervisor is independent, based on reliable information and transparent assessment criteria and that the executive board is assessed by the internal supervisor on elements relevant to the minister (Algemene Rekenkamer, 2008).

In 2014, the Ministerial Committee for the Renewal of Public Interests discussed the cooperation between internal and external supervision (Ministry of Economic Affairs, 2014). This committee, established as a result of various incidents in the semi-public sector, noted that many of these incidents could have been prevented if, among other things, the governance of public interests had been improved and the division of responsibilities between the government and semi-public organizations had been sharper (Ministry of Economic Affairs, 2014). ‘Strengthening governance and supervision’ is one of the focal points of the committee to improve the functioning of the semi-public sector. The committee makes this concrete by, among other things, recommending that external supervisors involve the internal supervisor in their supervision activities in order to gain sufficient insight into what is happening within supervised organizations.

According to the committee, supervision would become more effective by strengthening the interaction between internal and external supervisors by establishing a duty for external supervisors to provide internal supervisors with the same information as the executive(s) and a duty for internal supervisors to report irregularities to external supervisors (Ministry of Economic Affairs, 2014).

To make external supervision more effective and efficient, such a reporting obligation for internal supervisors has been introduced for the housing sector.<sup>26</sup> The internal supervisor must report (imminent) problems<sup>27</sup> that cannot be solved within the corporation itself and that have not yet been reported by the executive(s) to the Housing Corporation Authority. In the education sector, the proposal to introduce such an obligation to report led, incidentally, to a discussion and the obligation has been removed by an amendment from the draft law.<sup>28</sup>

The positions of the Ministerial Committee on Public Interest Renewal have also been elaborated in other sectors. In 2016, for example, the Minister of Health stated on the relationship between external and internal supervision, that the executives of supervised organizations are the first point of contact for the external supervisor, but that there may be risky situations in which the external supervisor contacts the internal supervisor, for example to make sure that the warning signals that the external supervision has sent to the executives have also been passed on to the internal supervisors. The Minister also states that external supervisors expect internal supervisors to report problems to them that are not resolved within the organization itself, but does not oblige internal supervisors to do so (Ministry of Health, 2016a, p. 6).

### 3.4.2 Analysis of policy documents from external supervisors

For the analysis of policy documents from the external supervisors that were interviewed – AFM, the Tax Authority, DNB, the Inspectorate, ILT/Aw, NVWA, NZa and the Education Inspectorate – we searched for published policy documents in which they documented their views on a possible working relationship with internal supervision. If they have formulated a policy, these policy documents were analysed to determine which type of relationship they prescribe or pursue in their policy.

26 Article 29 Decree Permitted Institutions Public Housing (Besluit Toegelaten Instellingen Volkshuisvesting).

27 (Imminent) problems can consist of situations in which the housing association (potentially) seriously harms the interests of public housing or in the event of an irreconcilable dispute with the management board about financial problems or the legitimacy of actions.

28 Tweede Kamer, *Handelingen* 2015/16, vergaderingnummer 52, item 10, Stemmingen Versterking bestuurskracht onderwijsinstellingen (34251), 9 februari 2016.



Of the external supervisors studied, the Tax Authority, the Inspectorate, the NZa, ILT/ Aw and the Education Inspectorate have published (a) policy document(s) in which they elaborate on their relationship with internal supervision. The NVWA, AFM and DNB have not published any policy documents regarding the subject.<sup>29</sup>

The Housing Associations Authority (Aw), part of the ILT, is the only external supervisor that pursues a policy that is based on the principle that internal supervision can supplement supervision by the Aw and that is aimed at strengthening each other's supervision. The Aw supervises, among other things, the quality of executives and the internal supervision of housing corporations and carries out 'audits' to control the risks in governance at housing corporations.<sup>30</sup> In the 'Contouren van het toezicht door de Autoriteit woningcorporaties' (Outlines of supervision by the Housing Corporation Authority) the Aw states that it will enter into discussions with internal supervision in order to get a picture of the functioning of the board and the internal supervisor (Autoriteit woningcorporaties, 2016, p. 32). In this way, internal supervision can strengthen the information position of the Aw. The Aw also states that it will inform the internal supervisor if it is aware of information that is relevant to the work of the board and if it intends to take (supervision) measures.<sup>31</sup> In such manner, the Aw can strengthen the information position of the internal supervisor. The Aw states in the Outlines of the supervision that if it can rely more on the quality of governance by assessing the work of the internal supervisor, it can reduce the supervisory load (Autoriteit woningcorporaties, 2016, p. 32).

The Tax Authority and the Education Inspectorate both pursue a policy based on the assumption that internal supervision can supplement and reinforce their own supervision. The Tax Authority uses the supervision guideline that it makes use (as much as possible) of the work that the internal supervisor has already done.<sup>32</sup> The Education Inspectorate uses the 'Supervision Framework for Higher Education September 2014' in which it states that if the internal supervisor acts actively in the event of a serious incident and shows to be 'in control', the Education Inspectorate will be reluctant with their own supervision (Onderwijsinspectie, 2014, p. 15). In addition, both supervisors

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29 The AFM and DNB do state what they expect from policymakers, including internal supervisors, in terms of knowledge, skills and professional conduct (AFM and DNB, Beleidsregel geschiktheid 2012, Staatscourant 2012, 13546), but this does not directly relate to the relationship between external and internal supervision in the way that they could replace, supplement or reinforce each other.

30 Article 25, 2 and article 30, 3, Housing Act.

31 [https://www.ilent.nl/onderwerpen/autoriteitwoningcorporaties/meldingen\\_en\\_vragen/meldingen\\_ongewone\\_omstandigheden\\_door\\_raden\\_van\\_toezicht/index.aspx](https://www.ilent.nl/onderwerpen/autoriteitwoningcorporaties/meldingen_en_vragen/meldingen_ongewone_omstandigheden_door_raden_van_toezicht/index.aspx). Accessed on 22 March 2016.

32 <https://belastingdienst-in-beeld.nl/over-de-belastingdienst/hoe-werken-we/>. Accessed on 22 July 2016.

see a possibility to strengthen their own supervision by entering into dialogues with internal supervisors. For the Tax authority, these discussions can contribute to the current information they need about the transparency, fiscal strategy and management of organizations in the context of horizontal monitoring.<sup>33</sup> The Education Inspectorate can enter into dialogues with the internal supervisor to get a better picture of problems that occur at a regulatee (Onderwijsinspectie, 2014).

The Inspectorate and the NZa have a policy based on complementarity. This is evidenced by the Good Governance Framework, a joint publication of the Inspectorate and NZa (NZa & Inspectorate, 2016). In this supervisory framework, they state that if good governance and internal supervision create the confidence that an organization is representing the public interest, external supervision can be more restrained. If executives and internal supervisors adopt a testable attitude and demonstrably make an effort to meet the conditions for good governance as formulated in the framework, this gives the NZa and the Inspectorate substantiated confidence and they will adjust their supervisory strategy accordingly (NZa & Inspectorate, 2016, p. 16). The supervisory framework does not contain a policy aimed at reinforcing external and internal supervision through interaction.

The relationships found in the policy documents of the external supervisors can be summarized as follows.

**Table 3.2:** Relationship between external and internal supervision according to the policy documents of external supervisors

<b>Relationship between external and internal supervision</b>	<b>Tax Authority</b>	<b>Aw and Education Inspectorate</b>	<b>Inspectorate and NZa</b>
<b>Variant 1</b> <b>Internal supervisor replaces external supervisor (Substitution model)</b>	No	No	No
<b>Variant 2</b> <b>Internal supervisor complements external supervisor</b>	Yes	Yes	Yes
<b>Variant 3</b> <b>Internal and external supervisors reinforce each other</b>	Yes	Internal supervision reinforces external supervision	No

33 With horizontal supervision, the Tax Authority makes arrangements with the management of organizations about obtaining up-to-date information. In addition to the executive board, the internal supervisor is one of the key officials who provides the Tax Authority with this information (Belastingdienst, 2013, p. 19).

### 3.5 THE SUPERVISORY PRACTICES OF EXTERNAL SUPERVISORS

The interviews focused on interaction between external and internal supervision in the supervisory practice of the respondent. The interviews focused on gaining insight into how external supervisors in practice construct the relationship with internal supervision, what the experiences are and whether a relationship with internal supervision actually contributes to external supervision being supplemented or strengthened.

All respondents from external supervisory bodies indicate that they are increasingly paying attention to the relationship between internal supervision and their own supervision. Although some supervisors had more experience with interaction than others, almost all respondents still find it difficult to see how and when internal supervision can be involved in their own supervision practices. This also applies if they have already formulated a policy on the matter. Several years ago, a number of respondents did not think about a relationship between external and internal supervision. Social developments such as the internationalization and growth of companies and the increased attention in the social debate of the role of internal supervisors after a number of major incidents led them to reconsider their relationship. In the interviews, we explicitly asked respondents to reflect on the relationship between internal and external supervision in the event of (1) incidents, (2) checks in the context of compliance or implementation supervision, and (3) safeguarding public interests. Below, the supervisory practices are briefly discussed based on these three situations.

#### 1. Contact in case of an incident

For all respondents, the board is the first point of contact in case of an incident unless the incident concerns the board itself. Three external supervisors have called on internal supervisors for malfunctioning of an executive board in the past because, being the executives' employer, they must ensure that the executives function well. For example, one of these respondents stated:

*'When it concerns the organization, it is primarily up to the executive board to take responsibility. When it concerns the executive board, the supervisory board has to take responsibility.'* (NZa expert)

In the event of an incident that concerns a different part of the organization than the executives, four supervisors sometimes speak to the internal supervisor in addition to the executives. They do this, for example, to emphasize the importance of the conversation and with the aim that the regulatee will implement the required organizational changes and process changes more quickly. It also happens that boards of executives themselves

choose to bring (a delegation of) the internal supervisors to a meeting with the external supervisor.

Three respondents interact with internal supervision in dealing with incidents in a way that complements the performance of their own supervisory task. Then, they do not correct the regulatee themselves, but leave it to the internal supervisors and ask it to report on the matter.

*'And there the inspection said: we let it go. We are not going to be on top of that. Trust anyway. The internal supervisor has reported to us afterwards.'* (Education Inspectorate expert)

This point of view shows that the external supervisor reduces his supervisory burden and takes more distance when he takes into account the actions of the internal supervisor. Respondents never see internal supervision as a substitute for their own supervision and will not transfer responsibilities or tasks to internal supervisors.

When we asked respondents about their experience with, and opinion on, an obligation for internal supervisors to report incidents, as proposed by the Ministerial Committee for the Renewal of Public Interests and introduced in the housing sector, it appears that internal supervisors rarely report an incident to the external supervisor. Most respondents do not expect this from an internal supervisor either because they believe that this is the responsibility of the executives. Some respondents state that they do expect a report from internal supervisors when there is a conflict between the executives and the internal supervisor. In those cases, the internal supervisor, with the knowledge of the executives, could contact the external supervisor. One of the respondents points out that it is precisely in these situations that it can be beneficial if both supervisors have established good communication. In his view, a situation in which both supervisors act on the basis of a good relationship, in which they know what they can mean for each other if an incident occurs, is preferable to a legal obligation to report.

## *2. Contact during checks in the context of monitoring compliance or implementation of regulation*

When monitoring compliance or implementation of regulations, the external supervisor actively (periodically) inspects whether the regulator complies with the law (supervision of compliance) or fulfills public duties properly (supervision of implementation of regulations). This form of supervision differs from 'incident-driven' supervision, where the external supervisor is not actively looking for deviant behaviour, but passively 'waits'

to be confronted with an undesirable incident (Ministry of the Interior and Kingdom Relations, 2005).

Five respondents give internal supervision a role in monitoring compliance or implementation of regulation. They involve – for example in an annual interview – internal supervision in order to get a better picture of the functioning of the regulatee and to build a relationship so that contact is easily made when something goes wrong. One of them indicates that if they have confidence that the systems within the organization are in good order and they have confidence in the internal supervisor, they will visit the organization concerned less often for an inspection. The respondent explains:

*‘With regular monitoring and compliance, it means that you occasionally go to the housing association. (...) If you trust a system that provides you with data, whether that is a supervisory board or an IT system, then you monitor whether that system itself operates reliably. Well, that is what we do at the housing association. If you then have faith in the system, you will not return there for four years.’ (ILT/Aw expert)*

Another respondent expresses a wish to discuss what future is out there for external and internal supervisors to support each other so that supervisory capacity can be deployed more efficiently:

*‘We remain ultimately responsible for our own supervision. The moment we signal that such a supervisory board is taking its role, then we will look at what is happening and assess that value and possibly adjust our supervision accordingly. We call that responsive enforcement.’ (Tax Authority’s expert)*

With one exception, none of the external supervisors has policy rules when a discussion with the internal supervisor should be on the agenda or what the content of such a conversation could or should be. The choice of whether or not to contact an internal supervisor often depends on the experience of an individual employee of the external supervisor:

*‘One person may already have a lot of experience with contacting a supervisory board. That person will sooner turn to a supervisory board member again than someone without this experience.’ (AFM expert)*

External supervisors do not often use accounting information from internal supervisors about their performance or about the functioning of their organization. Two external supervisors form an exception. They request (mandatory) reports from internal super-

visors and use them for supervision. For example, the ILT/Aw requests (among other things) the board's reports and executives reports before it goes on an inspection. Based on this documentation, the ILT/Aw forms a picture of the issues that are important to the executives, how these issues develop over the course of the year and how the internal supervisor responds to this and sees its duties.

Respondents react negatively to the proposal of the Ministerial Committee for the Renewal of Public Interests that external supervisors provide internal supervisors with the same information as executives. Respondents hardly ever send documents directly to internal supervisors. They expect executives to forward relevant documents to internal supervisors and do not want to take over this responsibility.

### *3. Contact to safeguard public interests*

In this chapter, contact to safeguard public interests is understood as contact between external supervisors and (internal supervisors of) supervised organizations in which the central question is how cross-organization interests and public interests can be better safeguarded. An example can clarify this. The Education Inspectorate speaks with internal supervisors, together with directors, about the number of schools in certain geographical areas where there are declining numbers of pupils. At issue in these conversations is which schools can merge or should be closed while retaining denomination. Where closing schools is clearly not in the interest of specific school boards or their supervisors, it is in the public interest desirable to achieve a merger in these cases. In this case, by entering into a discussion with internal supervisors, the Education Inspectorate expects to be able to jointly formulate a common – public – interest and jointly find a solution to reduce the number of schools. Education inspectors and those under supervision use the experience they gain in such processes to jointly identify good practices that can help solve similar problems in other regions.

The AFM also consults with internal supervisors beyond the functioning of an individual organization. For example, at an annual meeting with the chairs of internal supervisors, the AFM discusses the 'Customer's interest first' supervision theme. 'Focus on customer interests' is one of the focal points of the AFM's supervision, because focusing on customer interests offers the best chance that customers will be treated fairly. For the AFM, for example, the 'Customer's interest first' theme means that financial companies only make products that are useful, cost-efficient, safe and understandable.<sup>34</sup> For individual financial companies, this means that they have to free up time and money for this that they could have used elsewhere. Because the AFM is aware that the interests of the orga-

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34 See also <https://www.afm.nl>. Accessed on 27 June 2017.

nization and the public interest are not necessarily parallel, four years ago it started with an annual meeting with internal supervisors. By involving internal supervisors in the theme, the AFM wanted to ensure that internal supervisors stimulated and supported their executive(s) in shaping 'Customer interests first' within their organization. The AFM had carefully started a series of meetings to find out who could play which role without having to 'sit in each other's seats'. Later on in this series of meetings, the AFM supervisors and internal supervisors discussed experiences with giving shape to the 'Customer interests first' theme within financial organization. They discussed examples of good practice that inspired the participants. For example, each year the AFM comes a step closer to formulating a clearer vision of the expectations that it has within this theme of internal supervisors, the division of tasks between the two supervisors, and – if a task lies with internal supervisors – the minimum information they must have in order to fulfill that role.

None of the other respondents involves internal supervisors in issues that concern safeguarding public interests. One of the respondents points out that if she were to discuss such issues with internal supervisors; she would rather talk to members of an association of internal supervisors at sector level, because she speaks to them more often than to individual internal supervisors.

### **3.6 DISCUSSION AND CONCLUSION**

Internal supervision is steadily gaining a place in the practice of the external supervisor. Respondents cite six reasons for involving internal supervisors in their own supervision:

In the event of incidents:

1. Strengthening external supervision by assessing how internal supervision views the incident and fulfills its role;
2. Supplementing external supervision by preventing duplication of work between internal and external supervision; if the internal supervisor corrects regulatee behaviour, then external supervisors adjust (show restraint with) their supervision.

When monitoring compliance or implementation of regulation:

3. Strengthening external supervision by ensuring that the relationship is good, with the expectation that the external supervisor will be informed in a timely manner if something is wrong at the regulatee;
4. Strengthening external supervision by assessing how internal supervision sees the functioning of the regulatee.

When safeguarding public interests that go beyond an organizational interest:

5. Strengthening external supervision by involving internal supervisors in (cross-organizational) supervisory objectives, so that supervisory objectives can be better achieved;
6. Strengthening external (and internal) supervision by sharing good practices.

In practice, it appears that only in the event of an incident does internal supervision both supplement and reinforce external supervision. When monitoring compliance or implementation of regulation and safeguarding public interests, the relationship between external and internal supervision is primarily aimed at reinforcing external supervision. As the literature suggests, the six reasons for interaction are supposed to contribute to more effective and efficient supervision and to improving the functioning of the sector under supervision. However, experience with interaction between external and internal supervision is very limited and none of the external supervisors keep track of the effect on the supervisory capacity deployed or on the functioning of the sector. Therefore, no statements can be made as to whether the desired results are actually achieved.

According to the respondents, the substitution of tasks or interests by internal supervisors, in the sense of supervision by proxy, did not occur to them, which was in accordance with De Ridder's expectation. Insofar as the external supervisor remains legally responsible for those tasks, respondents would find it undesirable if internal supervisors were to take over tasks. After all, the duties of external supervisors (assigned by law) cannot generally be transferred to such an extent that their own responsibility for completing that task would end.

With regard to public interests, it also applies that internal supervisors cannot take over tasks, because public interests cannot be clearly defined and, moreover, can clash. With an example from merger supervision in healthcare (chapter 2), we showed earlier that a merger that was bad for affordability and accessibility of care was good for the quality of that same care. For each outcome – whether to merge, or not to merge – a justification could be given in which one public interest is guaranteed and another public interest runs risks. Public interests are context-dependent and it is not possible to prescribe in advance which public interest should prevail in the event of a conflict of interests. A better safeguarding of public interests could consist of exploring more cooperation between the government and those under supervision in order to jointly explore and pursue the public interest (see also chapter 2 of this thesis). That this also happens in practice, can be seen from the examples of the Education Inspectorate and the AFM that seek cooperation with internal supervisors in safeguarding public interests. The practice



of these external supervisors is also in line with the reflections in the literature that interaction between external and internal supervision can serve to reflect (WRR, 2015, p. 6).

Both the aforementioned literature and government policy documents state that a clear definition of external and internal supervision tasks is conditional to establishing a relationship between the two, but that this clear definition is often (still) missing. A number of supervisors have issued policy documents in which they outline the main tasks and relationship between external and internal supervision, but in practice there is little systematic policy in which choices are substantiated. Respondents indicate that they find it difficult to form a clear picture of what the tasks that are part of 'internal supervision' actually entail, how supervisory boards perceive their duties and interests, how far they go in their conversations with executives or what their influence on the organization is in practice. As a result, most respondents often do not know at what point in their own supervision it makes sense to make contact with internal supervisors. If contact is not established because the external supervisor is not familiar with internal supervision, it is important to seek contact so that they can become acquainted with each other and explore the possibilities to supplement or strengthen each other's supervision. By (also) speaking with an internal supervisor, an external supervisor gets a picture of the way in which internal supervision within the regulatees organization is organized and how the internal supervisor fulfils its responsibilities towards the directors and the organization.

Due to the hesitation to enter into conversations with internal supervisors on the part of external supervisors, opportunities to strengthen or supplement their own supervision may be missed. As we will show in chapter 4, internal supervisors are interested in entering into a relationship with external supervisors, at least with regard to incidents, but they too hesitate to contact the external supervisor who is unknown to them. In the event that an incident occurs, internal supervisors would like to be given the opportunity to adjust the organization if they can thereby prevent or limit (formal) action by the external supervisor (see also chapter 4). Both the hesitation and the interest to interact are therefore mutual. As far as contact about safeguarding public interests is concerned, the example of the AFM shows that it is precisely by engaging in conversation with each other that the relationship between the two supervisors can be explored and strengthened. Now that respondents are looking for ways in which they can construct a relationship with internal supervisors and respondents interpret this in various ways, the experiences of one supervisor described in this chapter may be a source of inspiration for another supervisor. It can help external supervisors to better substantiate choices and shape more systematic policy (Ministry of Health, 2015c, recommendation 44).

*To conclude*

This research has some limitations. The document analysis and the interviews yield only a small sample and the findings naturally relate to the vision, knowledge and experience of an individual respondent from a specific external supervisor. Although the interviews with experts provided the opportunity to delve deeper into the respondent's experiences with the involvement of internal supervisors, it cannot be excluded that alternative research methods, such as observation or case studies, would have provided other practical examples of the relationship between the external and internal supervisors.

In addition to inspiration for supervisory practices, the findings form a basis for further research. Further research could provide insight when the work of the internal supervisor is sufficiently reliable and relevant for the supervision of the external supervisor. This knowledge can contribute to a better, substantiated choice with regard to whether the work of the internal supervisor can supplement that of the external supervisor in such a way that the latter can exercise restraint in its own supervision.



# 4

## **Interaction between external and internal supervisors** *Cooperation in case of incidents in healthcare provision*

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## ABSTRACT

From time to time, incidents occur at healthcare providers: a provider may charge an incorrect fee, or the safety of patients may be at stake. To minimize and resolve these kinds of incidents, all healthcare providers are subject to supervision by an internal supervisory board as well as external state supervisors. In practice, it turns out that these supervisors hardly communicate, but in this study it appears both supervisors are – under preconditions – willing to. This study explores various aspects of interaction between internal and external supervisors. For external supervisors, contacting an internal supervisory board allows them access to an additional way to reach their goal. For internal supervisors, contact can provide them with information that can help it recognize and understand the severity and the scope of an incident. It can also prevent the organization from a difficult period when an internal supervisor instead of an external supervisor intervenes, preventing the organization from the possibly disrupting experience of intervention by an external supervisor.

## 4.1 INTRODUCTION

From time to time, incidents occur at healthcare providers: a provider may charge an incorrect fee, or the safety of patients may be at stake. To minimize and resolve these kinds of incidents, all healthcare providers are subject to supervision by an internal supervisory board as well as external state supervisors. Where two supervisors oversee the same object, it would seem fair to assume that they would be in contact on a regular basis.

In practice, however, internal supervisory boards and external state supervisors hardly communicate at all (WRR, 2015). Several policy documents have emphasized that both supervisors should be complementary and urged them to cooperate for the public interest, since they both supervise compliance with the rules and seek to assure the quality and safety of the care provided (Algemene Rekenkamer, 2008; De Ridder, 2013; WRR, 2015). The question arises of whether this is viable, however, given that the interest of the supervisory board in a well-run organization may diverge from the interests of the external supervisor to uphold the public interest (Algemene Rekenkamer, 2008). This chapter reports on research into whether contact between these supervisors is useful and feasible in cases where incidents, such as the incorrect declaration of provided services, occur. I will seek an answer to four questions in order to assess this primary question:

1. Are external supervisors and supervisory boards willing to cooperate in the event of an incident at a healthcare provider?
2. Do external supervisors and supervisory boards know how to shape cooperation in the event of an incident at a healthcare provider?
3. Are external supervisors and supervisory boards capable (juridical and institutionally) of cooperation in the event of an incident at a healthcare provider?
4. Do external supervisors and supervisory boards cooperate in practice when an incident at a healthcare provider occurs?

While the subject of the book in which this chapter was first published<sup>35</sup> as a whole was 'fraud', this chapter takes a somewhat broader perspective of incidents. In addition to fraud – defined as illegally obtaining a benefit of any nature by intentionally breaking a rule<sup>36</sup> – 'incidents' include cases where a healthcare provider unjustly obtains a benefit

35 Boertjens J, Mikkers M, Sauter W and Vincke P (2017) Healthcare Fraud, Corruption and Waste in Europe: National and Academic Perspectives. Den Haag: Eleven International Publishing 2017. Chapter 6.

36 European Healthcare Fraude & Corruption Network (EHFCN), Waste Typology, <https://ehfcn-powerhouse.org/groups/4-ehfcn-waste-typology-matrix/welcome>. Accessed 20 April 2016.

of any nature by unintentionally breaking a rule or guideline (errors), by knowingly stretching a rule or a guideline or by taking advantage of the absence of rules or guidelines (abuses).<sup>37</sup> I will take this broader perspective because recent research reveals that in the Netherlands, in cases of incorrect declarations, benefits were almost always obtained even though the deliberate intention to break a rule was only proven in a few instances (Kerpershoek, 2015). This study also includes incidents where the care provided does not meet quality standards or is unsafe.<sup>38</sup> This approach is taken in order to compare the opportunities of cooperation between a supervisory board and an external supervisor in various situations and to deepen our understanding of the specifics of the situation of cooperation between the two types of supervision.

In the Netherlands, the Minister of Health, Wellbeing and Sports (hereinafter referred to as the Ministry) is responsible for the healthcare system. Within this system, healthcare providers are primarily responsible for the provision of healthcare services. When (the board of) a healthcare provider fails, external supervisors, such as the NZa and the Inspectorate, form the lynchpins of the system of redress (Ministry of Health, 2001; Ministry of Health, 2016a). The NZa protects the interests of citizens with regard to accessibility, affordability, and the transparency of the quality of healthcare in the Netherlands. This includes supervision on the correctness of declarations. The Inspectorate, meanwhile, protects the interests of citizens with regard to the safety and quality of healthcare provided in the Netherlands.

This chapter focuses on the governance of healthcare providers, such as general hospitals, psychiatric hospitals, nursing homes or organizations that provide ambulatory or residential care. Dutch healthcare providers usually are privately owned entities. They are actively involved in the provision of publicly funded services (Maarse & Lodewick, 2011), although there is no direct financial relationship between government and healthcare providers. Health insurers contract with healthcare providers on the basis of price, volume and – increasingly – the quality of services. Health insurers provide basic insurance for everyone, acceptance is mandatory and they have a duty to arrange enough care for their policy holders.<sup>39</sup> Both healthcare providers and health insurers operate in a competitive marketplace. They are expected to act as entrepreneurs to secure the best deals (see also Van Kleef, 2012; Mikkers & Ryan, 2014).

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37 European Healthcare Fraude & Corruption Network (EHFCN), Waste Typology, <https://ehfcn-powerhouse.org/groups/4-ehfcn-waste-typology-matrix/welcome>. Accessed 20 April 2016.

38 These kind of incidents of course are not about gaining benefits.

39 <https://www.nza.nl/organisatie/sitewide/english/>. Accessed on 16 April 2016.

The method of research is presented in section 2. Then, the supervisory board (section 3), the external supervisors, the NZa and the Inspectorate, (section 4) and the expectations on cooperation between external supervisors and supervisory boards (section 5) are briefly described. Section 6 reports on the findings of document research regarding ten incidents, followed by a detailed report of interviews with members of supervisory boards and external supervisors (section 7). Section 8 summarizes and concludes this chapter.

## 4.2 METHOD OF RESEARCH

To answer our questions regarding cooperation between supervisory boards and external supervisors, two methods of research were used: document research and interviews.

In order to conduct document research, information was collected on ten incidents<sup>40</sup> which occurred in the healthcare sector between 2011 and April 2016.<sup>41</sup> Three cases involved incorrect declarations and fall within the competence of the NZa. These cases were selected by collecting all decisions whereby the NZa imposed a fine for incorrect declarations. In some cases, the NZa imposed a fine on an individual healthcare provider or a very small organization without a supervisory board. These cases, of course, are not of interest for this study of the interaction between supervisory board and external supervisor. I therefore selected the only three cases where the NZa imposed a fine on a healthcare organization with a supervisory board. Seven cases involve the quality and safety of healthcare provided and thus fall under the competence of the Inspectorate. These cases were selected by collecting together all the cases in which the Inspectorate imposed an intensified supervision regime, and selecting the only seven cases whereby the Inspectorate imposed intensified supervision on a hospital.

In November and December 2015, one semi-structured interview was held with an expert on supervising the quality and safety of healthcare from the Inspectorate and one semi-structured interview was held with a manager and policymaker from the NZa.

In April and May 2016, eight semi-structured interviews were held with nine members of supervisory boards of healthcare providers. Mixed sampling was used to select par-

40 See also section 4.3 on a definition of 'incidents'.

41 A description of the cases (including references) will follow in section 4.5 of this chapter.



ticipants from supervisory boards.<sup>42</sup> Six of the selected healthcare providers had faced an incident in the past five years and five healthcare providers had not dealt with an incident in the past five years. This selection was made in order to hear not only from supervisory boards of organizations that have experienced incidents, but also from supervisory boards that have not had to deal with incidents. The challenge of contact and cooperation between supervisory boards and external supervisors is not only a challenge for those who have faced incidents, but also for those who have not but may nevertheless have to deal with incidents in the future. Moreover, healthcare providers will also look at incidents that occur at other providers to see what they can learn for their own organization (Van Erp & Mein, 2013). Convenience sampling was used to select the members of the supervisory boards<sup>43</sup> (most of the interviewees were contacts of the chair of the executive board of the NZa) and approach the members of the supervisory boards. I used convenience sampling due to the known difficulties for researchers who are seeking to obtain access to individuals at this level (Bezemer, 2010). Five members of four supervisory boards that had faced an incident, and four members of four supervisory boards that had not dealt with an incident in the past five years accepted the invitation to take part in an interview. All board members interviewed are experienced supervisors. Their backgrounds differ: some have previously worked as medical specialists, some as executives at another (healthcare) organization, some have been civil servants or scientists and many have work experience in several of these areas.

### 4.3 INTERNAL SUPERVISION BY THE SUPERVISORY BOARD

#### *Structure*

Supervision within a company can be arranged in two ways: a 'one-tier structure' or a 'two-tier structure'. A one-tier structure consists of one board, made up of both executives and non-executives, also known as supervisors. The chair of the board is a non-executive. The chief executive officer (CEO) is responsible for day-to-day management and is also a board member. Companies with a one-tier structure are common in the United Kingdom, Belgium, Italy, Spain, Switzerland and Sweden and also in the United

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42 Where a sample plan envisages the use of two or more basic methods of sampling it is known as mixed sampling. <https://stats.oecd.org/glossary/detail.asp?ID=3719> (accessed on 17 June 2016). In this study we used information from the NZa and the Inspectorate to select organizations that had faced an incident and we used convenience sampling to select the supervisory board members to invite to participate in an interview.

43 Convenience sampling is a specific type of non-probability sampling method that relies on data collection from population members who are conveniently available to participate in the study. <http://research-methodology.net/sampling/convenience-sampling/> (accessed on 17 June 2016).

States, Australia and Canada. A two-tier structure consists of two independent bodies: the executive board and the supervisory board. The executive board is responsible for day-to-day management and is supervised by a formally independent supervisory board. Companies with a two-tier structure are common in Germany, China, Japan and the Netherlands (Hooge et al., 2006, p. 15-16). For healthcare providers in the Netherlands, a supervisory body is required by law.<sup>44</sup>

#### *Function of the supervisory board*

The introduction of a supervisory board for healthcare providers in the Netherlands have been inspired by the for-profit sector. There, shareholders need their interests to be upheld and taken into account by the executives who are managing their investment. Non-executives or supervisory boards constitute a counter-balancing force to those executives (RVZ, 2009; De Ridder, 2013). There are many theories on how these interests are best upheld:

- supervisory boards are a control mechanism by which shareholders can monitor the performance of the executives (Agency theory, see Bezemer, 2010);
- supervisory boards must serve their company in an active manner and acquire resources – capital, business partners – from their external network in a way that benefits the company; they must employ their knowledge to play an advisory role in order to support the executives (Resource based, resource dependence or social network theory, see Hooge et al., 2006; Bezemer, 2010);
- supervisory boards must ensure that the executives act in compliance with the law (Legal scholars, see Hooge et al., 2006);
- supervisory boards must take into account the interests of other stakeholders than the shareholders, such as employees, customers, patients (The Stakeholder approach, see Hooge et al., 2006).

#### *Tasks*

To turn to the question of what the supervisory boards of Dutch healthcare providers are expected to do, their tasks correspond with all the above functions. By law, the supervisory boards of healthcare providers are obliged to monitor and advise on day-to-day management.<sup>45</sup> In addition, Dutch representative associations of healthcare provider organizations have compiled a Healthcare Governance Code (Brancheorganisaties Zorg, 2010) which provides a uniform model describing the structure of relationships, tasks, competences and accountability of supervisory boards (Maarse & Lodewick, 2011). The Healthcare Governance Code has been adopted by most Dutch healthcare providers.

44 Article 6, 1 Implementing Decree on the Admission of Healthcare Institutions Act.

45 Article 6, 1 Implementing Decree on the Admission of Healthcare Institutions Act.

According to the Healthcare Governance Code, the supervisory board is responsible for providing for competent executive management and for appointing, evaluating, rewarding and discharging the executives. The supervisory board supervises all essential aspects of the healthcare provider, including:

- strategy and risks associated with the activities of the healthcare provider;
- designing and operating internal risk and control management systems and financial reporting;
- the quality and safety of the healthcare provided;
- compliance with the law;
- achieving the statutory and other goals and adequately fulfilling the social aims and responsibilities of the healthcare provider.

The supervisory board fulfills these duties in accordance with the societal importance of the healthcare provider and balances the relevant interests of stakeholders concerned.

The next section will show that the supervision provided by the supervisory board in relation to the quality and safety of healthcare and compliance with the law overlap with the supervision provided by external supervisors.

#### *Intervening powers*

When a supervisory board identifies shortcomings in one of the areas mentioned above, it has the power and the duty to discharge executives where necessary and provide the organization with competent executive management.

## **4.4 EXTERNAL SUPERVISION: THE NZA AND THE INSPECTORATE**

### *Structure*

Both the NZa and the Inspectorate are autonomous administrative authorities, which fall under the responsibility of the Ministry.

### *Function of the NZa and the Inspectorate*

The function of external supervision is to ensure social responsible behaviour and protect specific interests by means of the law and legally legitimate influence (Mertens, 2006; De Ridder, 2013; Schut et al., 2014). The mission statement of the NZa is to protect the interests of citizens with regard to the accessibility and affordability of healthcare in the Netherlands, as well as quality transparency.<sup>46</sup> The Inspectorate promotes public

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46 <https://www.nza.nl/organisatie/sitewide/english/>. Accessed on 16 April 2016.

health by effectively enforcing the quality of healthcare services, prevention measures and medical products.<sup>47</sup>

#### *Tasks*

Supervision by the NZa includes collecting and analysing information in relation to the functioning of healthcare markets and the compliance of healthcare providers and healthcare insurers with the law. For example, the NZa supervises whether healthcare providers charge their treatments to patients in accordance with the law. This analysis is the basis for intervention undertaken by the NZa (NZa, 2009). The NZa is also a regulatory body and acts as an advisor to the Minister.

The Inspectorate promotes public health by effectively enforcing the quality of healthcare services, prevention measures and medical products. It advises the responsible ministers and applies a range of measures, including advice, encouragement, pressure and coercion, to ensure that healthcare providers offer only 'responsible' care.<sup>48</sup> The Inspectorate examines each case individually and if necessary, determines which enforcement measure is likely to be most effective.

#### *Powers of intervention*

Various tools are available to external supervisors. The NZa is mandated to intervene if healthcare providers do not comply with its advice by giving legally binding instructions, by imposing a penalty payment or fine and by naming and shaming (NZa, 2009). The Inspectorate has various measures at its disposal to ensure compliance with legislation, (professional) standards and guidelines. It can also offer advice and recommendations to encourage improvements. It can impose corrective or coercive measures. Depending on the exact circumstances, the Inspectorate may require the healthcare provider to produce an improvement plan, or it may impose an 'intensified supervision regime' directly. The Inspectorate will usually impose an intensified supervision regime if an improvement plan has yielded insufficient results or if it has insufficient confidence that the healthcare provider will be able to achieve the desired results if it does not do so. The Inspectorate makes public any decision to impose (and revoke) intensified supervision.<sup>49</sup> The Inspectorate can institute immediate disciplinary or criminal proceedings should the circumstances require this.<sup>50</sup>

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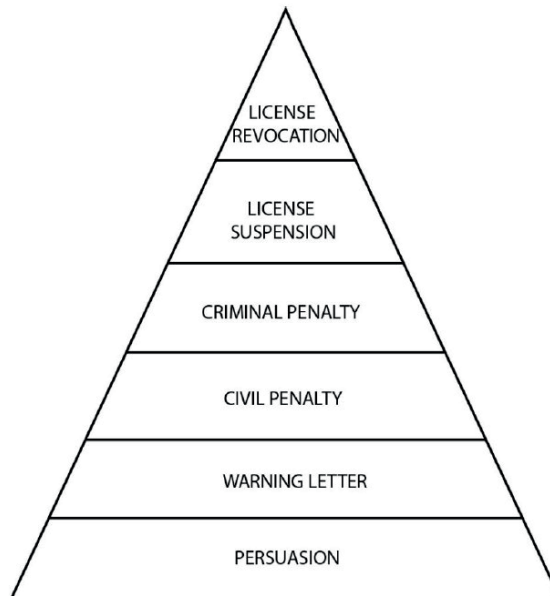
47 <http://igz.nl/english/>. Accessed on 17 April 2016.

48 <http://igz.nl/english/>. Accessed on 17 April 2016.

49 [http://www.igz.nl/english/enforcement\\_measures/corrective\\_measures/](http://www.igz.nl/english/enforcement_measures/corrective_measures/). Accessed on 31 May 2016.

50 [http://igz.nl/english/enforcement\\_measures/index.aspx](http://igz.nl/english/enforcement_measures/index.aspx). Accessed on 17 April 2016.

In documents on enforcement published by both the NZa and the Inspectorate, there are traces of the responsive regulation theory of Ayres and Braithwaite. Ayres and Braithwaite have developed a widely known theory on how to choose between different intervention tools (Ayres & Braithwaite, 1992). They developed a model of responsive regulation and represented it in the form of a pyramid.



**Figure 4.1:** Pyramid of responsive regulation (Ayres & Braithwaite, 1992, p. 35)

The idea is, that intervention by external supervisors is a combination of regulation by the external supervisor and self-regulation by – in this instance – a healthcare provider. Most healthcare issues can be resolved by expanding the managerial capacity of the regulated actors to resolve them for themselves (J Braithwaite, 2011). The pyramid shows the firm base of persuasion, with the means of intervention escalating towards the top of the pyramid, whereby ultimately supervisors can disband the organization if it consistently refuses to cooperate with the improvement measures proposed (J Braithwaite, 2011).

In accordance with the above pyramid, the NZa selects the means of intervention that is most effective and efficient<sup>51</sup> on a case-by-case basis. The NZa chooses the ‘smartest’ method of intervention to ensure compliance with the law. If the healthcare provider

51 NZa, Beleidsregel TH/BR-004. Handhaving. De invulling van het handhavingsbeleid van de NZa, p. 9.

fails to comply with its advisory instructions, the NZa can move to a more formal approach by issuing legally binding instructions or other formal enforcement actions.<sup>52</sup> The Inspectorate usually begins by applying a relatively 'light' measure (such as intensified supervision), only proceeding to more stringent measures (e.g., a compliance order or fine) if unsatisfactory progress is made in resolving the issues in question.<sup>53</sup>

#### *External supervision in the event of an incident*

Supervision by the NZa and the Inspectorate is often triggered by notification of an incident. An incident can be described as an unforeseen and disruptive event.<sup>54</sup> It follows from the description of the tasks and authorities of the NZa and the Inspectorate that 'disruptive' events are those whereby public funds are spent inappropriately such as fraud, errors or abuses, or whereby patient safety or the quality of the provided service is compromised. First contact in the event of an incident is usually between the external supervisor and the executive(s) involved. External supervisors do not usually contact the supervisory board first, nor are they obliged to at any time during an incident.

## **4.5 VIEWS ON COOPERATION BETWEEN EXTERNAL SUPERVISORS AND SUPERVISORY BOARDS**

In the Netherlands, there is ongoing debate on cooperation between external supervisors and supervisory boards in the non-profit sector. Several policy documents take the view that external supervisors can make use of work done by supervisory boards (Ministry of Economic Affairs, 2014); Ministry of Health, 2016a). It is assumed that when an external supervisor concludes that the supervisory board of a non-profit organization is functioning as it should, external supervision can be reduced (Algemene Rekenkamer, 2008). Some have challenged this view by adding provisos or preconditions to this. The Court of Audit (*Algemene Rekenkamer*) points out the different perspective of both supervisors: the supervisory board serves its organization and has to weigh up the interests of all stakeholders. The external supervisor, by contrast, is responsible for upholding the public interest and the spending of public funds (Algemene Rekenkamer, 2008; De Ridder, 2013).

In earlier research, De Ridder conducted three case studies and concluded that external supervisors may make use of the work done by supervisory boards, under the condi-

52 NZa, Beleidsregel TH/BR-004. Handhaving. De invulling van het handhavingsbeleid van de NZa, p. 10.

53 [http://igz.nl/english/enforcement\\_measures/index.aspx](http://igz.nl/english/enforcement_measures/index.aspx). Accessed on 17 April 2016.

54 <http://www.vandale.nl>. Accessed on 17 April 2016.

tion that the tasks of the supervisory board are well-defined and the board is publicly accountable for the way it upholds the public interest. The work done by the internal supervisor must be supported by a strong external supervisor (De Ridder, 2013).

The WRR recently conducted qualitative research and, with specific reference to incidents, concludes as follows (WRR, 2015).

- The configuration of the relationship between supervisory boards and external supervision is appropriate for the reflective role of an external supervisor, which must make sure that its knowledge about relevant signals and system risks is up-to-date.
- On a sector level, supervisory boards and external supervision can help each other to improve their work by reflecting on and learning from each other's work.
- Supervisory boards and external supervision should move from an incident-driven relationship at the level of the organization towards a prevention- and quality-driven learning process at the level of the sector.
- Normally, the Executive Board is the first contact of the external supervisor. Only in cases of incidents should there also be contact between supervisory boards and external supervisors.
- Supervisory boards and external supervision can exchange knowledge at a sectoral level, develop norms and arrange a learning processes that helps to prevent incidents.

To learn more about interaction between supervisory boards and external supervisors, I conducted document research on ten incidents and held interviews with supervisory boards members, the NZa and the Inspectorate. I report on my findings in sections 4.6 and 4.7, respectively.

## **4.6 DOCUMENT RESEARCH ON TEN INCIDENTS**

I conducted document research on ten incidents that occurred in the Dutch healthcare sector between 2011 and April 2016. Three cases relate to incidents involving incorrect declarations. Seven cases relate to incidents involving quality of care and safety. I looked specifically for any publicly available information regarding the involvement of the supervisory board: was the supervisory board involved during the incident? Was its role assessed by the supervisory board itself or by others and how was it assessed? Was there any contact and what was the nature of the contact between the supervisory board and the external supervisor?

### 4.6.1 Incorrect declarations

With regard to the incidents involving incorrect declarations, I conducted document research on three cases. In all three cases, the NZa imposed a fine for incorrect declarations in 2011, 2014 and 2015 respectively. The documents available on these incidents included the formal decisions of the NZa<sup>55</sup>, (news) items on the websites of the parties concerned<sup>56</sup>, annual reports (Ommelander Ziekenhuis Groep, 2012; St. Antonius Ziekenhuis, 2014; Stichting Altrecht, 2015) and an investigation report of an external investigation committee (Bruggeman & Voetelink, 2013).

According to these documents, in none of these cases was there contact between the NZa and the relevant supervisory boards following the incident. The NZa did speak to the other parties involved, for instance to the executives, the management, the specialists and other employees. In one of the formal decisions, the NZa stated that during the period of investigation the NZa had drawn the conclusion that the executives were not 'in control': they had fulfilled their governmental responsibilities on financial guidance and the legality of declarations in a way that was inadequate.<sup>57</sup> Yet, that did not seem to be a reason to contact the supervisory board to ask them what they were doing to ensure that the organization was provided with a competent executive board. Like the NZa, the external investigation reports elaborated on the roles, responsibilities and capabilities of all parties involved, except for the supervisory boards.

In two of the annual reports, the supervisory boards mention that the incidents were (stressful) events that the supervisory board was (intensively) involved in. The annual reports describe the general internal measures and changes that were introduced following on the incident. It does not follow from the reports that executives and supervisory board had evaluated their own performance during or after the incidents.<sup>58</sup> One annual report did not mention the incident at all in relation to the supervisory board or in relation to internal measures taken following on the incident.

### 4.6.2 Quality and safety

With regard to the incidents involving quality and safety, I conducted document research on incidents that occurred in seven hospitals. In all cases, the Inspectorate imposed an

55 Decisions of the NZa in the cases Stichting De Ommelander Ziekenhuis Groep, Stichting St. Antonius ziekenhuis and Stichting Altrecht.

56 <https://www.ozg.nl/over-ozg/ozg-nieuws/nza-beboet-ommelander-ziekenhuis-groep> (accessed 22 April, 2016); [www.antoniusziekenhuis.nl/overstantonius/pers/declaraties/faq/extern-onderzoek](http://www.antoniusziekenhuis.nl/overstantonius/pers/declaraties/faq/extern-onderzoek) (accessed on 30 October 2015).

57 Decision of the NZa in the case St. Antonius ziekenhuis, p. 22.

58 Decisions of the NZa in the cases Stichting Altrecht, p. 3 and 5; St. Antonius Ziekenhuis, p. 7.



intensified supervision regime. Documents available on these incidents included letters and the reports of the Inspectorate<sup>59</sup>, (news) items on the websites of the parties concerned<sup>60</sup>, annual reports (Maasstad Ziekenhuis Rotterdam, 2012) and, in two cases, investigation reports by external investigation committees (Externe onderzoekscommissie MSZ, 2012; Maasstad Ziekenhuis Rotterdam, 2012; Grinwis et al., 2012).

The documents show that in five cases, there was contact between the Inspectorate and the supervisory board during the incident and in two cases there was no such contact. The five cases in which there was contact between the supervisory bodies vary from the absence of a safety management system to disturbed relationships within teams of medical specialists or between executives and medical specialists resulting in (potential) risks for the safety of patients. In all these cases, the Inspectorate contacted the supervisory board at some point during the incident. In some cases, they only spoke once<sup>61</sup>, while in other cases they spoke more regularly<sup>62</sup>. Sometimes the Inspectorate had spoken to the supervisory board in the presence of the executives<sup>63</sup>, and in other cases, the reports do not mention whether executives were present. In every case, the Inspectorate published a final report.<sup>64</sup> In three cases, the Inspectorate's report elaborates on the role of the supervisory board<sup>65</sup>, and in two cases it also gives its judgment on the performance of the supervisory board involved.<sup>66</sup> In one case, the Inspectorate does not mention the role of the supervisory board in its report at all even though the Inspectorate had been in contact with the supervisory board during the period of the intensified supervision regime.<sup>67</sup> In one of these five cases, a report by an external investigation committee is publicly available.<sup>68</sup> This report includes an evaluation of the functioning of the supervisory board and makes recommendations on how to improve its performance. In the annual report, the supervisory board made an assessment of its own functioning.

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59 Decisions and other documents concerning individual cases of the Inspectorate are included in the reference list of this thesis. All documents concerning individual cases of the Inspectorate included in the reference list have been used for this document research in chapter 4.

60 VUmc, 2012; [https://www.umcutrecht.nl/getmedia/6da7788d-945c-4ffe-afce-ad7554bbf62f/Patienten\\_Veelgestelde-vragen-verscherpt-toezicht-IGZ.pdf.aspx](https://www.umcutrecht.nl/getmedia/6da7788d-945c-4ffe-afce-ad7554bbf62f/Patienten_Veelgestelde-vragen-verscherpt-toezicht-IGZ.pdf.aspx) (accessed 26 April, 2016).

61 Maasstad, UMC Utrecht.

62 Ruwaard van Putten, Admiraal de Ruyter Ziekenhuis, Diakonessenhuis.

63 UMC Utrecht.

64 The UMC Utrecht case is still pending at the time of writing.

65 Maasstad, Ruwaard van Putten, Diakonessenhuis.

66 Maasstad, Ruwaard van Putten.

67 Admiraal de Ruyter Ziekenhuis.

68 Maasstad.

In two cases, there was no contact between the Inspectorate and the supervisory board prior to or during the incident. The Inspectorate reports on both these cases fail to explain the different approach of the Inspectorate in these two cases, compared to the five cases mentioned above in which there was contact between both supervisory bodies. In one of these two cases, the supervisory board had been evaluated by an external investigation committee. Following on the report of these committees, which was made public, the supervisory board went on to announce publicly which improvements it was going to implement.

#### **4.6.3 Comparing the incidents involving incorrect declarations and involving quality and safety**

It is remarkable, that the performance of the supervisory board was not considered in any of the cases involving incorrect declarations, nor was the supervisory board addressed by the NZa, even when it was clear the executives were did not have sufficient control of the organization. By contrast, the Inspectorate addressed the executives as well as the supervisory board in most of the cases involving the quality and safety of care. This difference is even more remarkable given that prior research has shown that supervisory boards are traditionally more focused on financial and strategic issues, rather than the quality and safety of the care provided (RVZ, 2009).

### **4.7 INTERVIEWS**

Eight semi-structured interviews were held, with nine members of supervisory boards on the themes outlined at the beginning of this chapter: whether they would be willing to cooperate when an incident at a healthcare provider occurs, whether they are able to do this, and whether this actually happens in practice. One semi-structured interview was held with an expert of the Inspectorate and one semi-structured interview was held with two experts from the NZa on the subject of their contacts and cooperation with supervisory boards, including in the event of incidents. All interviews were recorded, transcribed and analysed to ascertain the extent to which the information provided contributes to an answer to whether they are willing to cooperate when an incident at a healthcare provider occurs, whether they know how to and are able to, and whether this actually happens in practice.

The results appear to show that there are hardly any differences between the opinions of the members of supervisory boards where an incident had occurred and the members of supervisory boards where no incident had occurred. Where relevant, the text will specify who made the statements. Statements on 'external supervisors' relate to the NZa as well

as the Inspectorate; only where a distinction is relevant will we specify which external supervisor is being referred to.

#### **4.7.1 Willingness to liaise**

*Supervisory boards are cautiously open to contact*

Asked whether supervisory board members would be open to contact with external supervisors in general, without focusing on a specific incident, their first reaction is positive. Most of them considered it useful to meet now and then, at the sectoral level for instance, in order to exchange knowledge, discuss future changes in the sector and build a relationship. They also stated that they expected it to be easier to liaise when an incident does occur if a relationship had already been established.

Asked whether supervisory board members would be open to contact and cooperation with external supervisors in the event of an incident, their first reaction ranged between cautious and fairly negative. Only a few of the supervisory board members interviewed stated that contact between both supervisors in event of an incident would be appropriate and potentially useful. Their hesitancy seems to emanate from their awareness that they must take care not to encroach on the role of the executives. The first role of the supervisory board in the event of an incident, as the respondents saw it, is to support the executives and to advise and assist them in trying to resolve the incident. The executives are primarily responsible for resolving the issues that have arisen and are therefore the first point of call for the external supervisor. Only when the executives have shown themselves to be incapable of taking appropriate remedial action within a reasonable period might they consider it appropriate, as a last resort, for external supervisors to approach the supervisory board.

Asked whether they would prefer to be given the opportunity to remedy the problem that led the incident before external supervisors impose formal measures, all but one of the board members stated that they would indeed prefer to be given such an opportunity. This, of course, would necessitate contact and cooperation between an external supervisor and a supervisory board in the event of an incident.

From the interviews with the members of the supervisory boards where an incident had occurred, it appears that intervention by an external supervisor has an enormous impact on the employees of an organization. Employees are generally shocked and feel that they are receiving unjust treatment if all the focus is on one incident, when they know that their organization does a great deal of good work.

*'People are all in shock there [at the hospital where an incident occurred]. (...) Then I think, how is this possible? What are you doing to us, external supervisor? (...) It takes an incredible amount of time.'* (member of a supervisory board that noticed the consequences of an incident at another organization)

Negative media or political attention can exacerbate this situation. It takes an organization and its employees quite some time to recover from such a shock. In the view of these interviewees, it would be an advantage for the organization if it was given the opportunity to resolve the problem itself.

*'I think this wouldn't be such a bad idea. But again, in open consultation with the executives. And the executives take the lead in resolving the problem within the organization. The supervisory board stays a supervisor. [...It] is about the prevention of unnecessary damage and achieving the final goal. That could be accomplished in this way.'* (member of a supervisory board where an incident had occurred)

*Under what circumstances could contact occur?*

As a last resort, the attitude of the supervisory board members towards liaising or cooperating with an external supervisor in the event of an incident is that it should be limited. It should be restricted to those cases where the executives do not respond to the problem effectively and where the problem could be resolved by the supervisory board. It would then be the responsibility of the supervisory board to resolve the problem, and it would therefore be considered appropriate for the supervisory board to liaise with the external supervisor. If the executives respond effectively and the external supervisor contacts the supervisory board, the interviewees believed that there would be a risk of strains in the relationship between the executives and the supervisory board.

*'For that we would have to be in a situation where the executives were acting very incompetently. I can imagine that when an external supervisor thinks it has a strong case and the executives won't listen, or not listen enough, that before taking formal measures, they might try to contact the supervisory board. Just to see on what level you can exercise some influence.'* (member of a supervisory board where no incident had occurred)

External supervisors can contact supervisory boards to ascertain whether they are fully in control and subsequently decide whether the external supervisor needs to take action or can leave this to the supervisory board. If an external supervisor decides that it has confidence in the approach of the supervisory board, it will be up the supervisory board to advise the executives on what action to take, or to discharge the executives if that is necessary to resolve the problem. In any case where external supervisors and

supervisory boards are in contact, this should be done with the knowledge of or in the presence of the executives.

*'I would never communicate with an external supervisor without telling my executives, unless there was a really big problem with the executives. But that is a very specific situation. If the problem is on such a scale that I needed to contact an external supervisor without telling my executives, I should probably have intervened myself in an earlier stage.'* (member of a supervisory board where no incident had occurred)

The nature of the contact between both supervisors is a delicate matter. The interviewed board members did not want the external supervisor to take the place of the supervisory board. They were comfortable with exchanging ideas with the external supervisor, but they did not see it as appropriate to be told what to do by the external supervisor. The supervisory board has its own responsibility to ensure that the organization is well-managed. Several of them would view it as a sign of weakness on the part of their own board if they needed instructions from an external supervisor to resolve issues within the organization. For them, that would be a sign they should reconsider their position.

*Contact is optional; discretionary leeway*

If an external supervisor were to decide that it had confidence in the approach of the supervisory board, it should ask the supervisory board to be transparent about its approach and it should monitor the progress the organizations is making. An external supervisor may decide not to trust the supervisory board and take action itself. This is a choice for the external supervisor. The supervisory board members interviewed understood that such a decision would depend on:

- the severity of the incident – are lives at stake or not?
- the nature of the incident – does it require corrective or punitive measures?
- on political aspects of a case – does the external supervisor want to set an example for the whole sector? And does the external supervisor feel the eyes of the media watching close and urging it to take action?

*'I'm honest, if I were an external supervisor I can imagine that sometimes you wouldn't give a supervisory board a chance to solve a problem. Just because you think: this organization has to face the music. Hence, no proportionality check, just an intensified supervision regime because they deserve the naming and shaming.'* (member of a supervisory board where no incident had occurred)

This discretionary leeway on the part of the external supervisor – the fact that external supervisors are not obliged to contact the supervisory board before imposing measures

themselves – prevents supervisory boards from being seen as a kind of ‘court of appeal’ for executive decisions. This is a role the supervisory boards do not want to play.

But, the discretionary leeway of the external supervisor also has a downside. It is a source of legal uncertainty. A board member on the supervisory boards of two different organizations brought up the following example during the interview. Coincidentally both organizations had to deal with issues concerning the safety of the healthcare provided. Following the incidents, the external supervisor contacts the executives as well as the supervisory boards in both cases. In the first case, the external supervisor imposes formal measures, resolving the problem but damaging the reputation of the organization. In the second case, the external supervisor does not impose formal measures, but is confident the supervisory board is able to resolve the problem. In his experience, these cases are not sufficiently different to explain the two different approaches of the external supervisor. The most significant difference would be that the first case had caught the attention of the media, whereas the latter case had not. He guessed that it would be the intention of the external supervisor to set a public example in the first case, whereas the second case was less suited to this approach because it had received less public attention.<sup>69</sup> When this board member was asked whether he would recommend liaison between a supervisory board and an external supervisor in the event of an incident, he was reluctant:

*‘I don’t trust the Inspectorate at present. If I trusted it, I would think that it has other interests to serve because it has to serve the whole country, or the sector, or the Minister, or the public. But that is not always the same as the interest of the individual organization. What you can imagine on theoretical grounds, though on theoretical grounds there are other arguments possible, I have a lot of experience in reality that there is a conflict of interest.’ (member of a supervisory board where an incident had occurred)*

Other interviewees also perceived a tension between the public interest, which the external supervisor is responsible for upholding, and the interests of the organization. In their opinion, the concept of the ‘public interest’ is not completely clear. Public funds should clearly be spent prudently, but considerations regarding macro level budgets are not the responsibility of an individual healthcare provider and its supervisory board. Some board members stated that the interests of the client should prevail with every

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69 In an earlier study, healthcare providers also presumed that (negative) media attention for an incident puts the Inspectorate under pressure to impose an intensified supervision regime (Van Erp & Mein, 2013, p. 70).

decision made by the board; as one stated: with every decision we have to ask ourselves – is this in the best interest of the patient or is it in the best interest of the company?

#### *External supervisors are open to contact*

When the external supervisors were asked if they would be open to more contact with supervisory boards following an incident, their first reaction was positive, especially in those cases where the executives are incapable of addressing a problem on their own (or are part of the problem). The NZa interviewee noted that increasingly, in cases where the NZa has invited the executives for a meeting concerning a (potential) incident, the executives are accompanied by (members of) the supervisory board. The NZa considers this a positive move, since it shows that the executives are not trying to keep the problem to themselves, but are involving their boards – an indication that they are working towards resolving the problem.

### **4.7.2 Knowledge**

#### *Knowledge of occurred incidents*

A first aspect of ‘knowledge’ is whether supervisors know that an incident occurred. Both supervisors depend on someone telling them about incidents. External supervisors receive notification of incidents, and for severe incidents involving quality and safety, notification is mandatory by law.<sup>70</sup> Incidents involving incorrect declarations are usually notified by someone who is dissatisfied with the current situation. In the interviews with the supervisory board members, they stated that in general they do not know about incidents until they receive notification from someone. The supervisory board has a helicopter view of the organization and wants to be reassured that all systems and processes are implemented according to the rules. They receive reports generated by systems with consolidated information on the outcomes. According to the interviewees, these meso level reports hardly ever reveal incidents at the micro level.

*‘I don’t think you can see everything. Really. And especially not in very large organizations.’ (member of a supervisory board where no incident had occurred)*

A mechanism for good and open communication within organizations is needed for an incident to be revealed. The board members interviewed hold the executives to be responsible for fully informing the supervisory board when an incident occurs.

Since both types of supervisor are dependent on people telling them about incidents, the exchange of information between both supervisors may help information on inci-

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70 Article 11 Complaints and Disputes Act.

dents to emerge more promptly. These findings are complementary to the WRR, which takes a broader perspective and recommends that exchanging knowledge can provide the external supervisor with information about relevant signals and system risks (see also section 5). While most of the interviewees were in favour of exchanging information with an external supervisor on general themes such as system risks, they were reluctant to exchange information on incidents as we will see in the next section.

#### *Knowing what form contact should take*

A second aspect of 'knowledge' relates to whether supervisory board members know what form contact should take. It appears from the interviews that hardly any of the supervisory board members think it is likely that a supervisory board would initiate contact. Rather, they would wait until invited into the debate by the external supervisor. One of the board members interviewed cited the following example. Starting as a supervisor at an organization with managerial and financial troubles, she needed information to make a quick assessment of what was happening in the organization. Based on her prior experience with an external supervisor, she believed that it was worth approaching the external supervisor to present the case and ask for information. While most of the board members interviewed found it difficult to imagine that an external supervisor would have more information on their organization than they would themselves, this board member pointed out that in some cases the external supervisor has greater knowledge and experience of specific kinds of incident and may be able to provide the supervisory board with information to help them understand the severity and scope of the incident. In her experience, this extra information contributed to better performance by the board. She also pointed out that not everyone on the board shared this opinion at first. Members who had not previously been in regular contact with an external supervisor were not willing to initiate contact with an external supervisor. She stated:

*'... unknown is unloved. To those [members] of the supervisory board of hospital [...], I said over and over again: you have to call the NZa. But, people were dreading that call, they did not dare to do it, you see? Something has to be done about this. They [the NZa] are an authority, they are too distant.'* (member of a supervisory board where an incident had occurred)

Being a supervisor at several supervisory boards, she expressed the view that there is often a great deal of hesitancy about contacting external supervisors on the part of supervisory board members, because in her experience there are far more board members who have never communicated with an external supervisor than board members who have.



For external supervisors, approaching a supervisory board can offer an alternative way to achieving their goals.

*'You [an external supervisor] can't supervise everywhere at all times. You just don't have the manpower, or the skills. And I think you shouldn't want to either. That would almost be a step on the road to a police state. It is about optimal involvement at the maximum distance. So you need other mechanisms so that you don't have to do this. I think a supervisory board is one of the most important mechanisms for doing this.'* (member of a supervisory board where an incident had occurred)

External supervisors are open to contact, but are searching for ways to involve supervisory boards. In 2013, the subject of contact between external supervisors and supervisory boards was put on the agenda of an annual meeting of external supervisors in order to explore this subject.<sup>71</sup> That meeting served as the inspiration for this research. In the interviews, the NZa and the Inspectorate both stated that they appreciate the contact they have with the branch association for supervisory board members to discuss the subject.

#### 4.7.3 Ability

In addition to the obstacle of *knowledge of how to* establish contact between supervisors, the *ability to* do so is equally important. As to the question of whether external supervisors and supervisory boards are capable (legally and institutionally) of cooperation in the event of an incident at a healthcare provider, there is no legal obstacle preventing contact between external and internal supervisors; however, as mentioned above, there are some institutional obstacles to take into account.

##### *Confusion of roles*

First, there is the risk of the confusion of roles. The interviewees stated that they should not and would not want to take the place of the executives. In order to prevent this from happening, they recommended that external supervisors should address the *executives* when there are problems with the *organization*, and liaise with the *supervisory board* only when there are problems with the *executives*. The external supervisors interviewed took a similar view.

*'Of course, if matters concern the actions of the organization, of physicians, of the back office, then in the first instance this is the responsibility of the executives.'*

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71 Agenda Markttoezichthoudersberaad 2013, <https://www.acm.nl/nl/publicaties/publicatie/11362/Agenda-Markttoezichthoudersberaad-2013>. Accessed 6 June 2016.

*When matters concern the executives, it is the responsibility of the supervisory board.’ (external supervisor)*

On the other hand, the more the incident is due to poor performance of the executives, the more the supervisory board would need to take over the role of the executives to ensure that the organization is run well. At the same time, however, the closer the supervisory board comes to the role of the executives, the harder it becomes to separate these two roles. In the literature on governance, it is noted that once the organization and the executives are back on track again, it is important that the supervisory board reverts to its original advisory and supervisory role (Van de Loo & Winter, 2015, p. 76).

#### *Strained relationships*

The board members interviewed also spoke of the risk of strains in the relationship between the supervisory board and the executives. Since the executives are the first point of contact for external supervisors, the board members interviewed expected the executives to feel side-lined if external supervisors were to contact the supervisory board directly. This is why the interviewees recommended that contact should occur with the knowledge of the executives and that external supervisors should only contact supervisory boards if there were to be some problem with the executives.

*‘If you have separate conversations, then you vote on a motion of censure against the executives. Then you have to be brave and say: “dear executives, we don’t trust you any longer, we need to have a proper dialogue.” You should not seek to legitimize yourself by means of the Inspectorate.’ (member of a supervisory board where an incident had occurred)*

#### *Capture*

A third risk, is the risk of capture. This refers to a situation in which an external supervisor becomes too closely involved in seeking a solution with the supervisory board. When relations become too close, an external supervisor risks losing its ability to retain a position of independence and impartiality. It may become reluctant to take the corrective and punitive measures necessary (Pollmann & Raaijmakers, 2009; Carpenter & Moss, 2014; Externe Onderzoekscommissie MST, 2009). Where the external supervisor trusts the supervisory board in its approach to resolving a problem, the external supervisor must make sure that it does not rely on this approach for too long. Giving a supervisory board the chance to resolve a problem before taking formal measures can have advantages for both parties, but when this proves ineffective, the external supervisor should abandon the approach in good time and take action itself.

*(...) the question is to what extent you [the external supervisor] monitor the actions of the supervisory board. In this case, you can check what kind of investigation report the supervisory board has at its disposal and how they are following up the recommendations in the report. Or you can state: is the fact that an investigation has been ordered enough for now?’ (member of a supervisory board where an incident had occurred)*

One of the board members interviewed suggested that guidelines would be very helpful. Guidelines could provide a procedure to be followed and bring clarity for both parties and their different roles. The Ministry recently announced that the Inspectorate and the NZa will publish a joint supervisory framework on good governance. This framework will also address the relationship between external supervisors and supervisory boards (Ministry of Health, 2016a).

#### *Hesitancy in establishing contact*

The hesitancy mentioned earlier with regard to establishing contact between the supervisors because they do not know each other personally represents an obstacle. Some board members interviewed stated that most board members do not yet know who external supervisors are or what they do. Likewise, external supervisors are unsure of how and when contact with a supervisory board is appropriate (WRR, 2015). Establishing relations through, for instance, (sectoral) meetings was favoured by most interviewees as this could help remove barriers to contact.

#### **4.7.4 Action**

Do external supervisors and supervisory boards cooperate in practice when an incident at a healthcare provider occurs? As mentioned above, with a few exceptions, supervisory boards do not generally initiate contact with external supervisors in the event of an incident. The documents analysed and the interviews show that supervisors do initiate contact with supervisory board members, but there seems to be a difference between the approach of the Inspectorate and the approach of the NZa.

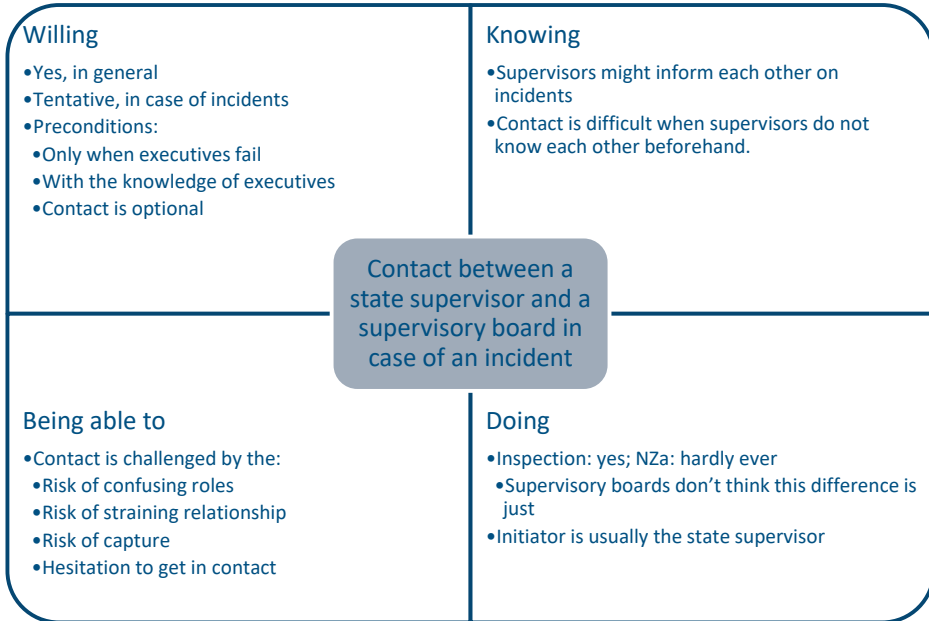
With regard to the Inspectorate, in five of the cases studied, there was contact between the Inspectorate and the supervisory board at some point in time, sometimes in the presence of the executives. Some interviewees also referred to annual meetings with the Inspectorate to exchange knowledge – without any focus on a particular incident – with the executives of healthcare providers in the presence of one or more members of the supervisory board. The supervisory board members interviewed who attended these meetings valued these as opportunities to get to know each other. The discussions

provided fruitful input for further internal discussions in order to enhance the performance of the organization.

Unlike the Inspectorate, it is remarkable that none of the documents from the NZa regarding incidents with incorrect declarations mention any role for the supervisory board, nor was there any contact between both supervisors. From the interviews with supervisory board members, as well as with the NZa, it appears that there is occasional contact in the event of an incident. Those incidents did not involve incorrect declarations, but mismanagement on the part of one or more executives and both supervisors shared their concerns. These incidents did not lead to formal measures being imposed by the NZa.

Most supervisory board members interviewed stated that there is no ground for this difference in approach between the NZa and the Inspectorate. Like the Inspectorate, the NZa has responsibility for assessing the role of governance. As well as incidents involving quality and safety, the supervisory board members would like to be offered the opportunity to address issues when it comes to incidents involving incorrect declaration. The role of the supervisory board on the correctness of declarations does not differ from their role on quality and safety and as such, these areas should not be treated differently.

*'(...) If you [an external supervisor] want to realize change within an organization and the executives are not willing to change, you can try to contact the supervisory board. You want something to change and that might be in the field of quality of the care provided or in the field of finance. What I want to say first is I think that there are differences, in the sense that with issues involving correct declarations for instance, you have in fact a situation from the past which is good or wrong or in-between, but if it is wrong than it just has to be repaired, full stop. Otherwise a fine will follow just because they have acted outside the boundaries of the law, whether or not it was deliberate. (...) Mistakes in the field of quality are hardly ever on purpose, whereas mistakes in the field of finance certainly can be deliberate. (...) But, of course, in principal both cases are the same. (...) When something goes wrong in hospital X, the NZa imposes a fine and carries out an analysis, and then that analysis should also focus on the question of whether the supervisory board was proactive enough. If the supervisory board was negligent, you should – as in the field of quality – just say that this could have taken place under the supervision of this board. That is justified, I think.' (member of a supervisory board where no incident had occurred)*



**Figure 4.2:** Summary findings

## 4.8 CONCLUSION

Our findings can be presented in the following figure.

In situations where executives fail, the members of supervisory boards interviewed – as well as the external supervisors – are in favour of contact in the event of an incident, with the knowledge of the executives. The members of supervisory boards interviewed would like to be given the opportunity to resolve a problem that has led to an incident before external supervisors impose formal measures themselves, while their progress is monitored by the external supervisor. The responsive enforcement policy of the NZa and the Inspectorate, as described in section 4 of this chapter, allows for such an approach. This enforcement policy allows relatively 'light' measures to be taken by the external supervisor, with self-regulation and improvements to the managerial capacities of the healthcare provider to resolve the problem for themselves; more stringent measures will only be taken if unsatisfactory progress is made towards remedying the situation.

There are several advantages for the healthcare organization if both supervisors liaise. First, from experience it appears that contact can provide the supervisory board with information regarding an incident that can help it recognize and understand the severity and the scope of an incident. This extra information from the external supervisor

can help the board to improve its performance. Second, it can enable the organization to avoid a difficult period in which the supervisory board rather than the external supervisor intervenes, preventing the organization from the possibly disruptive period of intervention by an external supervisor. However, sometimes a shock is needed to ensure that the necessary changes are made within an organization to prevent such an incident from happening again (Van Erp & Mein, 2013).

For both the Inspectorate and the NZa, contacting a supervisory board allows them an additional route to achieving their goal. A supervisory board can be their ally, at least insofar as the interests they are protecting are comparable in the sense that external supervisors can expect supervisory boards to do what is in the interests of clients at the micro level (Van de Bovenkamp et al., 2017). To make these contacts possible, it is necessary to overcome any reluctance to establish contact with each other. One way of doing this could be by holding regular (annual) meetings attended by both supervisors to get to know each other and to facilitate contact if an incident occurs. For instance, such meetings could be organized by external supervisors in cooperation with the Association of Internal Supervisors in the Healthcare Sector (NVTZ) or representatives from external supervisors could attend member meetings of the NVTZ from time to time. Guidelines could provide clarity and reduce (legal) uncertainty about when, how and why the two supervisors could contact each other, as well as when and who should play which role. Clear guidelines might prevent the risks of the confusion of roles, strained relationships and capture.

Other potential advantages for external supervisors are less obvious. As the WRR has pointed out, contact with supervisory boards can help external supervisors to make sure that their knowledge about relevant signals and system risks is up-to-date. It remains to be seen whether this benefit can be realized, because the interviews reveal that members of supervisory boards can hardly imagine a situation in which they would initiate contact with an external supervisor. Even in cases where incident must be reported, they would rather urge their executives to notify and dismiss them if they refuse than notify the external supervisor themselves.

A situation in which a supervisory board is given the opportunity to resolve a problem itself, rather than an external supervisor taking (publicly announced) measures, raises questions about whether a learning effect for other organizations (still) can be achieved. Where an organization can resolve a problem itself, it is less likely to make its findings public than when an external supervisor publishes a formal report or decision on the incident. Earlier research has shown, however, that healthcare providers prefer to use press-reports from the Inspectorate to evaluate their own organization than the under-

lying extensive reports (Van Erp & Mein, 2013). Therefore, when a supervisory board – as opposed to an external supervisor – is addressing issues within an organization, the Inspectorate could still generate a learning effect for the sector by publishing a press release on the incident for distribution among other healthcare providers.

I recognize that this chapter has several limitations. First, having interviewed nine supervisory board members and three experts from two external supervisors, I realise the sample is small. The findings only reflect their individual opinions on the subject. The interviews did however provide an opportunity to discuss the subject thoroughly with very experienced supervisors, which produced high-quality information. This information enables us to deepen our understanding of the relationship between internal and external supervisors and to identify some important aspects concerning interaction between them in cases where incidents have occurred. Future research could explore whether these findings are supported by a majority of the supervisors and could add a more concrete dimension to the recommendations on guidelines and establishing contact between internal and external supervisors.

Secondly, this chapter is limited to situations during an incident. Future research could also elaborate on how interaction between external supervisors and supervisory boards could contribute to the prevention of incidents through knowledge-sharing and exchanging experiences in order to understand how systems can enable the signalling of incidents and the advantages and disadvantages of various forms of intervention.

Thirdly, this chapter is limited to interaction between supervisors in the Netherlands. Although comparative research is absent, this chapter may open up the Dutch debate to other countries. As in the Netherlands, there is an ongoing debate on hospital governance in many European countries (Saltman et al., 2011). National policy-makers in several European countries have focused on the usefulness of adopting the principles of private sector governance to improve the quality and efficiency of the healthcare sector (Saltman et al., 2011). The results of this study into the interaction between internal supervisory boards and external state supervisors may contribute to this search for relatively new approaches to health policy analysis in the Netherlands as well as in other countries.







# 5

## **Exploring the start of collaboration between internal and external supervisors** *Insights from a practitioner's perspective*

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## **ABSTRACT**

Regulatory governance literature pays a lot of attention to the shift from a vertical to a horizontal, collaborative regulatory approach. How regulators can make this transition is however understudied. In this ethnographic study we analyse such a transition from a practitioner's point of view, observing the Dutch Healthcare Authority's (NZa) Good Governance project. Using insights from regulatory governance theory on collaboration, we analyse how the NZa differentiated and aggregated its activities to control its task to collaborate and to grow curiosity and hospitality to get to know its partner in collaboration: the internal supervisor of healthcare organizations. This research contributes to our understanding of the relationship between external and internal supervisors as well as the forces at work while exploring a more horizontal approach to regulation.

## 5.1 INTRODUCTION

Following severe incidents in the semi-public sector in the Netherlands, such as mismanagement of a large health care provider that forced it into bankruptcy, Dutch politicians called for public innovation of supervising health care providers. In addition to the traditional outcome-oriented supervision of care providers, the external supervisors should supervise the (good) governance of care providers; and internal and external supervisors should supplement and reinforce each other through collaboration (Ministry of Health, 2015a). The call triggered the NZa, the public regulator responsible for accessible and affordable health care, to reconsider its supervision strategy and start exploring collaboration with internal supervisors of health care providers in the context of good governance.

Earlier research indicates that a collaborative approach can indeed spur public innovation (Hartley et al., 2013). Although regulatory governance literature describes the shift from a vertical style of supervision toward more collaborative approaches as self-evidenced (Crawford, 2006; Lewin, 2016), in practice neither the external, nor the internal supervisors knew how to establish collaboration (see also chapter 4). External supervisors were concerned collaboration could lead to capture (Lewin, 2016); internal supervisors were reluctant to collaborate, because they feared encroaching on the role of the executives (see also chapter 4).

In this chapter, we examine how the NZa works from a vertical, to a more horizontal, collaborative supervisory practice that involves interaction with internal supervisors. Hereto, we have conducted a qualitative study, based on an ethnographic data collection of the change- and learning process of the NZa by observing its project called 'Good governance'. This research approach 'from within' is complementary to the more normative reading of collaboration models, such as Ansell and Gash's collaborative governance model. The observation of the Good Governance project is an added value, because this project provides insight into the dialogue and associated dynamics and micro processes between internal and external supervisors. By putting a magnifying glass on the (difficult) establishment of actual contact it shows that collaborative processes (for example, shaping a dialogue, the search for shared trust and discussing precarious topics) are not as linear as existing models suggest.

Below, we first describe the background for the regulatory change by reporting on an analysis based on parliamentary documents we made prior to the fieldwork. Next, we provide a short overview of relevant elements of regulatory governance theory and the methods we used to address our research question. We then present our findings and

conclude with a discussion of the results, offering insights relevant to both theorists and practitioners interested in starting a collaborative regulatory strategy.

## 5.2 BACKGROUND

Most Dutch health care providers are not-for-profit private entities with the social purpose of providing care to patients (Maarse & Lodewick, 2011). Supervision within Dutch health care providers is most commonly organized as a two-tier structure consisting of two independent bodies: the executive board and the supervisory board. The executives are legally responsible for delivering the quality and safety of care and for meeting the conditions to make this possible. The task of supervisory boards is to supervise the executive board and the general state of affairs in the care organization and to assist the executives with advice. The supervisory board fulfills the employer's role for the executive board.

Where executives and internal supervisors fall short, external supervisors, the NZa and the Inspectorate for quality and safety of health care, must protect the public interest (Ministry of Health, 2016a). When contacting regulatees, the NZa and the Inspectorate traditionally approach executives, ignoring the internal supervisors (see also chapter 3 and 4).

In several parliamentary documents, the Minister of Health has defined the call for enhancing supervision through collaboration in the context of good governance. The external supervisors, the NZa and the Inspectorate, and the association of internal supervisors should meet and explore how both could supplement and reinforce each other (Vaste commissie voor VWS, 2015b; Ministry of Health, 2016a). Mutual recognition of responsibilities and roles is key, according to Parliament. Because executives are ultimately responsible for the care organization, they are the first point of contact for external supervisors. By also approaching the supervisory board, the external supervisors obtain a picture of how the internal supervisor organizes and implements its responsibility to the executive board, and vice versa (Ministry of Health, 2015c). If the external supervisor has confidence in the executives and internal supervisors, it can show restraint with regard to its own regulatory activities (Vaste commissie voor VWS, 2015a). Yet, at the same time, the Minister raised doubts whether internal supervisors were up to their task (Ministry of Health, 2015a), giving the external supervisors rather an invitation to educate internal supervisors hierarchically than a motive to collaborate with them.

To meet the call for interaction to reinforce supervision on the good governance of care providers, the NZa and the Inspectorate published a ‘Supervisory Framework on Good Governance’ in July 2016. The Supervisory Framework defines good governance in terms of expected behaviour of the executives and internal supervisors and organizational culture and explains how the NZa and the Inspectorate aspire to regulate good governance: When the executive and the supervisory board of a care provider do not live up to these expectations, the NZa and the Inspectorate will invite the boards to a meeting that they have labelled a ‘governance conversation’. When the NZa and the Inspectorate are confident of the boards, they will show restraint with regard to their own regulatory activities. The NZa and the Inspectorate aspire a dialogue with health care providers in order to assess the extent of good governance and to build trust, aimed at mutual consultation and exchange of information.

The Association of Internal Supervisors in the Healthcare Sector (NVTZ) presented their view in a Policy letter in November 2018, containing several ideas for collaboration. First, internal and external supervisors could organize general meetings where they exchange benchmark information. Second, in exceptional cases, where the executives have lost the trust of supervisors and the instruments available to the internal supervisor are insufficient to reach a breakthrough, the supervisory board could use the external supervisor as a kind of crowbar. The policy letter stresses that internal supervisors cannot be perceived or utilized as an extension of external supervision, because each has their own tasks and responsibilities.

Interestingly, the NVTZ and NZa/Inspectorate documents were published independently of each other and without consultation. The differences in approach—especially with regard to the questions whether internal supervisory boards should be seen as an ‘extension’ of public supervision—proved crucial in later phases as we will show in our analysis. First, however, we discuss our theoretical approach.

### **5.3 THEORY**

Traditional hierarchical supervision can be associated with a vertical style of supervision, whereby the external supervisor dictates the desired conduct (process) top-down and non-compliance is a starting point for intervention (Ottow, 2015; Rutz, 2017). The call for enhancing supervision by the Minister of Health comprises two shifts in the supervision strategy of the NZa. A call to extend traditional supervision to – also – supervise the way a health care provider is governed. And a call to start collaboration with internal supervisors in a more horizontal manner. The first call is connected to what in the lit-

erature has been defined as ‘process-oriented regulation’ that mandates and monitors organizations’ self-evaluation, design, and management of their primary processes and their second-tier governance and controls (Gilad, 2010). The underlying assumption here is that good governance leads to a better change to reach the desired outcome: affordable, accessible and safe care of good quality.

The second call, collaboration between external and internal supervisors at a mutual level, can be associated with a horizontal style of supervision. This style is associated with two-way communication, deliberation and reflection, where compliance becomes a shared problem-solving process rather than an ordering activity (Lobel, 2004; Ottow, 2015; Rutz, 2017).

Collaboration between regulator and regulatee can take many forms (Black, 2001a; Crawford, 2006; Halpern, 2008). It can be as little as just exchanging information, and it can go as far as dispersing regulatory authority between public regulator and private stakeholder (Van Kersbergen & Van Waarden, 2004; Reynaers & Parrado, 2017). Several authors have provided frameworks for understanding various kinds of collaboration (Bryson et al., 2006; Thomson & Perry, 2006; Ansell & Gash, 2008; Huxham & Vangen, 2010; Sørensen & Torfing, 2011; Emerson & Nabatchi, 2015) and they all agree collaboration is complex (Johnston, 2005; Vangen, 2017).

In earlier research, a wide area of variables influencing the start and continuation of collaboration is identified. Some make a difference between the ‘initial (starting) conditions’ or ‘system context’ that shape collaboration and drivers and barriers that either stimulate or hamper collaboration (Sørensen & Torfing, 2011; Emerson & Nabatchi, 2015) while others approach it as (overlapping) ‘themes in collaboration practices’ in search for the consistencies and paradoxes between these themes (Huxham & Vangen, 2010; Vangen, 2017). A description of all possible variables would be beyond the scope of this chapter. Instead, for our research on the start of collaboration between the NZa supervisors and internal supervisors of health care providers, and their hesitance to actually get in touch with each other, we focus on the motives, and on the commitment to collaborate of the NZa project members.

People have a motive to start collaborating when they experience interdependency, and benefits of collaboration are seen to outweigh costs (Lobel, 2004; Thomson & Perry, 2006; Ansell & Gash, 2008). People also need to be committed to start collaborating. Ansell and Gash note ‘commitment to collaboration can still require a very significant psychological shift, particularly among those who regard their positions in absolute terms.’ (Ansell & Gash, 2008, p. 559). In our regulatory context, such a shift implies that

both parties should alter their view of a traditional vertical regulator-regulatee relationship and grow the skills and belief that it is possible and rewarding to work together. They need to reflect on, and go beyond, existing frames of supervisory techniques and practices which they have for so long worked with (Osborne, 2006; Sørensen & Torfing, 2011; Crosby et al., 2017).

Albeit not in a situation of collaboration, but in negotiation, Putnam (2004) identifies several conditions that foster transforming moments, which allow participants to reach new understandings of their situation. A new understanding can be triggered by frustration with the ineffectiveness of the traditional approach or by developing a stance of curiosity or connecting with the other party (Putnam, 2004, p. 284). A stance of curiosity is about an open-minded interest to explore and learn. Connecting means creating a 'shared web of knowledge by finding links between experiences, thoughts, and feelings', by sharing information and learning to understand the other party's point of view. Connecting fosters an atmosphere of trust between negotiating parties (Putnam, 2004) and is also relevant between collaborating parties: '*why would you share responsibility with people you don't trust?*' (Ansell & Gash, 2008, p. 560). Prior interactions are important to the level of trust between participants as well as to their incentive and commitment to collaboration (Ostrom, 1998; Bryson et al., 2006; Ansell & Gash, 2008). In short, the more participants interacted positively in the past, the more they are likely to trust each other and be willing to collaborate in the present; and vice versa: negative previous encounters lead to distrust and hesitation to collaborate.

Theories of collective actions indicate that commitment to cooperate rises when individual participants communicate face-to-face, exchanging mutual commitment, increasing trust, creating and reinforcing norms, and developing a group identity (Ostrom, 1998). Ciborra once introduced the phenomenon of 'hospitality' as a metaphor to give words to the precarious process of building a new relationship (Ciborra, 2002). He describes hospitality as the human process of making the stranger a human like oneself by listening, sharing, reaching out and crossing boundaries. By being hospitable people can deal with new persons (or things) as an ambiguous stranger – a friend or an enemy. Hospitality leads to innovation and learning, because it requires a cognitive displacement in a foreign territory and culture.

The notion of trust-building and hospitality offers an opportunity to explore the new relationship between the external and the internal supervisor, hence we included this theme in our analysis. Analysing the change and learning process of the NZa we examined:



- How does the NZa shape the reframing process to move from a vertical to a more horizontal supervisory style?
- How does the perspective of the NZa project members on collaboration affect their commitment to start collaboration with internal supervisors?
- How does the NZa project team manage hospitality and trust-building with regard to internal supervisors?

## 5.4 METHODOLOGY

We used a single-case study design and selected the NZa project on Good Governance as it was an excellent case to study how (public) external supervisors dealt with the task to start collaborating with (private) internal supervisors. Between August 2017 and December 2018 the first author conducted ethnographic fieldwork at the NZa to document and analyse the Good Governance project. With the prior consent of the NZa team members, she had access to the research site because besides working part-time as a researcher she also works for the NZa. The fieldwork activities included observation, interviewing and document collection. The first author observed and took part in 33 biweekly meetings of the Good Governance project team, one meeting between team members and two delegates of NVTZ, one conference on Good Governance attended by 17 inspectors of the NZa and 17 inspectors of the Inspectorate and one conference of the NVTZ. In addition, the first author interviewed the manager of the department where the project team was housed, three NZa team members (separately), and one expert from another Inspectorate to reflect on the data.

The first author was an observing participant of the Good Governance project team. As she was an observer of the 'lived realities' of her own organization (Alvesson, 2009), we were aware of the dangers of close involvement with the research subject and took three precautionary measures to prevent any methodological bias. First, the first author benefited from a moderate degree of personal involvement, because the project was based at the Supervision & Enforcement department and she works in the Legal department. Second, the collected data was analysed by all three authors, two from outside of the NZa (the second and third author), whose lack of insider knowledge enabled them to question interpretations. Intermediate results were discussed and these conversations resulted in further investigation. Also, situations showing tangible tension in the first author's dual roles of regulator and researcher were made explicit during our conversations (cf. Rutz, 2017). Finally, the first author presented the interim findings at two workshops attended by 20 individual inspectors from nine public regulators and inspectorates, followed by another workshop attended by 40 internal supervisors. The

first author took notes of the subsequent discussions which were included in the final analysis. Sharing the data assisted self-reflection, and helped challenge potentially taken-for-granted forms of understanding.

We tried to increase the validity of the study by planning and discussing the observation process, the pros and cons, and the way to record our findings in advance. Most team meetings were recorded and the first author always took notes as well.<sup>72</sup> After the meetings, the first author wrote up a report from the observation notes and relevant parts of recorded discussions were transcribed. The original transcripts and texts are in Dutch with citations translated into English. Theoretical or reflective notes, kept distinct from the observation notes, complemented the reports that were helpful in the discussion and analysis of the findings with the other authors.

Triangulation was used to validate the results. Besides taking observations and interviews, we studied the documents produced by the Good Governance project team, such as the project plan, the (draft) vision report on Good Governance and several (draft) manuals. All documented data were analysed to ascertain the extent to which the information provided helped answer the research questions. After eight months of observation, we did a member check, with the first author presenting the research findings and interpretations to the members of the Good Governance project team. Their comments served as a check on the viability of the interpretations.

The data analysis combined inductive and deductive methods. Data were coded deductively, resulting in four top-level codes: (1) the reframing process; (2) motives; (3) commitment; and (4) hospitality. We used these four theoretical codes to portray the process of initiating collaboration. By combining theories from the literature and the empirical findings, we inductively developed new insights on a profounder level than the four top-level codes. We then used these insights as a heuristic to describe how the NZa constructed a more horizontal, cooperative supervisory practice.

## 5.5 FINDINGS

During the rollout of the project, establishing initial contact with internal supervisors and developing a collaboration process ran in parallel. First, we present how the team

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72 Discussions of individual cases during team meetings were off the record. Because case discussions could reveal the names of regulated healthcare organizations under suspicion, the team considered them too confidential to be recorded. At these moments, the researcher took field notes only.

members of the Good Governance project got their first experience collaborating with internal supervisors and how these experiences impacted their view on collaboration with internal supervisors. Then we present how the team members approached the project, to be able to carry out the assignment.

### 5.5.1 First contact

At the start of the project the NZa team members were uncertain what to expect from interaction with internal supervisors. They did not know from experience how capable or reliable internal supervisors are and they had the Ministerial ‘warning’ in the back of their mind. The NZa team members made contact with supervisory board members in cases where the NZa questioned whether the executive board of a health care provider complied with the definition of good governance as described in the Supervisory Framework. There was no collective process to construct the objective each party wanted to obtain by collaborating. After several conversations, the NZa team began doubting the capabilities of internal supervisors. Whereas the NZa team had expected that the internal supervisors would share their view and act in the best interests of the public, they instead perceived internal supervisors to act in the best interests of the healthcare provider they supervise, or to act in the interests of maintaining a good relationship with the executive board. An NZa team member remarks:

*‘I suspect that (...) supervisory boards firmly support the executive board. It was typical. Even in a conversation where only the supervisory board was invited, they still brought along their executives. This supervisory board did not want to talk to us by itself.’ (NZa team member)*

The conversations fuelled the uncertainty the NZa team members felt: were internal supervisors fit to collaborate with? The team did not question why internal supervisors did not seem to share their view of the situation. To the NZa inspectors it was clear what the ‘public interest’ was and deviating from this meant that the internal supervisors were not acting in the interest of the public.

Seen through the lens of an external supervisor it might seem logical that the internal supervisor should correct its executives where public interests are endangered by those executives, for supervisory boards are legally the superiors of the executives. But internal supervision is more comprehensive. The findings in chapter 4 indicate that because normally the executives are the first point of contact for public regulators, supervisory board members fear that executives will feel side-lined if there is a relationship between the NZa and the supervisory board. When a relationship between external and internal supervisors leads to mistrust between executives and internal supervisors and the

executive board might feel it has no support of the supervisory board, the executives might hesitate to provide the supervisory board with information it needs to supervise. Furthermore, to supervise is not their only task: supervisory boards are also responsible for providing the executives with advice. In practice, where advising should stop and supervision starts is a grey area (see also chapter 4).

Moreover, by civil law, supervisory boards are supposed to act in the best interest of the organization they supervise, while in contrast, according to several Parliamentary documents and the NZa's Supervisory Framework, supervisory boards are supposed to act in the best interest of the public. There are multiple public interests, which can vary on a case-by-case basis. In the Dutch healthcare sector, as well as in other countries, market forces are becoming increasingly important. The distinction between public and private interests is becoming diffuse because of the increasing complexity of organizational structures (Trubek, 2006; Hodgkinson, 2013). In the Dutch healthcare sector – where a substantial part of the market is unregulated and care providers are required to act as competitive market players – the best interest of the organization is not necessarily equal to the best interest of the public. In many situations the composition of public interests is not clear, nor which interest should prevail (see chapter 2). Given this confusion, it is understandable that supervisory boards are uncertain at least about how to collaborate with a public regulator too.

Hence, whilst the NZa team members assumed that internal supervisors serve the public interest and not the organizational interest and that it is clear what the public interest is, both assumptions are debatable. However, the team did not question these assumptions, so that the existing frame of supervisory techniques and practices was not challenged and an opportunity was missed to discover new interpretations and new ways to facilitate understanding of a relationship with internal supervisors.

### **5.5.2 The project approach**

During the rollout of the project, we observed various steps the team took to deal with their uncertainty on what to expect from interaction with internal supervisors. First, the team narrowed the original goal to a manageable size. Second, they unilaterally drew a manual on when and how to contact supervisory boards. Third, after feeling in control of the assignment, they became curious about the other participant: the internal supervisors. We will elaborate on these three steps below.

#### *Narrowing the goal*

According to the project plan, the goal of the Good Governance project was to implement the Supervisory Framework on Good Governance. In the framework, the NZa sets

ambitious but quite abstract goals. No experience was gained with the abstract concepts of ‘good governance’ or when to put as much trust in a board that the NZa could show restraint with regard to its own regulatory activities. Instead of starting to implement all elements at once, the project team made their assignment manageable by pinpointing their main goal as a subset of the original goals of the framework. They selected cases concerning malfunctioning executives and focused on ‘governance conversations’—the meetings with executive and supervisory board when they do not live up to the expectations of the NZa. They did not invite health care providers to reflect on their intentions. One team member commented in retrospective:

*‘From the start of the project we were supposed to deliver products that enable the NZa to have governance conversations on the behaviour and culture of health care boards, arising from the Framework on Good Governance. Our objective had a narrow focus. We delivered it, but now we see that it is broader than only the governance conversation (...)’*  
(NZa team member)

Hence, due to their uncertainty, the project team did not collaborate as initially directed by the Minister, but shifted the goal to implement the most manageable aspect: holding ‘governance conversations in the case of malfunctioning boards’. The Supervisory Framework introduces the governance conversation as vertically oriented, with the external supervisor calling executive boards and/or supervisory boards of care providers to account. Choosing to work on the governance conversation meant that the team linked the new idea of interaction to their familiar values (comp. Gilad, 2014) and allowed them to stay close to the vertical regulatory approach they were already used to, instead of starting collaboration at a more reciprocal level.

#### *Designing a manual*

The team also tried to reduce uncertainty by translating the complex reality into a manual on governance conversations, based on desk research. The developed manual contained rules on when to contact internal supervisors and what to discuss with them. It got the shape of a filter: inspectors could submit information on a potential case at the wide end of the filter and the solution on how to supervise came out at the other end. Yet a manual can also have undesirable effects, as it leaves little space for tailor-made solutions to a concrete case. As the NZa team soon discovered, this meant wrestling with the friction between theory and practice:

*‘We need to set norms: what’s allowed, what’s not? Particular behaviour can be good and appropriate in the first case, but in the next case it can lead to nothing but problems and poor management. (...) I understand our reflex to deliver theoretical*

*definitions, but it doesn't [always] fit good governance cases in practice, where a lot depends on the specific situation.'* (NZa team member)

The team experienced that 'good governance' cannot be caught in detailed norms. Over time, they noticed that the manual was beautiful in theory, but not one case actually fitted in:

*'It was the ideal 'good governance' case: because of financial problems [a health care provider] couldn't meet the quality norms, their employees were airing their concerns through the media and the executive board was pretty laconic about the whole situation. But in dealing with this case, our management did not want to follow the steps of our manual for governance conversations. They were just fed up with that board and wanted them to resign.'* (NZa team member)

It is important to note here that discharging board members was not in the manual; the NZa lacks a legal mandate to enforce. After these experiences, the team realized that they were unable to handle cases without a manual to provide some sort of guidance, but also unable to create this manual without practical experience. One of the team members noticed:

*'I see an interplay: you can't look at the practice without some sort of frame, but you can't develop a framework without looking at the practice. (...) We share our field experiences and use them to enhance our manual.'* (NZa team member)

Team members shared their experiences, within the team as well as in a meeting with the Inspectorate, and used their knowledge to adapt the manual where necessary. For instance, the members learned that if they discussed board behaviour with an executive board without involving the supervisory board, they themselves ran the risk of taking over the responsibilities of the supervisory board, as this quote from a team member illustrates:

*'In this case the team was sucked in too deep. It was almost playing an inappropriate role for a public regulator... almost becoming some sort of internal supervisory board.'* (NZa team member)

As a result of these experiences, the team included a new step in the manual: in all cases the NZa should (also) get in touch with the supervisory board in order to trace how the supervisory board perceived the incident and how they planned to solve the issues at hand. Hence interestingly, while they were drafting the framework to gain control,

with releasing control a bit by adjusting the manual based on practical experience and reflecting on it, the team members became increasingly confident with the assignment.

#### *Getting curious*

Having gained confidence by obtaining knowledge and experience, the team began wondering how the internal supervisors saw the possibilities of collaboration. To satisfy their growing curiosity the team started attending meetings with the association of internal supervisors to share and discuss their ideas of good governance practice, in accordance with the Supervisory Framework's promise 'to enter into a dialogue and to look for a connection'. For instance, one meeting was a large seminar organized by the association of internal supervisors of health care providers, NTVZ. Besides attending several workshops, the NZa team – among other organizations – set up a meeting point, where they could meet internal supervisors passing by in an informal way. The team members satisfied their newly grown curiosity by chatting informally with internal supervisors, exploring each other's view on collaboration, good governance and on supervising health care providers in general.

Though it still seemed to be a balancing act between the new horizontal approach (trying to connect and discuss good governance with internal supervisors) and the traditional vertical approach (by telling internal supervisors what the NZa expects of them), the NZa team members began feeling more at ease interacting with internal supervisors. After speaking to supervisory board members, the team members became more empathic and sympathetic to the perspective of internal supervisors. Team members shared their experiences in team meetings, discussing their conversations with internal supervisors: their shared passions for the profession of supervising health care organizations in general, and their shared concerns about certain developments in the sector. One team member noticed:

*'Many issues the NZa is concerned about are also a concern for the internal supervisors I spoke to. For instance, like us, they're worried about the position of an executive who is also a shareholder, (...) or how to deal with profit distribution. It would certainly be worthwhile exploring these issues together.'* (NZa team member)

These experiences contrasted with the previous experiences of governance conversations with supervisory boards, where in the heat of the moment to solve an incident, little room was left for discussing roles and different viewpoints. One team member observed:

*'We see that the distinction between 'supervising a supervisory board' and 'supervising with a supervisory board' is unclear. There is a grey area in between. Because, when we're in a meeting with a supervisory board and notice that it's not fulfilling its obligation properly to correct its executives, the way the NZa would like it to do, we're probably inclined to shift the tone of the conversation from informative to corrective.'* (NZa team member)

Hence, building mutual understanding and trust is less difficult in general meetings where external and internal supervisors explore the similarities and differences in their ideas of collaboration than in the setting of a governance conversation, which is characterized by an ambiguous grey area between supervising a supervisory board and supervising in collaboration with a supervisory board.

This is not the end of the story. No fully developed working method has yet been established as to how internal and external supervision can reinforce and complement each other, but an interest has been aroused to actually get in contact and to instigate joint discussions about creating a relationship. Discussing the relationship together (repeatedly) brings the opportunity to explore a common understanding of their relationship (Ciborra, 2002; Etienne, 2012; Ansell & Gash, 2018) and to discuss the balancing act between distance and involvement. Too little distance leads to a risk of capture, for it may result in aligning with the interests of the regulatee rather than operating in the public interest (Ansell & Gash, 2008; Ottow, 2015; Lewin, 2016; Abbott et al., 2017). Too much distance limits collaboration and prevents team members from becoming detached from the existing frames of supervisory techniques and practices. Although the team members seem to become more and more 'hospitable', willing to listen, share and reach out (Ciborra, 2002), it remains difficult to put the other, the internal supervisor, centre stage.

## 5.6 DISCUSSION AND CONCLUSION

Whereas in the literature a shift from a vertical supervisory practice towards a more horizontal, collaborative supervisory practice is argued for, the observation of the NZa project reveals some difficulties. It shows that the change- and learning process was not linear, but characterized by differentiation and aggregation. First, the team narrowed the goal to a bite-sized chunk (differentiation), then they saw the broader perspective of their assignment (aggregation) again. Within the narrowed goal, two main activities took place: gaining practical experience in various good governance cases and setting up a manual on governance conversations. Aggregation then took place through team



reflection on how to land the practical experiences in the manual and – in the end – in meetings with the association of internal supervisors.

As to the sub-question of how the perspective of the team members on collaboration affected their commitment to start collaboration with internal supervisors, we found that a feeling of being in control is crucial to the team members' commitment to collaborate. 'Uncertainty' limits the view and led to differentiation in goal and activities. Where earlier research reports that uncertainty can drive parties to collaborate (Bryson et al., 2006, Emerson and Nabatchi, 2015), here the team was not prepared to start collaboration as long as they did not feel in control of the assignment. The NZa team focused on what it considered possible, by narrowing the goal of the project. This can be qualified as goal displacement, which can occur in the case of overwhelming task demands (Bohte and Meier, 2000; Huizinga and De Bree, in press). Goal displacement is described as a phenomenon in which the major goals claimed by the organization are neglected in favour of other goals that are, for instance, less vague, ambiguous or ambitious than the original goal (Abramson, 2009). Between the intentions expressed by the Minister and the practice, things are not always so clear cut. The external supervisor had to find its way through this area of tension (Wilson, 1989; Gunningham, 2011).

Then, the team overcame their uncertainty by familiarizing themselves with the theoretical aspects by designing the manual, containing procedures and norms that guide the interaction between the external and internal supervisor, reducing uncertainty in three ways. First, the manual is a way of channeling the information the team has about the boards of health care providers, providing them with a sense of overview and control. Second, it provides guidance to the inspectors: follow the manual and you will not make mistakes or be arbitrary (Raad van State, 2018). And third, it brings certainty because the team can deliver something tangible to management and get approval for their work. The flipside of the coin is that using a manual that is too tight, is equal to denying oneself the chance to communicate, respond, adapt to and learn from the diversity of people and cases (Trubek, 2006; Baldwin & Black, 2008). Hence, the manual provided for a sense of control; the practical experience creates the awareness that a working method grows through meetings with internal supervisors and reflecting on those meetings.

With regard to the final sub-question on how the NZa project team managed hospitality and trust-building, we saw that the team members certainly did try to go beyond existing frames of supervisory techniques and practices, but it appeared immensely difficult to let go of their own vision of 'good governance', thinking from their familiar vertical, hierarchical frame. Good governance of health care organizations is a complex

concept that cannot clearly be judged as right or wrong. In its nature, it provides for a good starting point for a discussion between external and internal supervision on the institutions, behaviour, roles and responsibilities, transparency and accountability of all parties involved. What was (implicitly) irrelevant to the team was the complexity of collaboration from the point of view of the internal supervisor, as described in our findings. And the team members held on to the expectation that the other, the internal supervisor, had to comply with their frame. As long as the team members held on to the frame: *'you have to comply with our rules'*, no actual collaboration was started between the team members and internal supervisors.

Perhaps one of the most important barriers to successful collaboration appeared to be a feeling of being comfortable enough to abandon hierarchical judgment. In our observations, becoming hospitable to internal supervisors started with a sense of control that made the team members confident they understood and trusted their own judgment and abilities. Becoming more confident, gave space to look beyond the narrowed scope and to become curious about the other—even though they were disappointed in the internal supervisor for not safeguarding the public interest. Team members committed themselves to contact internal supervisors to satisfy their curiosity. Whilst in the negotiation literature a stance of curiosity is seen as a condition that facilitates a transforming moment in a conflict process, at which point parties reach new understandings of their situation (Putnam, 2004), our findings show that curiosity can also lead to a transformation in the preparatory phase of collaboration. The team started attending joint meetings, not with a hierarchical, but with a more hospitable attitude (Ciborra, 2002). They released their control of the conversation and let it flow, listening to the stories of how it is to be an internal supervisor and sharing their experiences as external supervisors.

As it turned out, they had more in common with internal supervisors than they thought, and so a foundation stone was laid for the start of collaboration. It remains a continuing challenge for team members to be aware of and to do justice to the perspective of internal supervisors. Although earlier literature describes vertical and horizontal regulatory approaches as opposites, our findings acknowledge recent research (Rutz, 2017; Klenk, 2020) that in practice, there is a grey area in between. With the Ministry's warning regarding the incapability of internal supervisors—confirming a need for a vertical, hierarchical approach—in the back of their minds, the fragile trust of the internal supervisor can easily be undermined by incidents at care providers that they are not informed about, or when external and internal supervisors do not share their views on relevant interests. In case of incidents, where the external supervisor starts questioning the capabilities of the internal supervisor to solve the problem, curiosity can evaporate in a wink while the

external supervisor will return to its hierarchical role and behaviour, thinking it knows what good governance is.

Our research has some limitations. The findings of our ethnographic study derive from just one public regulator, which limits generalizability. Second, the process described in this chapter entails just the preparatory phase of collaboration, not the total process of establishing a relationship between external and internal supervision. As time goes by, motivation and commitment to collaborate might change if team members or managers change, or if the context changes due to incidents, for example. Then, the process might diverge from the path portrayed here.

On the other hand, the focus on the preparatory phase is warranted, as this is a crucial phase in the development of process-oriented regulation. Providing for in-depth insight in the micro-processes of what is just one of the boxes in more general models of collaboration is thus important. Collaboration is complex, as is known from the public administration literature, but our research shows that this complexity is located in the meetings between the team members and internal supervisors (Klenk, 2020). These meetings are therefore a relevant source for doing research. Future research might build on our findings, expanding the research by studying the dialogue between external and internal supervisors: how to tackle feelings of uncertainty and how to create the conditions in which parties are able to adopt a hospitable attitude towards each other in mutual contact. From the perspective of the internal supervisor, it is interesting to study whether and how they struggle with the multitude of relationships in which they are involved as an internal supervisor. From the perspective of the external supervisor, it might be interesting to study the switch between vertical and horizontal supervision approaches – being aware of the difference between choosing a vertical approach because it is the best approach in a particular setting, or choosing a vertical approach because he or she prefers staying in the rut of the familiar vertical approach, not feeling comfortable changing methods.





# 6

## **Ambiguous signaling in regulatory conversations**

*How miscommunication and hierarchy hamper  
voluntary regulatee cooperation*

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**ABSTRACT**

This case study investigates interactions between inspectors and regulatee representatives during regulatory conversations. We study how healthcare inspectors pursue voluntary cooperation from internal supervisors of healthcare providers to alter organizational management practices. We identify ambiguity as a central characteristic of the regulatory conversations. We observe several discrepancies as inspectors display hierarchical behaviour incongruent with the horizontal relationship they aim for – and incongruent with the relationship style that internal supervisors expect. Analysing these discrepancies in terms of relationship types and associated relational signals helps explain and prevent suboptimal communication and reduced acceptance of regulators' demands by regulatees.

## 6.1 INTRODUCTION

Studies aiming to understand interactions between representatives of public regulators (inspectors) and regulatee representatives are often limited to exploring the perspective of the regulator and their inspectors' regulatory enforcement style, separately from regulatees' compliance motivations and perceptions of these interactions (Li & Van Rooij, 2021; Pautz et al., 2017). Such regulatory interactions nevertheless appear to be important sites of conflicts and disputes due to misunderstandings and discrepancies between mutual perceptions that take place in this hierarchical setting (Black, 2002; V Braithwaite et al., 1994; Mascini & Van Wijk, 2009; Etienne, 2012; Gilad, 2014). Studies that do take into account both perspectives showed how inspectors were unable to accurately communicate their intentions, while regulatee representatives were unable to recognize cooperative intentions and perceived regulators as punitive and/or inconsistent (Mascini & Wijk, 2009; May & Wood, 2003; Winter & May, 2001). They also show how regulatory interactions are perceived differently depending on the regulatee representative (Li & Van Rooij, 2021) and context (Carter & Siddiki, 2021). These studies imply a need to better understand regulatory interactions in a way that incorporates regulatees' perceptions of these interactions and the implications for compliance (Pautz et al., 2017, p. 103). This need is especially salient in the absence of readily enforceable norms, because in such a context inspectors need to persuade rather than force regulatees to comply with the norms that they advance (Black, 2009).

We apply Etienne's (2012) relational signaling framework to study regulatory interactions from the perspective of both inspectors and regulatee representatives. More particularly, this chapter examines interactions of inspectors with members of internal supervisory boards of regulated organizations – a group that has not been a focal point for such empirical research before. In the three case studies we present, the Inspectorate and the NZa were concerned that poor executive management of the regulated organization would adversely affect the public interest, and they perceived the executives of the health care providers to be ineffective or unwilling to improve the quality of management of their organizations.<sup>73</sup> But, what constitutes good or poor organizational management may be subjective, and may not be articulated in detail by (enforceable) law. So, obtaining voluntary regulatee cooperation is essential. In response, the regulators searched for new approaches and collaborated with members of the internal supervisory board of the regulated organizations (a discursive form of 'meta-regulation', see Black 2002, p. 172 and Ottow, 2015) to nevertheless address the problem. But, if there

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73 In these case studies we do not explore to what extent the regulators are justified in qualifying management practices as 'poor'.



is no readily enforceable norm underlying such attempts, how do inspectors pursue voluntary cooperation from regulatees in those regulatory conversations? And, specifically, what role does hierarchy play in such attempts? That is the focus of the research reported here.

We study the regulatory interactions between inspectors and regulatee representatives by identifying and analysing the displayed behaviour and the subjective relationship styles (Freeman, 1985; Huitema & Van Snellenberg, 1999; May & Wood, 2003). We derive the displayed behaviour by identifying the behaviour both parties observed during their interaction, making use of the relational signaling theory as elaborated by Etienne (2012). We derive the subjective relationship style by asking both parties about their intentions and perceptions of the relationship (Huitema & Van Snellenberg, 1999; May & Wood, 2003). Comparing the displayed behaviour and the subjective relationship styles brought several discrepancies to the fore that help us understand regulatory interaction outcomes. A better understanding of this dynamic may help to more fully illuminate how voluntary cooperation might be obtained, what role hierarchy plays in this process, and how in such a context regulatory relationships evolve and regulatory objectives can be achieved (comp. Pautz & Wamsley, 2012).

Next, we first provide an overview of relevant regulatory relationship theory and the methods we have used. We then present our findings and conclude with a discussion addressing our research question: How do inspectors pursue voluntary cooperation from regulatees?

## **6.2 THEORETICAL FRAMEWORK**

### **6.2.1 Relevant extant theory**

Whether a regulator primarily aims to elicit voluntary regulatee cooperation or to establish deterrence is a matter of supervisory strategy, or more particularly agency enforcement philosophy (May & Burby, 1998). To what extent this voluntary cooperation is sought also where there is no readily enforceable norm underlying such attempts, as in our case studies, may depend on the regulator's discretionary attitude towards its supervisory mandate (Kasdorp, 2016b) but also on individual inspectors' preferences and enforcement style (Kasdorp & Zijlstra, 2020). Our case studies focus on the ensuing interaction via face-to-face regulatory conversations (Black, 2002) between inspectors and regulatee representatives and the individual cognition and decision making in the context of those conversations. Our theoretical framework is thus positioned at the individual rather than the institutional level. We refer to regulators and regulatees (as

organizations) for instance where the institutional level is relevant to understand inspectors' and regulatee representatives' viewpoint, for example, to interpret the institutional context in which the individual actors operate.

Regulatory inspectors are a particular type of 'street-level bureaucrat' (De Boer, 2018; May & Wood, 2003) who interact directly with citizens with substantial discretion. Inspectors use this discretion to choose their enforcement styles and cope with the uncertainties of their work (Klenk, 2020). Those enforcement styles are relevant here as they affect regulatees' motivations and conduct, and thereby the efficacy of supervisory interventions (May & Winter, 1999; Van Parys & Van Struyven, 2018), particularly when pursuing voluntary cooperation.

Enforcement styles can be defined as the character of the day-to-day interactions of inspectors when dealing with representatives of regulated entities (May & Wood, 2003). They can be conceptualized on a continuum of two dimensions: formalism, the degree of rigidity in interactions that varies from informal to rule-bound conversations (May & Winter, 1999, 2000; May & Wood, 2003), and facilitation, '*the willingness of [street-level bureaucrats] to help regulatees and be forgiving*' (May & Wood, 2003, p. 1999; for example, De Boer, 2018; Mascini & Wijk, 2009; Nielsen, 2015).<sup>74</sup> Inspectors frequently employ a combination of regulatory styles, depending on the situation and the regulated firm (De Boer, 2018; Mascini, 2013; Pautz, 2010; Pautz et al., 2017). They may even display different styles during the same inspectee-encounter (De Boer, 2018; Nielsen, 2015; Mascini & Wijk, 2009; May & Winter, 2000; Nielsen, 2015). Although there might be more dimensions, this two-dimensional understanding remains the main conceptualization (De Boer, 2018; May & Winter, 2011; Van Parys & Van Struyven, 2018).

Insights into how these enforcement styles affect regulatees' motivations to comply with regulations and their subsequent conduct are arguably less established (Parys & Van Struyven, 2018; Pautz et al., 2017). Such motives likely play a fundamental role in explaining regulatees' compliance (Nielsen & Parker, 2012), in particular when obtaining voluntary cooperation (Borck & Coglianese, 2011). It seems that three types of interest or commitment motivate compliance (May, 2005; Nielsen & Parker, 2012; Winter & May, 2001). Compliance motives subsequently tend to be categorized as economic, social

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74 Early research on enforcement styles distinguished inspectors using one of two mutually exclusive styles: a formal, rules-oriented, deterrence-based style or a flexible, results-oriented, accommodative style (Pautz et al., 2017; Liu et al., 2018, both citing Bardach & Kagan, 1982; Hawkins, 1984; J Braithwaite, 1985). These concepts were further refined by e.g., J Braithwaite et al., 1987; Kagan, 1994; Gormley, 1998; May & Winter, 2000; May & Wood, 2003.

(commitment to earning the approval and respect of others), or normative (commitment to obeying the law because doing so makes the firm realize its normative understanding of what is it to 'do the right thing'). However, data indicate that obeying the law and doing the right thing constitute separate motives (Nielsen & Parker, 2012).

All firms, through their representatives, hold a mix of such compliance motives. Regulators are advised to deploy plural regulatory strategies 'responsively' in order to activate these plural motives, that is, in ways that are sensitive to the conditions in which regulation occurs and the capacity of the regulated for self-regulation (Ayres & Braithwaite, 1992; J Braithwaite, 2011; Nielsen & Parker, 2012). Extensive empirical research into regulator-regulatee relationships (Ayres & Braithwaite, 1992; Nielsen & Parker, 2008; J Braithwaite, 2011; Black, 2002; Etienne, 2012; Mascini & Van Wijk, 2009; Pautz et al., 2017) indeed shows that regulation is considered to be more legitimate and effective when becoming more 'responsive' (Ayres & Braithwaite, 1992; Black, 2001b; Crawford, 2006). It also demonstrates how compliance is negotiated in repeated interactions between regulator and regulatee representatives (Black, 2002; Lewin, 2016). It is through such communicative interactions that issues are defined and redefined, identities constructed, interdependencies and inter-linkages recognized and formed (Black, 2002, see also Hedge et al., 1988; Black, 1997; Hutter, 1997; Fineman, 1998; Pautz, 2009; Pautz et al., 2017). The regulatory interactions between inspector and regulatee representatives thus determine the outcome that a regulator obtains (Pautz et al., 2017, p. 101; see also Hedge et al., 1988; Black, 1997; Hutter, 1997; Fineman, 1998; Pautz, 2009).

Extant research on regulatory interactions shows that inspectors indeed often employ combinations of regulatory styles, depending on the situation and the regulated firm (Pautz et al., 2017). But although theory suggests to choose an approach in light of the specific regulatory context, in practice inspectors do not always agree on what is the best approach and their intentions are regularly perceived differently by regulatee representatives, evidently affecting the results of the interaction (Mascini & Van Wijk, 2008; 2009). Empirical studies suggest that it is difficult for inspectors to accurately communicate their intentions or for regulatee representatives to recognize them, even if these intentions are cooperative (Winter & May, 2001; May & Wood, 2003; Mascini & Van Wijk, 2009; Pautz et al., 2017). This communicative challenge is exacerbated as regulatee representatives may typically not want or choose the interaction (Nielsen, 2015; Winter & May, 2015) but feel obliged to enter into it in light of inspectors' perceived power (Raaphorst, 2018; De Boer, 2018). The 'shadow of hierarchy' (Rhodes, 2007) inherent to regulatory conversations may thus further hamper effective communication.

In the particular context of obtaining voluntary compliance, inspectors may be especially dependent on creating a shared understanding of the situation. A key insight, derived in particular from discourse analysis of regulatory conversations, is however that parties to a regulatory conversation may fail to reach such a shared understanding because each interprets what is said according to his or her own position and purposes (Black, 2002). Black (2002, p. 182) highlights the need to research this further:

*‘Co-ordinated action may depend on the conversational development of shared meanings, but these of course may not arise... More generally, the task for further research into regulatory conversations is to ask which conversations ‘work’ to produce coordinated action, which do not, and why.’*

Empirical research into how inspectors and regulatee representatives perceive their interactions is thus needed to enrich our understanding of voluntary compliance more broadly. We conduct such research by applying Etienne’s (2012) relational signaling framework for regulatory relationships to identify what behaviour participants realize during regulatory interaction. Etienne’s theoretical work, grounded in empirical scholarship as referred to above, may help explain which conversations ‘work’ and which do not, especially in light of the ambivalence and discrepancies that tend to occur in the context of regulatory practice. Etienne (2011, 2012) proposes a detailed, five-fold typology of relationships between inspectors and regulatee representatives (see also Table 6.1). One type of relationship, whereby considerations of gain and cost dominate, can be defined as Self-interest. Etienne also discerns two types of relationship that presuppose a vertical or hierarchical relation between inspector and regulatee representative: Authority (in which the inspectors’ orders are expected to be given and obeyed without question), and Legality (revolving around rules and obligations). In addition, he discerns two regulatory relationship types that have a more horizontal character: Judgment (in which considerations of truth or right dominate), and Solidarity (in which expectations of solidarity are pivotal).

This typology is meant to account for the ambiguity inherent to regulatory encounters (Etienne, 2012, p. 1; see also Mascini & Van Wijk, 2009). Such ambiguity may be caused by discrepancies between participants’ intentions on such an encounter (e.g., their goals and expectations) as well as the signals they give off during that encounter; and the difference between participants’ intentions and their intentions as perceived by the other participant (V Braithwaite et al., 1994; Mascini & Van Wijk, 2009; Jung, 2012; Etienne, 2012).

**Table 6.1:** Signals in regulatory interactions congruent/incongruent with relationship types, modified after Etienne (2012)

	<b>Self-interest</b>	<b>Authority</b>	<b>Legality</b>	<b>Judgment</b>	<b>Solidarity</b>
<b>Relationship type</b>	A social exchange relationship	A vertical relationship from superior to inferior	A vertical relationship determined by legal rules	A relationship determined by morality or science	A horizontal relationship of trust
<b>Relationship characterization</b>	Considerations of gain and cost dominate	Orders are expected to be given and obeyed without question	Both inspector and regulatee representative are expected to follow legal rules	Considerations of truth or right dominate	Inspector and regulatee representative are expected to show solidarity to one another
<b>Congruent relational signals</b>	- Regulatory relief - Bribery/extortion - Bargaining	- Claims of authority - Monitoring	- Arguing - Monitoring - Formalism - Calling in third parties (e.g., independent experts)	- Arguing - Formalism - Calling in third parties (e.g., independent experts)	- Bargaining - Mutual assistance - Regulatory relief - Gifts & favors
<b>Incongruent relational signals</b>	- Claims of authority - Prosecution - Threats/sanctions	- Bargaining - Arguing - Threats/sanctions - Calling in third parties (e.g., independent experts)	- Bargaining - Claims of authority - Threats/sanctions - Regulatory relief - Gifts & favors	- Bargaining - Claims of authority - Threats/sanctions - Monitoring	- Formalism - Threats/sanctions - Claims of authority - Calling in third parties (e.g., independent experts)

Etienne identifies ‘relational signals’ – types of conduct of either party in a regulatory relationship – that support cooperation in such a relationship, and relational signals that are counterproductive. He outlines which relational signals would in theory qualify as either ‘positive’ (hereinafter: congruent) or ‘negative’ (incongruent) within five ideal-types of relationships, as summarized in table 6.1 (modified after Etienne, 2012, p. 39). In this context, a congruent relational signal supports and contributes to the establishment and maintenance of a certain relationship type, whereas an incongruent relational signal undermines it. Certain behaviours may qualify as congruent relational signals in one type of relationship, but incongruent in another (Etienne, 2012). For instance, arguing may be a congruent relational signal in a relationship typified by Judgment (focused on determining what is appropriate or accurate). But arguing may be an *incongruent* relational signal in an Authority relationship, as from this perspective arguing by the regulatee representative may be seen as challenging or disrespecting authority. Thus, if an inspector and a regulatee representative typify their relationship differently, they may hold conflicting interpretations of their mutual relational signals. Such discrepancies

can negatively affect the regulatee's acceptance of the regulator's efforts and thereby the regulator's efficacy (Mascini & Van Wijk, 2009).<sup>75</sup>

### 6.2.2 Applying relational signaling theory to our case studies

To our knowledge, our study is the first empirical application of Etienne's relational signaling framework. Our study addresses situations in which inspectors consider regulatee conduct to be problematic as it assumedly constitutes poor organizational management, yet this conduct is legal or legally ambiguous. Inspectors thus cannot readily impose the management practices that they aim to achieve.

To enable analysis of selected face-to-face regulatory conversations – whereby inspectors intended to discuss and alter the conduct of regulatees (hereafter: the focal meetings) – in light of Etienne's (2012) relational signaling framework, we undertook research steps that imply several choices. First, we make a distinction between displayed behaviour and subjective relationship styles (Freeman, 1985; Huitema & Van Snellenberg, 1999; May & Wood, 2003). To analyse the displayed behaviour, we analysed what behaviour participants realized as indicated by their recollection during our case study interviews, by asking interviewees (i) which relational signals, as mentioned in Etienne's framework, they have sent themselves, and (ii) which they have observed that the other party sent (Etienne, 2012; also May & Wood, 2003). As we did not participate in the focal meetings, these actions were not observed directly but triangulated from after the event accounts.

A subjective relationship style is the style that is preferred and pursued – also referred to as 'intended behaviour' (Freeman, 1985; Huitema & Van Snellenberg, 1999; May & Wood, 2003). To analyse the subjective relationship style, we identify (i) what behaviour each party intended by identifying their oral statements during the interviews about their goals and expectations for the examined meeting, and (ii) their perception of the behaviour of the other party (Huitema & Van Snellenberg, 1999; Mascini & Van Wijk 2009).

Second, we used statements of interviewees on their intended behaviour during focal meetings to help us interpret the relational signals. For instance, if one was bargaining, was it out of self-interest or out of solidarity? Statements of interviewees on their perception help us reveal any gap between intentions of one party and perception by the other.

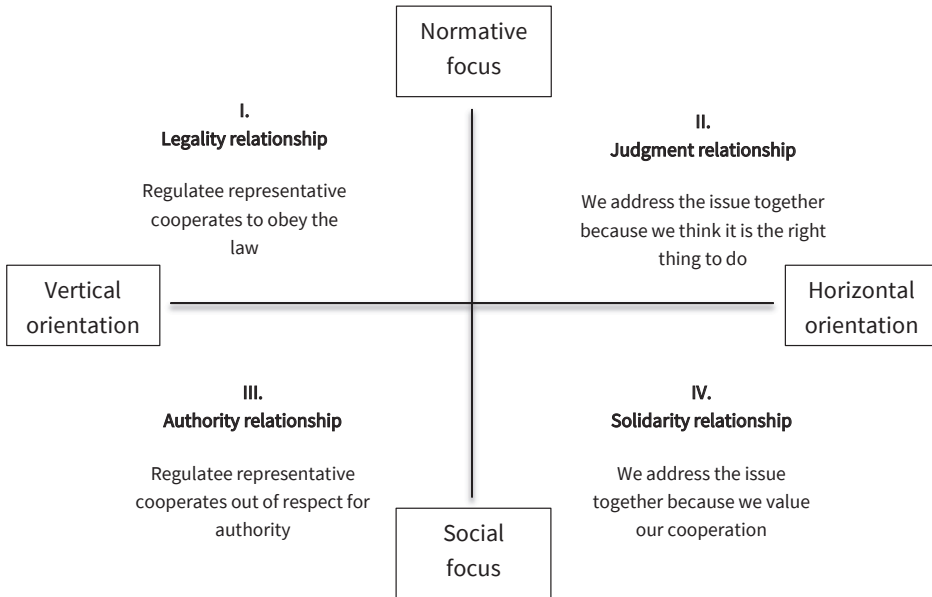
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75 Indeed, regulators generally seem aware that their efficacy substantially *depends* on stakeholder support or at least acceptance, as widely suggested by research (see Tyler, 1997 for an overview). And this logically applies all the more in a context, such as the 'good governance' cases analysed here, where regulators cannot achieve their objective through enforcement.

Although it is likely that inspectors' and regulatee representatives' behaviour signals to the other party which particular relationship style is assumed (Lindenberg, 2000), such relationships are full of ambiguity (Lindenberg, 2003; Etienne, 2012). Perverse effects of inspector behaviour are relatively common because regulatee representatives' perceptions and inspectors' intentions often do not match (Mascini & Van Wijk, 2009, p. 48; also V Braithwaite et al., 2007; Six et al., 2010). Therefore, we analysed the focal meetings with specific attention to any apparent discrepancies between the displayed behaviour of inspectors and regulatee representatives in conjunction with the intended and perceived relationship.

Third, we explore how those discrepancies, if any, might be analysed in terms of relationship types, and how this may help explain suboptimal communication and reduced acceptance of the inspectors' wishes by internal supervisors. We also examine whether, vice versa, convergence between the parties' professed intentions and actions seems to contribute to quality of communication, acceptance, and voluntary cooperation.

To provide additional structure to our analysis and to do justice to the perspective of both the inspector and the regulatee representative, we rearranged Etienne's framework into a figure (figure 6.1) that plots relationship types into quadrants and adds motivations to comply. This figure visualizes, for example, the hierarchical orientation of relationship types, which is helpful given our particular research interest in the role hierarchy plays in obtaining cooperation. Figure 6.1 is thus a two-axial elaboration of the first row of table 6.1, typifying the regulatee motivation to comply in each type of relationship. On the x-axis, we thus distinguish the predominant orientation of the relationship as being vertical (hierarchical) or horizontal (heterarchical) (Black, 2002; Etienne, 2012). Although in compliance motivation theory a motivation to comply out of respect (or fear) for authority is not commonly distinguished separately, Etienne (2012, p. 8) argues that authority is to be distinguished as typifying a separate relationship type where: '*As a motivation, authority requires one to conform to the requests of someone whose status enables him or her to legitimately claim unquestioned obedience, irrespective of the content of the request*'. As such, we have plotted 'authority' in quadrant 3 as it constitutes a relationship type – and an associated motivation to comply – characterized by a vertical, hierarchical relationship between inspector and regulatee representative; with a social focus where a regulatee representative aims to earn the approval of the authoritarian inspector. Along the y-axis, we distinguish the focus of relationships as being normative or social (Nielsen & Parker, 2012).



**Figure 6.1:** Regulatory relationship types and compliance motivations

## 6.3 METHODS

In our case studies, we use relational signaling theory to analyse how inspectors manage voluntary cooperation in their regulatory relationship with regulatees through interactions with board members. We thereby take inspiration from Black's (2002, p. 164) viewpoint which '... contends that social action can be comprehended only by comprehending discourse'. The focus of our analysis is on regulatory conversations, more specifically (i) the displayed behaviour as observed by the participants of the conversation and (ii) the subjective relationship type(s) as intended and perceived in these conversations. We reconstruct these relationship styles through interviews. To this end, we adopted a data management protocol, interview protocol, and code list.

We focused on cases in the context of the NZa and the Inspectorate's joint 'Good Governance' program (see 'Supervisory context' below). We made a selection from all nine cases available in this program in 2017. We initially selected all four cases in which inspectors conducted regulatory conversations with internal supervisors of the care provider to address problematic conduct by the executives (see also 'Regulatory context' below). We excluded one of these four cases because the two internal supervisors of the relevant care provider that we approached did not respond to our requests for an interview, and their participation was deemed essential. For each of the three



remaining cases, we obtained cooperation from both inspectors and internal supervisors, although for two of these cases, one of the two regulators' inspectors did not grant an interview. We thus obtained an initial response rate of 75% at the case level, and 83% at the interview level for the three cases ultimately selected.

Studying three cases in the same broader context (the same supervisory program) enabled rich empirical descriptions (Eisenhardt & Graebner, 2007) and provided us with a stronger base than a single case (Eisenhardt & Graebner, 2007; Swanborn, 2010). Studying data from multiple cases and sources (interviews and document research) enabled us to triangulate our research and increase the internal validity of our findings (Mortelmans, 2013). We conducted ten interviews (see below) that generated our primary source of data. To help us understand the particular regulatory setting, we supplemented the interview data with publicly available documentation (e.g., reports and news items).

We selected a focal meeting for each of the three selected cases. We first conducted four semi-structured preliminary interviews with NZa inspectors to better understand the broader regulatory context and the specific cases' context and to identify a suitable focal meeting. We then conducted six semi-structured case-specific interviews with representatives from NZa or the Inspectorate, and with internal supervisory board members that were present at those three focal meetings (thus six case-specific interviews in total).

During the case-specific interviews, we explored, *inter alia*, interviewees' intentions in terms of goals and strategy, as well as their perceptions of the other party with regard to the focal meeting. We also provided interviewees with sets of cue cards, each representing a type of relational signal (e.g., 'arguing', 'issuing threats') plus an 'Other, namely' cue card in case interviewees' observations did not match any of the predetermined options. We clarified these in non-technical terms. We invited interviewees to identify, using the cue cards, which relational signals played a role in the focal meeting (consecutively focusing on relational signals from their conversational counterparts and from themselves). We then systematically explored via follow-up questions how this was the case.

The interviews were recorded and transcribed in full. We made use of standard qualitative analysis software to analyse these transcripts. To enable us to categorize our findings we developed themes and codes deductively, based on available theory, but we supplemented these in an iterative abductive process (Dubois & Gadde, 2002) going back and forth among the relevant literature, interview data and other documentation (Tummers & Karsten, 2012; Klenk, 2020). During the research process we inductively

refined our framework where needed in light of the preliminary findings (Klenk, 2020; Decorte & Zaitch, 2009). We elaborate this in the remainder of this section.

Our coding system was geared towards identifying and analysing the displayed behaviour and subjective relationship styles (Freeman, 1985; Huitema & Van Snellenberg, 1999; May & Wood, 2003). To account for indicators of the displayed behaviour, each relational signal that Etienne (2012) distinguished and described theoretically was assigned a code in order to categorize interviewees' realized behaviour during the focal meeting. We applied these relational signal codes (e.g., 'arguing') to the transcripts not based on formal definitions of these codes, but rather on interviewees' accounts of the focal meetings as triggered by the cue cards (each cue card reflecting one type of relational signal). To account for indicators of subjective relationship styles, we categorized interviewees intended behaviour and perceptions of the relationship (Freeman, 1985; Huitema & Van Snellenberg, 1999; May & Wood, 2003) by applying respective codes to interviewees' oral statements regarding their goals, strategy, and meeting expectations.

In light of the exploratory nature of this research, the application of these codes to segments of interview transcripts and documentation was governed primarily by the authors' conjunct judgment, rather than a fixed set of indicators for each code. That operationalization was objectified by having standard interview questions, as featured in the interview protocol, correspond with specific codes (for instance, all interviewees were asked what their prior goals for the focal meeting were, and responses were coded as 'meeting goals'). The sets of cue cards, which we used to systematically inquire after interviewees' displayed relational signals, provided additional structure to the operationalization as these cue cards equally corresponded with codes. The interview protocol and coding scheme were also reviewed by six regulatory scholars.

As an example of framework refinement during the research execution (Klenk, 2020; Decorte & Zaitch, 2009), we adjusted our coding and subsequent analyses to reflect the preliminary finding emerging from our analysis (Saldaña, 2021) that the hierarchy that interviewees perceived during the focal meeting and the way they characterized the other meeting participants seemed pivotal in how they experienced the regulatory relationship. That preliminary finding generated 'hierarchy' and 'characterization of meeting participant' as additional codes, which enabled systematic analysis of those themes across the three cases.

## 6.4 RESULTS

### 6.4.1 Regulatory context

In the Netherlands, two separate public regulators oversee the healthcare system. The Inspectorate regulates health care quality; the NZa regulates the accessibility, affordability and transparency of quality of health care.

Dutch regulators possess only limited independent regulatory powers. Typically, although the regulator may prompt this process, adopting new substantive regulations is the prerogative of the central legislature (which may mandate regulators to ‘fill in the details’). Thus, when a regulator is faced with a regulatory gap in its supervisory practice, adjusting regulations is not a ‘quick fix’ option. This can make Dutch regulators more prone to seek alternative ways to address harmful but unregulated conduct in their supervisory practice, such as prompting regulatees to cooperate on a voluntary basis.

In addition, Dutch regulatory culture *‘...is based on the corporatist philosophy, which emphasises the principles of consensus building and the use of expert advice to improve regulatory quality, with a view to promoting the legitimacy of regulation and trust in government’* (OECD, 2010, p. 13). This predilection for consensus building can generate a deliberative supervisory style which, rather than resorting merely to formal supervisory measures and associated hierarchical communication, may feature substantial regulator-regulatee discussions.

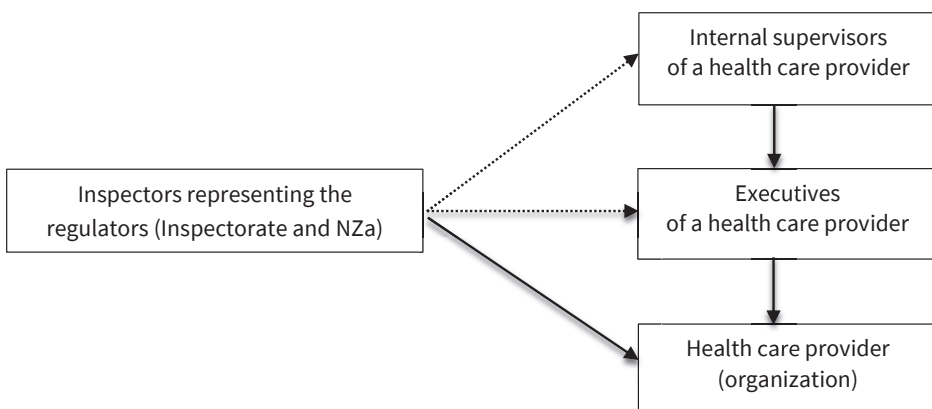
### 6.4.2 Supervisory context

In our cases, the Inspectorate and the NZa join forces to address management deficiencies at health care providers. However, their regimes are focused primarily on the objectives that health care providers as organizations are expected to achieve, not on their executives or internal supervisors. The Inspectorate and the NZa have no legal basis to supervise or enforce how management mitigates the risks that its organizations’ operations pose to those regulatory objectives. Thus, in a context of organizational management issues, they cannot directly coerce appropriate conduct from executives themselves (see figure 6.2). The inspectors in our cases therefore engage with the organizations’ supervisory boards informally – even though they lack formal regulatory powers over them – to obtain their voluntary cooperation in improving organizational management.

Our cases take place in the context of the NZa and the Inspectorate’s joint ‘Good Governance’ supervisory program. In this context, the concept of ‘governance’ is used to denote the way executive boards and supervisory boards ensure proper management of

a health care provider to safeguard quality of care and of compliance with regulation (in other words, the internal governance of the organization, see Van de Bovenkamp et al., 2017). In July 2016, the NZa and the Inspectorate jointly published a regulatory framework on ‘Good Governance’ (the Framework). In this Framework, the regulators describe what conduct they expect from board members – executives and internal supervisors – of health care providers and how they intend to oversee this conduct. The Framework has no formal regulatory status and is not enforceable through legal coercion by the regulators. The healthcare sector has also adopted a ‘Healthcare governance code’ (Brancheorganisaties Zorg, 2010; 2017). This is a self-regulatory code that also does not provide the regulators with formal leverage to compel a change of conduct.

Internal supervisors of Dutch health care providers are by civil law obliged to pursue sound organizational governance and provide for well-functioning executives. And, in contrast with inspectors, they *do* possess formal means of leverage towards the executives: as the executives’ superiors, internal supervisors can discharge executives as an *ultimum remedium*. The governance code also asserts that internal supervisors need to take the public interest served by a health care provider into account in their actions, which provides some common ground for inspectors and internal supervisors as they share this public interest focus. Therefore, the inspectors in our cases engage with internal supervisors informally – even though they lack regulatory powers over supervisory boards themselves – to obtain their voluntary cooperation in preventing or mitigating the perceived harm to the public interest. The primary objects of our case studies are thus the regulatory interactions between inspectors and internal supervisors of Dutch health care providers (see also figure 6.2).



**Figure 6.2:** Simplified illustration of formal and informal powers in the presented case studies (formal powers indicated by solid arrows)

A final supervisory context element is the possibility of initiating an ‘intensified supervision regime’. If a care provider breaches regulations, the Inspectorate or the NZa might impose a fine or institute disciplinary proceedings. A milder, yet still impactful measure of the Inspectorate is the temporary intensified supervision regime, which it can impose in light of quality of health care concerns even if no breach of regulations has been established. An intensified supervision trajectory is ‘*an undefined period wherein the [Inspectorate] intensifies its supervision activities within the healthcare facility, in the attempt to force its leadership and management to ‘sort out’ serious issues that have been identified*’ (Kok et al., 2020, p. 3). During this regime, the Inspectorate monitors a care provider constantly until it has achieved the desired results. The Inspectorate publicizes names of providers subject to an intensified supervision regime. This tends to generate negative media attention (Van Erp et al., 2020). In our cases, the inspectors’ threat of imposing an intensified supervision regime and internal supervisors’ wish to prevent such a regime (Bokhorst & Van Erp, 2018) evidently impacted the tone and content of the focal meetings in the selected case studies (see discussion section).

**Table 6.2:** Summary per case

	Case A		Case B		Case C	
Dominant...	Inspector	Internal supervisor	Inspector	Internal supervisor	Inspector	Internal supervisor
<b>...relationship type mindset (according to authors)</b>	Authority	Solidarity	Judgment (‘in the shadow of authority’)	Solidarity	Authority (with elements of Legality)	Solidarity (with elements of Judgment)
<b>...displayed behaviour</b>	Claims of authority Monitoring	Mutual assistance Arguing Concessions Bargaining	Formalism Claims of authority Monitoring Threats / sanctions	Mutual assistance Arguing Bargaining	Claims of authority Threats Monitoring	Arguing Mutual assistance Appeal to empathy
<b>...subjective relationship style</b>	We observe a problematic situation and we will monitor you resolving it.	We question your mandate, but let’s cooperate for the sake of our relationship.	For the good of your patients, we expect you to address the issue, or else we will impose an intensified supervision regime.	We want to address the same issue that concerns you and would expect to find an ally, but we do not feel heard.	Let’s tick this box so we can impose an intensified supervision regime.	We want to convince the inspectors that we are in control and would hope to converse on equal footing but run into a stand-offish stance.

### 6.4.3 Summary of case-specific findings

Table 6.2 provides a summary of our findings per case. It lists our conclusions on the relationship type that was dominant from the perspective of the inspectors and internal supervisors in the focal meeting (first row). The dominant relational signals they reportedly gave off during that meeting are listed in the second row; the third row features our characterization of inspectors' and internal supervisors' intentions and perceptions regarding the focal meeting as expressed during their interview with us (bottom row). The subjective relationship type (third row) enables interpretation of the displayed behaviour (second row), as discussed further below.

### 6.4.4 Case A

In case A, the Inspectorate and NZa were concerned that the administrative and financial preconditions for the provision of good health care were not sufficiently met due to a lack of transparency and accountability in the governance structures. The healthcare provider first became aware that the regulators had these concerns from media reports rather than from the regulators themselves. Inspectors and internal supervisors agreed that this was not appropriate, and both indicated in their interviews that the aim of the focal meeting highlighted in case A was to address this.

For both, a second goal of the focal meeting was for the internal supervisors to provide the inspectors with more information about the governance situation at the care provider. The internal supervisors wanted to provide the inspectors with information by *'explaining the correct facts'*, hoping that this would avert an intensified supervision regime. Accordingly, the internal supervisors' relational signals were: mutual assistance – volunteering information (about their governance structure, procedures and decision making process), arguing, concessions and bargaining:

*'... they [were] willing to be completely transparent, we were given access to every employee in the organization [and all] documents (...) I clearly sensed their interest in this: if we provide you with the documents than you will be able to see very quickly that there is no issue here.'* (Inspector)

The inspectors requested information to better understand the situation and also to convey a monitoring signal: *'there is more going on and we are on to you, and this will have consequences, we are all over this'*. The interviewed inspectors and internal supervisor concurred that the most dominant relational signal sent by inspectors were claims of authority – sometimes underscored by the implicit threat of sanctions or negative publicity:

*'Above all, we had to rely on our authority. So foremost we had to say: listen, it does not matter at all which rule you violate here, we see a situation here that is undesirable, which may have consequences for: affordability, accessibility and transparency (...) we worry about that and you should too.'* (Inspector)

In the inspectors' perception, they based this appeal to authority on their mission, rather than on formal rules or powers:

*'You use your authority from [an implicit appeal to] your mission and vision (...), not [from] an appeal to the law.'* (Inspector)

Although the inspectors assumed an authoritarian position – by appealing to their authority and monitoring the regulatee – they were also seeking for Solidarity, a partner to solve the problem: *'In this way, I think we [inspectors] shared our concerns with them'*. Inspectors tried to convince the internal supervisors to accept their intervention and to cooperate with them, using public-interest arguments and transparency about the limits of their formal mandate.

The internal supervisors likewise found it legitimate for the Inspectorate to investigate indications about the quality and safety of health care provided by their health care organization. They did however comment on how far this mandate extends:

*'What I observed was (...) a need for a wider supervisory framework to be able to get more within scope than usual. (...) That may be hidden in those moral arguments. (...) As if saying: there is also sort of a national political sentiment, which further supports a mistrustful view of organizations such as [ours].'* (Internal supervisor)

The interviewed internal supervisor doubted whether the inspectors were capable of fulfilling this expanded role:

*'We felt there was a (...) narrowed understanding of the daily [governance] ... So, we felt that we were not talking to fellow experts in this field.'* (Internal supervisor)

The internal supervisor considered hierarchy inherent to the regulatory relationship and therefore as such unproblematic. However, in his experience this hierarchical relationship was tainted by personal preferences from an inspector:

*'In any case, the personal opinion of the official did play a role (...) I think: that should not play a role in this context. You should supervise objectively, within the framework of standards that applies.'* (Internal supervisor)

Notwithstanding the internal supervisor's occasional 'push back', he demonstrated an interest to maintain cooperative relationships given the inspector's position:

*'You are (...) entrusted to the supervision of the external supervisor, so we also have an interest in keeping the relationship normalized if possible (...) a bit calculative, perhaps.'* (Internal supervisor)

In summary, in this case A we observe a discrepancy in 'chosen' relationship types. In light of their claims of authority and their monitoring signals throughout the focal meeting, the inspectors primarily assumed an Authoritarian relationship type, even though at some point they sought cooperation using public-interest arguments and transparency about the limits of their formal mandate. The internal supervisors, on the contrary, were not convinced that the inspectors were entitled – or had the capability – to act as they did, but did cooperate to maintain a good relationship (aiming to prevent an intensified supervision regime), hence opting for a Solidarity relationship type.

#### **6.4.5 Case B**

The focal meeting in case study B took place shortly before the Inspectorate established an intensified supervision regime in light of the disturbed working relationships between executives and internal supervisors. Another cause for concern was the executives' apparent intention to transfer a substantive amount of money from the organization's funds to personal accounts, even though in the inspectors' view the organization needed the money to invest in the quality of its health care. Although the inspectors could not identify any illegal intended transaction, they invited both the executives and the internal supervisors to a meeting at the inspectors' office.

The interviewed inspectors and internal supervisor concurred that the regulatory relationship during this meeting was of a vertical nature (from superior to inferior):

*'There was hierarchy, unmistakably. [This was evident from] the fact that we clearly had the chairmanship, but also because we cut off [discussions] where needed and started looking, very purposefully, whether there was any remaining reason to adjust [our course].'* (Inspector)

*'Hierarchical. Like: "You have been naughty. All of you?"'* (Internal supervisor)



As for the regulatee, the purpose of the internal supervisors was to receive support from the inspectors, enabling them to supervise the executives more thoroughly:

*'Well, we expected to get more support from the Inspectorate to be able to supervise a little more in-depth, to find support (...) we expected an ally. And that was not experienced at all [by us].'* (Internal supervisor)

With regard to the relational signals sent, both parties' interview accounts indicate that the internal supervisors wanted to discuss the case and offered to keep the Inspectorate informed or quickly deliver actions that would provide the Inspectorate with insight into the intended improvements, which suggests that the internal supervisors assumed a Solidarity relationship type.

Considering the inspectors' stance, we find indicators of several relationship types, but not Solidarity. The inspectors' primary goals were to formally determine whether they had correctly summarized the facts, substantiate whether they should impose an intensified supervision regime, and give the internal supervisors the opportunity to respond to the intended duration of that regime. In terms of relational signals, both inspector and internal supervisor indicated that the inspectors mainly invoked rules and procedures, appealed to authority, and threatened to impose sanctions, leaving little room for discussion. In the perception of the inspectors, they mainly appealed to public interest-based arguments to justify their intervention:

*'We said, you just have to fix it, because those clients are going to be affected somehow. And we stand for good care for the clients. ... We did use our authority, of course. Had we not been from the Inspectorate and NZa, we would not have been able to do this. So that was a legitimation that enabled us to do it. That is explicitly part of our role, of course.'* (Inspector)

The interviewed internal supervisor confirms that the inspectors mainly appealed to public interest-based and authoritarian arguments to justify their intervention:

*'I also think it is moral because it is about public resources. "And that concerns us as supervisors", they did say. But we also said that it was our concern as well. (...) Yes, and authority (...) As they invoked their authority, we did not feel taken seriously.'* (Internal supervisor)

According to the interviewed inspectors, the internal supervisors cooperated well, all relevant information was shared, and the relationship was sound. However, the internal

supervisors had a different recollection of the focal meeting. The interviewed internal supervisor did not feel heard:

*'We were all there with spirit and passion for the social side of the company and we were not seen as such by the Inspectorate, I felt (...) the Inspectorate has continuously called us to account.'* (Internal supervisor)

The internal supervisor also doubted whether the inspectors were capable to fully comprehend and assess the situation:

*'I also found the background of some inspectors to be very "blue". (...) If you need to assess whether the relationships and the genes of the organization and the management are trustworthy, such that you can be confident of good management, that is impossible to tick off. You need to sense that. You don't need paper for that. And if you are blue, you cannot sense that.'* (Internal supervisor)

Given these findings, we observe a discrepancy between the inspectors' and internal supervisors' pursued relationship type – and corresponding expectations – during the meeting. The inspectors appeal to public interest-based arguments with their call to address the issue because it is the right thing to do, apparently aiming for a Judgment type of relationship. Interestingly, the inspectors do so 'in the shadow of hierarchy' (Rhodes, 2007) – indicative of an authoritarian relationship type – by referring to their authority and by threatening with an intensified supervision regime if the issue is not addressed soon. The internal supervisors on the other hand were in search for a partner that would help them to 'put their house in order', apparently pursuing a Solidarity relationship type.

#### **6.4.6 Case C**

The focal meeting in case study C took place shortly before the Inspectorate established an intensified supervision regime in light of disturbed working relationships between executives and medical staff. By withholding information, the medical staff did not sufficiently enable executives to fulfill their coordinating and controlling obligations towards the quality and safety of the health care provided. Neither executives nor internal supervisors were able to reestablish functional working relationships. As no regulation was infringed, the inspectors lacked regulatory instruments to intervene.

The inspectors' formal goal for the focal meeting was to meet the administrative requirement ('tick-the-box') of discussing the Inspectorate's intention to establish an

intensified supervision regime with representatives of the organization. The inspectors also had an ‘informal’ goal:

*‘(...) the informal goal [was] that the Inspectorate wanted to give the hospital one more opportunity to reflect on that intention. The arguments they would put forward would then be taken into account in the final judgment of the Inspectorate to impose (...) intensified supervision. Actually (...) that judgment had already more or less been established. So, it was sort of a mere formality.’ (Inspector)*

The internal supervisors’ goal was to prevent the intensified supervision regime. They intended to convey that a lot had been done already to deal with the issues, thus no need to establish the regime:

*‘Our goal was also to take the Inspectorate along with how we had acted, (...) towards the entire organization, as we were taking steps. (...) Perhaps still to prevent an intensified supervision regime.’ (Internal supervisor)*

They expected the inspectors to use the meeting to gain a better understanding of the situation:

*‘What you expect is that they question us, but also question the executive and the medical staff what role each person has taken. And that they get an impression of whether that constitutes good governance as expressed in the governance code.’ (Internal supervisor)*

The NZa inspector observed a discrepancy between the inspectors’ and internal supervisors’ expectations during the focal meeting:

*‘They still wanted to engage us in a conversation and jointly reflect (...) Our approach was precisely not to do that. (...) This was also a difficult element of the meeting, because we noticed that the care organization really wanted to hear from [us]: “what exactly should we do or what exactly are we doing wrong that makes you want to impose an intensified supervision regime?” [We] had a very different view: “... this is your chance to convince us that intensified supervision is not necessary. So, bring it on.” So, both parties... expected different things from each other.’ (Inspector)*

As indicated above, the inspectors’ relational signals included enquiries. Both parties attest to that. However, the apparent intent behind these enquiries diverged. The in-

spectors' intent was to meet an administrative requirement to impose an intensified supervision regime, and invite the internal supervisors to reflect on the case. The inspectors did not want to enter into substantive discussions. In contrast, internal supervisors *did* repeatedly signal that they wanted to conduct substantive discussions (arguing), and they expected inspectors' enquiries to be aimed at understanding the case better (which might avert the inspector's apparent need to establish an intensified supervision regime).

The inspectors and internal supervisor agree that the inspectors' relational signals during the focal meeting included frequent threats – specifically the threat of imposing an intensified supervision regime – and appeal to authority.

The internal supervisors occasionally appealed to empathy, according to an inspector (who noted that this was not included in the relational signal options provided for the interview). Apparently, this appeal to empathy was not reciprocated:

*'Perhaps that is an [aspect of the meeting to be caught by the relational signal cue card] "Other, namely": [That is] that the care organization tried to create a lot of understanding for their situation. (...) Like: "Pity us, because this has turned our entire organization upside down. (...) Because intensified supervision (...) what if the hospital goes belly up. So please quit this intensified supervision thing" (...) Not specifically focused on content, but rather on empathy: "Please understand our situation": (Inspector)*

Both parties reported that their mutual relationship during the focal meeting was problematic. The internal supervisor thereby repeatedly emphasized the interpersonal (non-institutional) aspect of this, stressing a perceived lack of empathy from an inspector:

*'That [relationship] was, I think, already poor.' (Inspector)*

*'I had the impression ... that it was hard to get through [to one of the Inspectors]. (...) One [was] very open and... listened [well]. (...) While, [with] the other person you just noticed the appearance, (...) the atmosphere, the setting, the facial expressions, almost through his non-verbal behaviour I noticed that what was being said, may not have been [properly] heard.' (Internal supervisor)*

More broadly, the internal supervisors felt that the relationship between inspectors and themselves arguably *should* be on equal footing, given their complementary roles in pursuing the same objective:

*'The objective of both parties is the same. You want to guarantee quality of care. You respect everyone's role and the [mutual] relationships.'* (Internal supervisor)

However, they perceived that the relationship was *actually* hierarchical:

*'It [was] not an equal relationship. You are summoned. (...) So, that already says something. (...) And I don't know if it's wrong, perhaps this is how it should be in such a situation (...).'* (Internal supervisor)

In sum, various relational signals and associated relationship types were apparent during the focal meeting. The inspectors' frequent threats and appeals to authority mostly reflect an Authority relationship preference. In addition, the 'tick-the-box' meeting goal that motivated much of the inspectors' enquiries (consistent with monitoring and formalism) indicates elements of a Legality relationship. In contrast, the internal supervisors were inclined towards a horizontal relationship type. They had hoped to argue the facts on equal footing (indicative of a Judgment relationship) and appealed to empathy to stave off an intensified supervision regime (indicative of a Solidarity relationship). However, it seems that, in light of the inspectors' strictly vertical stance in practice, internal supervisors reluctantly acquiesced in a (vertical) Legality relationship.

In all three cases overall, we observe a range of discrepancies, as inspectors send relational signals incongruent with their intentions and between the relationship types as pursued by the inspectors on one hand and internal supervisors on the other. In the next section, we analyse these discrepancies in terms of relationship types and associated relational signals to explain suboptimal communication and reduced acceptance of the regulators' demands by regulatee representatives.

## 6.5 ANALYSIS

Below, we first analyse the discrepancies that we observed. We then discuss how such discrepancies shape regulatory relationships, both in these three cases and more generally. We conclude this section with broader observations on the consequences of these relational dynamics for managing regulators' legitimacy and voluntary regulatee cooperation.

### 6.5.1 Two kinds of discrepancies

We observe discrepancies predominantly of two kinds. First, discrepancies between the inspectors' displayed behaviour and subjective relationship style. Their displayed

behaviour, expressed by the relational signals as observed by the participants, predominantly tended towards Authority, while their subjective relationship style – the intentions – had characteristics of Authority, Judgment and Solidarity relationship types. Second, discrepancies between these inspectors' displayed behaviour – their authoritarian relational signals – and the displayed behaviour of internal supervisors, featuring relational signals congruent with Solidarity. Hence, where earlier research surfaced a gap between the relationship style as intended and the relationship style as perceived (Mascini & Van Wijk, 2009), we can also pinpoint a gap between the subjective relationship style as intended and the behaviour as displayed (by the relational signals used) by the inspectors; and a gap between the displayed behaviour of the inspector and the displayed behaviour of the regulatee representative. Meanwhile, the displayed behaviour and the subjective relationship style of the representatives of the regulatee were mostly congruent; their behaviour as identified by the relational signals matched their intentions.

Clearly, we must exercise caution in those interpretations, especially given that we did not observe the focal meetings themselves but rather depend on participants' recollection and interpretation thereof. Still, several analytical contentions seem warranted, as discussed below.

The three cases are fairly comparable in terms of their broader context and they arguably show the same general pattern in the regulatory relationship analysed. In each case, a key part of the inspectors' approach is to seek an alliance with the internal supervisors based on common ground. To that end, they appeal to the public interest goals – quality and affordability of care – that they have in common with these internal supervisors, if only as a starting point to engage them in a regulatory conversation, pursuing a horizontal relationship type – either a Judgment relationship with a substantive focus or a Solidarity relationship with a relational focus (figure 6.1, quadrants II and IV respectively).

In all three cases, the inspectors ostensibly had the *opportunity* to find such an ally in the internal supervisor. In each case, the internal supervisors send 'mutual assistance' and 'arguing' signals. These are signals that are especially congruent with a horizontal relationship. In cases B and C, the internal supervisors explicitly state that they hoped to find an ally in the inspectors and they interpret their interactions in terms of solidarity and non-solidarity.

Despite their prior intentions, the actual approach of the inspectors during the focal meetings is ambivalent. On one hand, they stress the public interest issue, hoping that internal supervisors will share their concerns and help address it (which may suggest a

horizontal orientation). On the other hand, in the focal meetings the inspectors specifically tend towards an Authority relationship as they send hierarchical relational signals that are congruent with that relationship type (and incongruent with a horizontal relationship). For example, they send ‘claims of authority’ and ‘monitoring’ signals in every focal meeting. This suggests that the inspectors consciously or unconsciously tend towards a vertical relationship in practice. In addition, in every case inspectors threaten, and ultimately impose, a measure feared by the regulatee: a publicly announced intensified supervision regime. They avoid relational signals that can stimulate an alliance and affirm a Solidarity relationship, although internal supervisors repeatedly invite such an alliance by means of their ‘mutual assistance’ and ‘arguing’ signals.

These discrepancies in relational focus – the vertical Authority relationship type of the inspectors and the horizontal Solidarity relationship type of the internal supervisors (see the lower side of figure 6.1) – thus hamper the interaction between the parties. This frustrates any prior intention from inspectors to arrive at a joint substantive focus with internal supervisors revolving around the public health interest at stake. These findings are in line with Etienne’s theoretical expectation that the signaling ambiguities already inherent in regulatory relationships may turn out to be especially troublesome in cases where the regulatory requirements are ambiguous, and that an appeal to authority may nevertheless be a key source that inspectors turn to in order to alter behaviour.

### **6.5.2 The effects of discrepancies on regulatory relationships**

Inspectors and internal supervisors failed to settle on a shared relationship type in each of the focal meetings (despite the partial joint interests). The inspectors interpret the regulatory conversations primarily in terms of obedience or non-obedience, while the internal supervisors interpret them in terms of solidarity and non-solidarity. Hence, they do not make sense of these conversations in mutually consistent ways, making cooperation difficult to achieve (cf. Etienne, 2012, p. 4). Inspectors and internal supervisors are both looking for an ally to steer the executives’ problematic conduct and safeguard public interests. But in practice, due to the authoritarian relational signals sent by the inspectors, the inspectors provoke a defensive response and the internal supervisors feel unjustly treated as ‘offenders’ who are being held accountable (as if they were the executives), rather than as an ally. They experience insufficient space to express their own concerns regarding the issues under discussion as professional supervisors. And the discrepancy between the inspectors’ intentions and the signals they give off not only confounds the internal supervisors (cf. May & Wood, 2003), it also triggers confusion for the inspectors themselves. Whereas internal supervisors adopt a wait-and-see attitude in response to inspectors’ authoritarian relational signals, inspectors do not understand this attitude, seemingly not recognizing the effect of their own authoritarian signals.

Our case studies also suggest that whether a shared relationship understanding is established might depend more on what relational signals participants actually sent than on their intended relationship type. The authoritarian relational signals sent by inspectors proved decisive for the dynamics of the focal meetings, regardless of what prior thoughts (in terms of goals and strategy) inspectors had and regardless of what arguments they used to convince internal supervisors to address the issue. Case B clearly exemplifies this. In this case, inspectors mix public interest arguments with authoritarian relational signals, which subverts the solidarity relationship sought by the internal supervisors.

Our research further illustrates how participants' relationship type preference in a regulatory conversation impacts their interpretation of signals sent by the other party. Consider for example case C, in which both parties send 'discussion' signals but ostensibly with a different relationship type in mind. Internal supervisors assume a Solidarity or Judgment relationship. They sent 'discussion' signals to exchange information in order to address the issue together. Meanwhile, inspectors sent 'discussion' signals to meet an administrative requirement before imposing an intensified supervision regime, congruent with a vertical Authority or Legality relationship type. Hence, both parties send 'discussion' signals with an underlying intention quite different from how the other party interprets them. This discrepancy ostensibly generated an emotional distancing that undercut a potential cooperation pursued by both parties: The internal supervisors were frustrated that discussion did not lead to a Solidary-type dialogue about jointly safeguarding public interests, while inspectors in turn were annoyed that internal supervisors kept debating instead of accepting the situation. This example also underscores the value of studying discrepancies between displayed behaviour and subjective relationship style – what is intended by the sender of the signals and what is perceived by the receiver – as studying signals alone may be insufficient to understand what is going on.

### **6.5.3 Consequences for managing regulators' legitimacy and voluntary regulatee cooperation**

In all three cases, a prominent 'shadow of hierarchy' (Rhodes, 2007) affects the focal meeting as the inherently hierarchical structure of the relation between regulator and regulatee as organizations ostensibly defines the context within which the focal meetings between their representatives take place, and steers how signals are interpreted. The hierarchical manner in which the inspectors interact with the internal supervisors seems to detract from any voluntary acceptance of their position, which may negatively affect the regulators' authority and regulatees' inclination to cooperate voluntarily in future instances. The problematic management conduct is ultimately addressed via pressure applied through an intensified supervision regime.



The ongoing threat of an intensified supervision regime can hamper ‘voluntary’ compliance (Baldwin & Black, 2008) and decrease cooperation early in the interaction (Tenbrunsel & Messick, 1999). That presence makes agents such as internal supervisors more calculative and less aware of public interests. Inspectors may control such perverse effects only when they successfully communicate their intentions (Mascini & Van Wijk, 2009). In our cases, the focal meetings suggest that the available fallback option of intensified supervision might contribute to the inspectors’ vertical (hierarchical) orientation, their ambiguous signaling, and their disconnected communication with internal supervisors.

In a case where obtaining voluntary cooperation is crucial, regulators might therefore consider removing the threat of such a fallback option, for example, by renouncing that option explicitly. This might prompt their inspectors out of their hierarchical ‘comfort zone’ to actually engage in a horizontal relationship with regulatee representatives, focused on the content and public interests at stake (Judgment) and / or seeking real rapprochement (Solidarity). However, even without such a threat at their disposal, regulators cannot realistically erase their hierarchical position (Black, 2002). It is therefore uncertain if such an approach would indeed enable inspectors to adopt a horizontal orientation in regulatory conversations.

Our analysis also reveals broader consequences for inspectors who intend to secure cooperation from regulatees by persuasion rather than force. Specifically, while addressing poor management practices or other problematic conduct that is not clearly illegal, managing legitimacy may require inspectors to acknowledge that they do not get to decide what is ‘right’ (De Graaf et al., 2016), and to reconsider how they wield the power they possess through the aforementioned ‘shadow of hierarchy’. Research suggests that the quality of inspectors’ coping strategies may depend on their attitude towards the hybridity of the context and the reflexivity of their response to it (Klenk, 2020). Managing legitimacy in this context may require them to adopt a more ‘decentered’ (Black, 2002, p. 192) understanding of their role in that context and to engage representatives of regulatees in reflective dialogues on each other’s position in their regulatory relationship. In cases such as discussed here executives and internal supervisors of the same care provider may have diverging goals. Given that goal clarity empowers such representatives to conduct a more effective dialogue (Song et al., 2020), this may thus warrant separate engagements. Such reflective dialogues can take place at the outset of a regulatory conversation in order to lay a foundation for mutual understanding, during such a conversation if and when discrepancies in signals and mutual relational perceptions emerge, or as a separate effort. It should arguably address the different types of regulatory relationships and the institutional and personal factors that

determine whether the parties to a regulatory conversation are able to develop a stable common conception of their relationship (cf. Mascini & Van Wijk, 2009; De Boer, 2018).

More generally, our analysis suggests that inspectors who intend to secure voluntary cooperation need to reflect critically on their role; on the nature of their relationship with regulatees (and with particular representatives such as internal supervisors); on who gets to assert or contest what counts as, for example, a regulatory issue and an acceptable solution thereof (and on what grounds); and on what these reflections imply about the power distribution and impact of hierarchy in that context (compare Black, 2002). During interviews, we noticed that Etienne's relational signaling theory helped to raise inspectors' and internal supervisors' awareness of regulatory relationship types and the relational signals they send, and inspectors were enthusiastic about the resulting insight into their own performance during the focal meetings. If inspectors are thereby able to recognize a mismatch of mutual perceptions regarding roles, relationships, and assertive powers, they can choose to reframe their messages (Gilad, 2014) and accordingly adjust their relational signals in order to attain effective and legitimate regulatory conversations.

## 6.6 CONCLUSION

This chapter shows how inspectors may struggle to obtain voluntary cooperation from regulatees if there is no readily enforceable norm underlying such attempts. It features the first case study application of Etienne's (2012) relational signaling framework for regulatory conversations, grounded in literature strands on enforcement styles and compliance motivations. We show how this framework helps to understand the ambiguities inherent to such regulatory conversations. We analyse how the 'shadow of hierarchy' (Rhodes, 2007) implicit in regulatory conversations may thwart efforts to establish a cooperative affiliation. We also show how incongruencies between inspectors' and regulatee representatives' displayed behaviour and subjective relationship styles may generate an emotional distancing, which undercuts attempts to achieve the common ground conducive to voluntary cooperation. Our findings further suggest how converging on this common ground in a regulatory conversation may be more dependent on the relational signals that participants express and observe than on their subjective intentions, and how a participant's relationship type preference may impact his interpretation of the relational signals he observes. Increased scholarly insight into this dynamic will help to more fully understand how voluntary regulatee cooperation might be obtained.

Besides scholarly contributions, our findings also generate actionable insights conducive to effective and legitimate regulatory practice. Awareness of the relational signals that inspectors send during regulatory conversations – and of the resulting incongruencies they may come with – can help these inspectors to proactively manage regulatee representatives' perceptions and obtain voluntary cooperation. More specifically, awareness of how persistent the regulatory 'shadow of hierarchy' (Rhodes, 2007) impacts both their relational signals and how regulatee representatives perceive those signals can lead inspectors to consider communicative measures that counteract this effect (e.g., discarding the threat of enforcement; acknowledging that regulations fail to capture a regulatee's potentially harmful conduct; denouncing any claim to unilaterally 'judge' such harmful but legal conduct).

Future research may posit relational signals not included in Etienne's (2012) framework. For instance, the crucial role that information requests play in regulatory conversations might lead to considering a dedicated 'inquiry' relational signal category separate from 'discussion'.<sup>76</sup> It will also add value to apply Etienne's framework in other settings. For instance, regulatory settings that feature a different power balance and degree of hierarchy between inspectors and regulatee representatives, or a different degree of overlap between their interests at stake in a regulatory conversation, may generate additional insights. Other methods to apply this framework (e.g., discourse analysis, vignette study) might also prove fruitful.

While interpreting our findings and discussions, the inherent generalizability limitations of in-depth qualitative case study research should be taken into account (Yin, 2009; Swanborn, 2010) as well as its potential to capture the subtleties inherent to regulatory conversations. Specifically, our findings seem most likely to be relevant in regulatory contexts where averting regulatee conduct through regulatory conversations and pursuing voluntary regulatee cooperation are amongst the accepted regulatory practices. Additionally, our case studies' Dutch regulatory context – highlighted at the outset of the Results section – should be taken into account. This context can make inspectors more inclined to seek voluntary cooperation through regulatory conversations in case the regulatory framework precludes coercion. The cultural context might also make regulatee representatives less inclined to accept a hierarchical relationship towards in-

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76 This might facilitate focused analyses of incongruencies associated with this signal, given the different interpretations that may be attached to such information requests as evident from our findings (an underlying intention to exchange information to jointly address an issue, versus an intention to meet an administrative requirement). Similarly, as suggested by one interviewee, 'appeal to empathy' might also be considered as a relational signal category in a regulatory conversation context.

spectors, especially if coercive powers are lacking. However, regardless of such context specifics, the fundamental dynamics inherent to a regulatory conversation and the role of relational signals therein – as illustrated by our case studies – should be considered, especially if the parties to such a conversation pursue a voluntary resolution of the issues at hand.





# 7

## **Discussion and conclusion**



## 7.1 INTRODUCTION

As described in the first chapter, due to incidents in the semi-public sector, the functioning of the governance of semi-public organizations has been put on the agenda in the last decade (Strating et al., 2020). In line with developments in other sectors, the Minister of Health presented a 'good governance agenda' that contains a plan of action to improve the organizational governance of healthcare providers (Ministry of Health, 2015; Ministry of Health, 2016). As one of the areas where improvement was possible, the Minister of Health called for enhancing supervision through the interaction between external and internal supervision. Whereas before, external supervisors traditionally engaged with executives and not with the internal supervisors, now the NZa, the Inspectorate and the association of internal supervisors were called upon to meet and explore how external and internal supervision could supplement and reinforce each other (Vaste commissie voor VWS, 2015b; Ministry of Health, 2016).

At the start of this thesis project, building a relationship between external supervisors and internal supervisors in healthcare – but also in other semi-public sectors – was in its infancy. In day-to-day supervisory practices, there was still little interaction between external and internal supervisors nor was there much scientific research into the relationship between external and internal supervision. What happens when these two supervisors meet has been understudied (De Ridder, 2013; De Waal, 2020).

This is where this thesis comes in. This thesis focuses on the building of a new relationship between external and internal supervision and seeks an answer to the following question:

*How can external and internal supervisors complement, reinforce or substitute each other in their goal of supervising organizations?*

To understand the new to be built relationship between external and internal supervisors, I seek to understand the context in which this relationship is embedded by making use of two specific theoretical orderings of regulation: the construction of the regulatory object as defined by De Kam (2020) and the three tiers of regulation as identified by Gilad (2014). With De Kam's concept of the construction of regulatory objects in mind, I use his definition of the regulatory object and Gilad's distinction between the three layers of regulation to analyse how the NZa and the Inspectorate construct 'good governance' as a regulatory object, which of the layers of regulation their approach focuses on and what this entails for the relation between the external and internal supervisor. The theory of responsive regulation helps to show how the relationship between external



and internal supervisors is formed at the different layers of regulation, by studying good governance as a new regulatory object. As described in chapter 1 (paragraph 1.3.4), following the notions about the construction of regulatory objects, regulatory instruments and regulatory relationships, I distinguished four sub-questions that complement the main research question:

1. How do external supervisors construct the quality of organizational governance ('good governance') as a new regulatory object?
  - a. If the aim of collaboration between external and internal supervision is to contribute to the better safeguarding of public interests – is it actually clear what public interests are or is this a shifting goal (chapter 2)?
2. How do external supervisors mobilize internal supervisors as agents in their effort to make good governance inspectable?
  - a. How does the NZa work from a vertical, to a more horizontal, collaborative supervisory practice that involves interaction with internal supervisors (chapter 5)?
3. How does the way in which the external supervisors approaches good governance as a regulatory object, and mobilize internal supervisors, affect the relationship between them and internal supervisors?
  - a. How do external supervisors give shape to a relationship with internal supervisors (chapter 3)?
  - b. Is contact between external and internal supervisors useful and feasible in the eyes of the internal supervisors (chapter 4)?
  - c. How do external supervisors obtain voluntary cooperation of internal supervisors (to alter organizational governance practices) (chapter 6)?
4. What can we learn from the experiences in a good governance context about a future relationship between external and internal supervisors?

I will discuss these four sub-questions in the next four paragraphs in order to arrive at a synthesis of the findings and an answer to the central research question in the last paragraph.

## 7.2 GOOD GOVERNANCE AS A NEW REGULATORY OBJECT

As discussed in the first chapter, a *regulatory object* defines a certain *quality issue* as the (legitimate) object of regulation (Dahler-Larsen, 2019; De Kam, 2020). Due to a need to prevent incidents with the quality of care or with the quality of compliance with administrative or financial regulations by health care providers, the Dutch government set the goal of improving the governance of health care providers, making 'good governance' an object of regulation. A regulatory object posits a relationship between the

quality at stake in the object and regulatee behaviour (De Kam, 2020, p. 14). By making ‘good governance’ an object of regulation, the Minister of Health assumes that the good governance behaviour of health care providers is related to and indicative of the quality of care provided by the healthcare provider (Behr et al., 2014), so that the regulation of good governance is legitimate (Ministry of Health, 2015; Ministry of Health, 2016). The assumptions that appear to underlie the policy of the Ministers of Health and of Economic Affairs in reaction to incidents in the Dutch semi-public sector, as described above, go even further than that. Good governance is also presumed to be related to and indicative of the extent to which healthcare providers adhere to regulations regarding affordability and accessibility of healthcare (the ‘quality of compliance’) – or even more broadly – the degree to which healthcare providers are prepared to act in the ‘public interest’ (Ministry of Economic Affairs, 2014; Ministry of Health, 2015; Ministry of Health, 2016).

Following the instructions of the Ministry of Health, the NZa and the Inspectorate developed a supervisory framework on good governance (NZa & Inspectorate, 2016; NZa & Inspectorate, 2020). The supervisory framework tried to capture a broad view of healthcare governance in standards by elaborating supervision on three focal points: results, behaviour & culture and systems (NZa & Inspectorate, 2016; NZa & Inspectorate, 2020; Stoopendaal & Van de Bovenkamp, 2018). In the Good Governance Framework, the NZa and the Inspectorate state that *‘Good governance results in healthcare providers providing good and safe care to their patients and clients. This care is affordable, transparent and accessible. (...) Care providers can only achieve good results if the board has the preconditions in order. This concerns behaviour and culture as well as having the right systems in place. The regulators pay attention to the functioning of all three areas: the results, behaviour & culture and systems’* (NZa & Inspectorate, 2020, p. 6). With these three areas as points of attention, the external supervisors introduce a three-way division that reflects Gilad’s three tiers of regulation (see paragraph 1.3.3 of this thesis), as illustrated in Table 7.1.

Hence, the translation of the quality of governance into good quality of care and compliance leads to three potential regulatory objects, situated in the three tiers of regulation of Gilad: on core production and operations, on systems, and on the organizations’ learning process. Regulation in the first tier (on the quality, affordability, accessibility of care) concerns the traditional prescriptive or performance-oriented regulation already familiar to the NZa and the Inspectorate (Gilad, 2011; Stoopendaal et al., 2016). The idea of system-based regulation in the second tier, or regulation focusing on organizational management and culture in the third tier, on the other hand, is relatively new to the NZa and the Inspectorate. Earlier research reported on an experiment of the Inspectorate

**Table 7.1:** The tiers of Gilad and the Good Governance Framework

<b>Tier of regulation (Gilad, 2010)</b>	<b>Regulatory standards (Gilad, 2010)</b>	<b>Good Governance Framework (NZa &amp; Inspectorate, 2016; 2020)</b>
<b>First tier: Organizations' core production and operations</b>	Prescribed actions, output specifications, or principles that control and constitute firms' production processes	'Good governance leads to affordable and accessible healthcare (good quality of compliance) of good quality.' (NZa & Inspectorate, 2016, p. 5; NZa & Inspectorate, 2020, p. 6)
<b>Second tier: Organizations' compliance systems</b>	System-oriented specifications that direct organizations' governance and control of their compliance with first-tier specifications	'The healthcare provider works with an operational integrated quality system for monitoring, controlling and improving the quality of care. This includes internal risk management, safe incident reporting and internal audits.' (NZa & Inspectorate, 2016, p. 11; see also NZa & Inspectorate, 2020, p. 10-11)
<b>Third tier: Organizations' self-evaluation</b>	Process-oriented specifications that guide organizations' analysis of the risks that their operations pose to regulatory objectives and their setting of first-tier and second-tier specifications	'The board knows where risks arise and which themes require attention. The board derives this information from a variety of measurements, investigations and control mechanisms. Control and monitoring are the basis for a continuous learning process. The Inspectorate and NZa do not only look at the hard figures in those results and monitoring. Also important are the systematic improvement actions and a culture of calling others to account. We expect that internal supervisors stimulate these discussions, participate if necessary, and monitor the remedial actions' (NZa & Inspectorate, 2016, p. 7; NZa & Inspectorate, 2020, p. 8)

to safeguard good and safe healthcare outcomes with system-based regulation and process-oriented regulation (Stoopendaal, 2016; Stoopendaal et al., 2014; Stoopendaal & Bovenkamp, 2018). This research showed some of the challenges in creating such a reorientation in supervisory practices.

It is important to stress that the idea of system- or process-oriented regulation in the second and third tier is to support a favourable outcome of first-tier specifications: organizations' core production and operations (Parker, 2002; Gilad, 2010; Mills & Koliba, 2015). In the healthcare sector, this means that system- or process-oriented regulation contributes to first tier prescriptive regulation that supports affordable and accessible healthcare (prescriptive declaration and administration regulations) of good quality (safety prescriptions and field norms). And this is where something remarkable happened. Based on the NZa-project studied in chapter 5 and the cases studied in chapter 6, it appears that the NZa and the Inspectorate have abandoned this direct link between the output, as regulated in the first tier, and the second and third tier specifications. In the studied cases, the NZa supervisors – together with inspectors of the Inspectorate – were concerned that poor management conduct would adversely affect the public inter-

est, although the conduct was legal and although there was no direct indication that the particular health care provider was delivering poor care or care that was not affordable or accessible. In other words, in these cases there is no clear breach of prescriptive regulation in the first tier. Still, the inspectors of the NZa and the Inspectorate, with an appeal to the Good Governance Framework supervising the management and culture of that health care provider, held executives and internal supervisors of health care providers accountable for legal behaviour that in the eyes of the NZa and the Inspectorate might harm the public interest. Good governance, therefore, goes beyond the expectation that healthcare organizations will comply with the law. It also includes awareness of the socially responsible role that healthcare providers have in society (Halsema et al., 2013; Minderman, 2012).

In the Good Governance Framework, the NZa and the Inspectorate do not elaborate on situations where, in their view, poor governance may endanger public interest without there being a breach of regulation or any other indication that the particular health care provider was delivering care that was not affordable, accessible healthcare of good quality, other than their positive formulated statement: *'Good governance and good internal supervision instill in us, as external supervisors, the confidence that an organization properly represents the public interest'* (NZa & Inspectorate, 2020, p. 17). It is not known, from the Good Governance Framework, how the NZa and the Inspectorate aspire to establish a relationship between the quality that is at stake – the quality of properly representing the public interest – and good governance behaviour (Dahler-Larson, 2019; De Kam, 2020). The study in chapter 2 shows the difficulties of constructing such a relationship: public interests cannot be precisely defined as they are fluid and context-bound and are often mutually contradictory. It is also not possible to determine unambiguously and a priori who is responsible for which interest. The same applies to the translation of 'good governance' as it does not lend itself to be defined by hard metrics (for example, it cannot be made inspectable by drawing up 'check-lists'), because it is highly situational and it also requires an assessment of 'soft information', such as the willingness and capability of executives and internal supervisors to successfully work towards a solution to the perceived problem (Legemaate et al., 2013; Kok et al., 2020). These characteristics of 'public interests' and 'good governance' could explain why the NZa and the Inspectorate did not include in the framework more specific statements about their expectations regarding good governance in relation to proper representation of public interest. In the next section, I will elaborate on how the NZa and the Inspectorate nevertheless tried to make 'proper representation of public interests by good governance' inspectable.

### 7.3 MOBILIZING INTERNAL SUPERVISORS AS AGENTS TO CONTRIBUTE TO THE QUALITY OF THE REGULATED OBJECT

Once a regulatory object has been defined, the regulator mobilizes or invites ‘agents’ to behave in a way that contributes to the quality of the regulated object (De Kam, 2020). The regulator can assess how an agent is performing on the quality of the regulated object by making their behaviour inspectable. Therefore, regulators depend on regulatory instruments to make the performance of an agent tangible (De Kam, 2020). Again, this entails a series of translations through which the regulatory object becomes inspectable (Dahler-Larson, 2019; De Kam, 2020).

According to the Good Governance Framework, the NZa and the Inspectorate appeal to a whole configuration of agents (Dahler-Larson, 2019): executives, internal supervisors, care providers and clients to promote good governance. In the framework, the NZa and the Inspectorate indicate what they expect from these agents in the context of good governance (Stoopendaal, 2016). The executives are responsible for the systems with which executives can monitor the state of affairs regarding quality, safety, registration, declaration and information, as well as the right working climate to achieve the desired results with the organization. Of particular interest for this thesis, of course, is how the NZa and the Inspectorate aim to mobilize internal supervisors. According to the Good Governance Framework:

*‘In addition to the organizational interests, it is up to the internal supervisors to always keep the public interest in mind. They supervise responsible weighing and control of opportunities and risks. They do this by, among other things, complying with the Zorgbrede governance code, being alert to the changing healthcare landscape and the future of the healthcare organization. In coordination with the executive board, internal supervisors therefore proactively put new social themes on their agenda’ (NZa & Inspectorate, 2020, p. 13).*

Chapter 5 of this thesis, on the observation of the NZa Good Governance project, and chapter 6, on good governance cases, show how the NZa searched for ways to make the new regulatory objects inspectable and how to mobilize – or invite – internal supervisors to behave in a way that contributes to the quality of governance. The Good Governance project was set up at the NZa to implement the Good Governance Framework in the existing regulatory strategy and to mobilize ‘agents’ to behave in a way that contributes to the quality of the regulated object. In the project, the NZa team members developed ideas on how and when to contact internal supervisors and on the way these internal supervisors could contribute to the regulatory goals the NZa wanted to obtain. As

mentioned, the NZa team members did not choose to invite internal supervisors to contribute in cases where there was a problem with the output of the health care provider or with the systems with which executives monitor the state of affairs regarding quality, safety, registration, reimbursement and information. Instead, they (only) choose to invite internal supervisors to contribute to cases where they were concerned that poor, but legal, executive management of the regulated organization would adversely affect the public interest, although there was no direct indication that the particular health care provider was delivering care that was not affordable, accessible healthcare of good quality (yet).

These cases clearly show that the NZa and the Inspectorate expected more from health-care providers than that they were compliant with administrative and financial rules following field standards for quality and safety. It was not clear from the Good Governance Framework, however, how much more they expected exactly. This observation entails two aspects that are relevant for the way in which the NZa and the Inspectorate mobilize agents to contribute to the goal they have in mind.

The first aspect concerns the way in which agents are mobilized. As mentioned, the exact relationship between good governance and the outcomes envisaged by the Inspectorate and NZa has not been established. What constitutes good or poor organizational management that endangers public interests is difficult to objectify (Legemaate et al., 2013; Kok et al., 2020) and the characteristics of ‘public interests’ (chapter 2 and paragraph 7.1) make it hard to define what ‘proper representation’ of public interest entails. This relationship, between good governance and outcomes, is therefore a suitable subject for debate between the Inspectorate and the NZa and the agents they want to mobilize. At a general level, external and internal supervisors could start a dialogue to develop a working method by mapping out the context that is relevant, viewed from the perspective of both external and internal supervision. In individual cases, in such a debate, external and internal supervisors might balance the different interests at play and analyse the relationship between the quality of ‘properly’ safeguarding public interests and good governance, on a case-by-case basis. But this is not how the NZa has approached the elaboration of the Good Governance Framework. The observations of the Good Governance project, described in chapter 5, showed that the NZa team members who had to implement the Good Governance Framework did not discuss the regulatory objects they aspired to obtain with internal supervisors (nor with executives). The team members put a lot of effort into developing a theoretical manual on when and how internal supervisors (and executives) could be invited to contribute to the regulatory goals the NZa wanted to obtain. The NZa used an authoritarian style of regulation, for team members

did not consult internal supervisors, or executives, but designed a framework on their own and expected internal supervisors to comply with that framework.

The second relevant aspect arises from the NZa's choice to gain experience engaging internal supervisors in cases in which the NZa lacks a legal mandate to enforce good governance or to sanction the conduct that they consider to be a threat to public interests. In the absence of a specific enforceable norm underlying their attempts to alter conduct, the NZa inspectors might hope to alter organizational governance practices by obtaining voluntary cooperation from the agents they aim to mobilize. Taking a look at what type of regulatory instrument inspectors might choose in such a context, it seems unlikely that an inspector would expect to obtain voluntary cooperation by taking an authoritarian stance and referring to legal rules, given there are no legal rules to refer to (Tyler, 1997; Black, 2009; Carter & Siddiki, 2021). Without taking a normative stance on which of the following motives can best be invoked in the given context, it is more likely that an inspector might presume, or hope, that the regulatee adopts good governance practices with a heterarchical appeal to normative motivations: (the extent to which the organization is committed 'to do the right thing' because it is convinced that its conduct is indeed problematic in face of the public interests at stake), economic motivations (the extent to which the organization is committed to maximizing its economic or material utility) or social motivations (the extent to which the organization is committed to earning the approval and respect of others) (Black, 2002; May, 2005; Winter and May, 2001; Burby and Paterson, 1993; Nielsen & Parker, 2012; Etienne, 2012). The case study in chapter 6, however, showed that when entering into a regulatory conversation with internal supervisors in individual good governance cases, despite their intention to make the internal supervisor a partner and ally in their concerns about safeguarding certain public interests, the attitude of the external supervisors during encounters was mainly authoritarian in style (see also Etienne, 2012).

The choice of the NZa on how to invite internal supervisors as agents to behave in a way that contributed to the quality of the regulated object, had repercussions on their relationship with internal supervisors, as I will explain in the next section.

#### **7.4 HOW CHOICES ON HOW TO MAKE GOOD GOVERNANCE INSPECTABLE IMPACT THE RELATIONSHIP BETWEEN EXTERNAL AND INTERNAL SUPERVISORS**

For the purpose of the regulatory object, using the regulatory instrument that makes the expected behaviour explicit, the activity of regulating establishes a relationship be-

tween a regulator and regulatee (De Kam, 2020; Stoopendaal & Bouwman, 2017; Spronk et al., 2019). The choice made by a regulator about a particular regulatory instrument is not neutral, as it determines the participation of mobilized agents. Furthermore, each instrument contains expectations of how they can or will behave in response to it (Pautz et al., 2017; Parys & Van Struyven, 2018; De Kam, 2020). Hence, internal supervisors of health care providers – the mobilized agents – influence the regulatory object not only in the way foreseen by the regulator (Lascoumes & Le Gales, 2007; De Kam, 2020). The appeal that external supervisors have started to make of internal supervisors, by setting expectations in the framework and by mobilizing them in regulatory conversations in individual good governance cases, evoked a response on two levels. At the sector level, the Association of Internal Supervisors in the Healthcare Sector (NVTZ) responded with its own framework, which included their view on a relationship between external and internal supervisors. At the case level, the members of the internal supervisory board of the health care provider that was the subject of the investigation responded to the appeals made to them by the external supervisors of the NZa and the Inspectorate.

At the sector level, the NVTZ has responded to the instructions of the Minister, the Good Governance Framework of the NZa and the Inspectorate, and the activities of the NZa and the Inspectorate, with their own vision of the relationship with external supervisors, in the context of supervising good governance. Independently of the NZa and the Inspectorate, the NVTZ presented their view on the subject in a Policy letter drawn up after a broad consultation among internal supervisors. In the Policy letter, the NVTZ states that interaction between external and internal supervisors has added value in incidental cases where the board does not perform well, but they disagree with the NZa and the Inspectorate about the applicable situations and character of the interaction (NVTZ, 2018). Internal supervisors see added value in interacting with external supervisors in cases where a health care provider may charge an incorrect fee or when the safety of patients may be at stake. Such cases were not discussed in the Good Governance project of the NZa. According to the Policy letter, in exceptional cases, where the executives have lost the trust of supervisors and the instruments available to the internal supervisor are insufficient to reach a breakthrough, the supervisory board could use the external supervisor as a kind of crowbar. As showed in chapter 4, the members of supervisory boards interviewed for this study elaborated on this view and noted that they would like to be given the opportunity to resolve a problem that has led to an incident before the NZa or the Inspectorate impose formal measures themselves. But – and this is also different from the view of the NZa and the Inspectorate – internal supervisors cannot be perceived or utilized as an extension of external supervision, because each has its own tasks and responsibilities (*compare* NVTZ Policy letter, 2018, p. 4).



The Good Governance Framework was therefore not simply adopted by the NVTZ, but was provided with critical comments. These caveats and provisos are understandable. Although no one in general will be against protecting public interests (*compare* Dahler-Larsen, 2019), internal supervisors, by law, also have other interests to take into account. By civil law, supervisory boards are supposed to act in the best interest of the organization they supervise. In the Dutch health care sector, as well as in other countries, market forces are becoming increasingly important and the distinction between public and private interests is becoming blurred because of the increasing complexity of organizational structures (Trubek, 2006; Hodgkinson, 2013). As was illustrated in chapter 2, in the Dutch health care sector – where a substantial part of the market is unregulated and care providers are required to act as competitive market players – the best interest of the organization is not necessarily equal to the best interests of the public (Bal, 2008; Van de Bovenkamp et al., 2014; Schott et al., 2016; Klenk, 2020). The dilemmas between public and organizational interests, as shown by the examples in chapter 2, make it clear that the weighing up of interests is not unambiguous and that therefore internal supervisors cannot be expected to focus primarily on the public interest and the provision of services to citizens over the interests of the organization (WRR, 2015; Ministry of Economic Affairs, 2014; Minderman, 2012). Whereas earlier, the WRR recommended that reflective supervisors should be able to develop standards together in dealing with these tensions, between public and organizational interests (WRR, 2015, p. 11), this recommendation might also apply to the relationship between the balancing of interests and the relationship with good governance. In the Policy letter, the NVTZ invites the external supervisor to take the lead in organizing such a debate at the sector level (NVTZ, 2018).

At the case level, the case study of chapter 6 shows how the NZa has mobilized internal supervisors in face-to-face regulatory conversations to pursue voluntary cooperation in preventing or mitigating the perceived harm to the public interest. In these regulatory conversations, the construction of safeguarding public interests by good governance unfolded through an interaction with internal supervisors. The study identified hierarchy and ambiguity as a central characteristic of this interaction. First, external supervisors displayed authoritarian behaviour incongruent with the horizontal relationship style they aimed for. Although hoping for internal supervisors to share their concerns and help address the perceived harm to the public interest, external supervisors summoned internal supervisors to the office to hold them responsible for poor governance. What constituted good governance or what public interests were endangered in the given case was not constructed in a debate with internal supervisors, but was announced during the regulatory conversations by the external supervisors to internal supervisors, leaving little or no room for the context of good governance. And second, the authoritar-

ian behaviour of the external supervisor was incongruent with the horizontal relationship style that internal supervisors tended towards.

The ambivalent behaviour and mismatch between expectations led to confusion and irritation among both external and internal supervisors. To put it bluntly, this confusion and irritation led to the opinion, on both sides at the table, that ‘the other party does not understand us, and that is the fault of the other’. During these regulatory conversations, external supervisors failed to mobilize the internal supervisor to contribute to the desired result in a way that the external supervisor had expected, or had hoped for. In the studied cases, the regulatory objectives were eventually achieved via pressure applied through an intensified supervision regime by the Inspectorate. This regime included the publication of a press release and a research report. The ambivalent and hierarchical way in which the regulatory conversations were conducted, as well as the applied intensified supervision regime, led to a lack of understanding among the internal supervisors involved who did not support this approach by the external supervisor.

Although no cases are available to study whether a different approach could lead to a different result, the cases studied in chapter 6 show that the NZa and the Inspectorate had not succeeded in making an understandable translation of the relationship between good governance as a regulatory object, and the public interests they aimed to safeguard by supervising good governance. The NZa and the Inspectorate had not sufficiently taken into account the context of good governance and the role of internal supervisors in it, and the complexity of the balance between public interests and organizational interests. By ignoring this and hierarchically mobilizing internal regulators as agents to contribute to their regulatory purpose, internal regulators were not compelled to make the contribution that external regulators had intended. Moreover, internal supervisors were irritated and confused about how they were involved in supervision by the external supervisor, as the approach of the NZa and the Inspectorate did not make sense to them (*compare* Ciborra, 2002; Mascini & Van Wijk, 2008; 2009). For the relationship between the external and internal supervisors in the case studied, this meant that none of the parties had the feeling that collaboration had led to positive outcomes. Incidentally, internal supervisors were less positive than external supervisors, perhaps because external supervisors had ultimately achieved their goal – albeit by ‘regulation by revelation’: the use of making the case transparent to the public as leverage to achieve the regulatory object (Van Erp, 2011; Van Erp & Mein, 2013).

The vertical relationship style, in the shadow of hierarchy (Rhodes, 2007; Black, 2002), used by the NZa and the Inspectorate may fit well with their traditional prescriptive or performance-oriented regulation (Ottow, 2015; Rutz, 2017), but it has not adapted to the

new regulatory object of good organizational management and culture in order to safeguard public interest in cases where there was no direct enforceable norm underlying such attempts. In this ambiguous context, the authoritarian attitude of the NZa and the Inspectorate is a cop-out from constructive interaction with internal supervisors. The NZa and the Inspectorate miss an opportunity to discuss all relevant interests of a good governance context that allows for making good, solid decisions that can be supported by both external and internal supervisors. Yet, as has already surfaced in the study of chapter 5, there are also positive relational developments. After NZa team members gained confidence by obtaining knowledge and experience with good governance as a new regulatory object, the team members were able to take a step back and see the relationship from a broader perspective than the individual good governance cases. The team started attending joint meetings with the association of internal supervisors, not with a hierarchical attitude but with a more hospitable tone that established a bridge between the external and internal supervisors (Ciborra, 2002, p. 103). By ‘hospitality’, I refer to Ciborra’s interpretation: the phenomenon of dealing with someone or something new (Ciborra, 2002, p. 110). A more hospitable attitude entails that both parties are open to listen, to share and to comprehend each other’s position and points of view. From there, a relationship can be built, taking into account each other’s interests, roles and responsibilities (Ciborra, 2002; Scholtes, 2012). During these general meetings, where external supervisors were not on a mission to address perceived poor management of a specific healthcare provider, the external supervisors released their control of the conversation and ‘let it flow’. They took the time to listen to the stories of how it is to be an internal supervisor and to share their experiences as external supervisors.

The inspectors of the NZa that attended the general meetings shared their experiences with other colleagues from the supervision department of the NZa. By disseminating this knowledge and experience among the NZa-colleagues, these experiences also led to learning at the department level. Members of the supervision department subsequently held internal meetings to reflect on the findings of the study described in chapter 6. They shared their experiences of regulatory conversations in good governance cases, but also in other cases where they had to rely on the voluntary cooperation of regulatees. They also reflected on their preparation of current cases. During these reflections, they learned that not all colleagues held the same view about the type of regulatory relationship they considered appropriate in a given situation. They agreed to openly discuss expectations and aspirations about the appropriate type of relationship and corresponding behaviour toward the regulatee (representative) in general, as well as in specific cases, and they agreed to align their own views internally before engaging into a regulatory conversation with third parties. They also concluded that it benefits the relationship with third parties if they discuss goals and expectations openly and trans-

parently with them. This can be done prior to a conversation or during a conversation as soon as ambiguities or misunderstandings hamper communication. Discussing the relationship together (repeatedly) brings the opportunity to explore a common understanding of their relationship (Ciborra, 2002; Etienne, 2012; Ansell & Gash, 2018). The individual external supervisors expressed a desire to train their skills, with the aim of having better conversations with regulatees, that is, less ambiguous conversations with more attention to the relationship and the needs of the other, aimed at more balanced and supported outcomes.

## **7.5 WHAT CAN WE LEARN FROM THE STUDIED INTERACTION BETWEEN EXTERNAL AND INTERNAL SUPERVISORS?**

*What has this research into the question of how external and internal supervisors can complement, reinforce or substitute each other in their goal of supervising organizations yielded?*

The first three sub-studies of this thesis showed how in general interaction between external and internal supervisors can take place, what the advantages can be and what the points of attention are. In particular, internal supervisors are in favour of meeting, sharing knowledge and experiences, and reflecting on both supervisors' roles and responsibilities. In their Good Governance Framework, the NZa and the Inspectorate state that they have a similar ambition: they seek connection by entering into a dialogue aimed at mutual consultation and information exchange. Yet, such meetings between external and internal supervisors only take place sparsely. Both supervisors hesitate to initiate such meetings unsure of how and when contact between external and internal supervisors is appropriate (WRR, 2015, p. 4). The study in chapter 4 showed that most of the interviewed internal supervisors preferred to enter into relationships through, for example, informal (sectoral) meetings, as this could help to remove barriers to contact. In situations where executives fail, both external and internal supervisors are in favour of contact in the event of an incident. With the connivance of the executives, the members of internal supervisory boards prefer to be given the opportunity to resolve a problem that has led to an incident before external supervisors impose formal measures.

This charged contact, when the 'heat is on', should preferably not be the first contact between the external and internal supervisors, however. Several participants in the study suggested that contact could be built up, especially in calmer waters, for example through the above-mentioned informal sectoral meetings, or when the NZa or the Inspectorate supervisors make an informal working visit to individual healthcare provid-

ers. Some participants see an opportunity to improve supervision by reflecting together on the things that are going well within the healthcare provider, instead of putting the emphasis on negative incidents as NZa and the Inspectorate do now in good (or rather: 'poor') governance cases. This opportunity is reflected in the literature on health system reform, as Braithwaite et al. succinctly summarize:

*'The key is to appreciate that healthcare is resilient to a large extent, and everyday performance succeeds much more often than it fails. Clinicians constantly adjust what they do to match the conditions. Facilitating work flexibility, and actively trying to increase the capacity of clinicians to deliver more care more effectively, is key to this new paradigm. At its heart, proactive safety management focuses on how everyday performance usually succeeds rather than on why it occasionally fails, and actively strives to improve the former rather than simply preventing the latter'* (Braithwaite et al., 2015, p. 418).

By reflexing on what goes well – and why – both supervisors could get acquainted and share knowledge of the health practices, systems and good governance that lead to good outcomes (J Braithwaite et al., 2015; Bal et al., 2015; Stoopendaal, 2016; Rutz, 2017). The reasons why things go right are a lot like the reasons why things go wrong; lessons can therefore not only be learned from incidents where things went wrong, but also from reflection on the things that went well (Bal et al., 2015; see also Braithwaite et al., 2014; Stoopendaal, 2016). Precisely with debatable concepts such as 'good governance' and a 'correct representation of public interests', actually looking at *good* governance – instead of *poor* governance – offers an interesting perspective.

In the studied conversation about *poor management*, we saw that the external supervisor mobilized the internal supervisor to have the executives change course in order to protect the public interests that the external supervisor considered to be at risk. Hence, in the perception of the external supervisors, the goal of the regulatory conversation was not to assess whether there was good or poor governance, but rather to protect an interest that was potentially at risk because of the behaviour of the (board of) executives of the health care organization. Bad behaviour (poor governance) had to be modified to avert that risk, leaving little to no room to reflect on the context of good governance and the interests at stake. Such a starting point of the conversation involves a certain urgency. After all, if the external supervisor does not act, his agency may face disapproval from politicians and other social stakeholders, as well as negative publicity that undermines trust in supervision (Kasdorp, 2016a; Baldwin & Black, 2016). In this context, the case studies showed that the external supervisors imposed their vision hierarchically on the internal supervisor, which was reflected in the authoritarian behaviour of

the external supervisors during the regulatory conversations with internal supervisors. This authoritarian behaviour was also evident through the exertion of pressure by the imposing an intensified supervision regime.

In conversations about *good* governance (that leads to good, affordable and accessible health care), on the other hand, there is room to discover how public interests can be better safeguarded in relation to good governance (Bal et al., 2015). To discover what good governance entails, external supervisors are forced ‘to be sensitive to the context in which an organization is operating and appraise the leadership qualities of organizational leaders’ (Kok et al., 2020, p. 8). For example, by listening to the stories of the executives and the internal supervisor about how they have shaped good governance in their organization: how they handle the weighing of different interests, control and evaluate their processes, involve their care takers, patients and other stakeholders. The external supervisor can learn from the experiences of the health care boards while internal supervisors can learn from the external supervisors when they share their lessons from previous conversations with other health care organizations. As has been pointed out by various participants I interviewed, involvement is important but this close contact should not lead to capture. ‘Capture’ refers to a situation in which an external supervisor becomes too closely involved in seeking a solution with the supervisory board of a regulatee. When such relations become too close, an external supervisor may align with the interests of the regulatee rather than operating in the public interest; consequently, the supervisor loses its ability to retain a position of independence and impartiality (Ansell & Gash, 2008; Pollmann & Raaijmakers, 2009; Carpenter & Moss, 2014; Ottow, 2015; Lewin, 2016; Abbott et al., 2017). As these discussions about good governance do not entail any judgment from the external supervisor about whether or not to take a formal measure, the risk of capture will probably be much smaller than in discussions about potential infringements.

### **7.5.1 Scholarly contributions and opportunities for future research**

These findings contribute to current scholarly knowledge by providing conceptual and empirical insight into interactions in new regulatory relationships, and more particularly, the interaction between external and internal supervisors. It thereby makes several academic contributions.

First, this thesis contributes to knowledge about the understudied regulatory relationship between external and internal supervision (De Ridder, 2013; De Waal, 2020). Earlier research shows that there is a difference in how an appeal to compliance affects the organization, depending on the group of representatives of the regulatee who are called upon (Li & Van Rooij, 2021). Hence, studying the interaction between external and inter-

nal supervisors is a valuable addition. To my knowledge, this regulatory interaction with internal supervisors has not been a focal point for such empirical research before. In addition, many studies on regulatory interactions are limited to exploring the regulatory enforcement styles of regulators separately from the compliance motivations of regulatees (Pautz et al., 2017), while in this thesis I explicitly study the interaction between the regulator and the representative of the regulatee, involving the input of both parties participating in this interaction. In particular, chapters 5 and 6 provide insight into the possibilities of interaction to improve external and internal supervision and the context of the dynamics in which interaction takes place at a micro-level. A better understanding of this dynamics helps to more fully illuminate how cooperative interaction might be accomplished and how in such a context regulatory relationships evolve and regulatory objectives can be achieved. The findings also offer an interesting scientific perspective for future empirical research into the possibilities of joint contributions of external and internal supervision to construct and safeguard public interests by means of reflecting on and learning from each other's work, not only in healthcare, but also in other semi-public sectors.

Second, this thesis builds on earlier research that empirically assessed the tenability of the assumptions underlying the predominant interpretation of responsive regulation theory. A common theme in earlier research is that regulatees perceive regulators as punitive and/or inconsistent, despite the intention of regulators to engage in a cooperative style of regulation (Mascini & Wijk, 2009; May & Wood, 2003; Winter & May, 2001; Pautz et al., 2017). The cases examined show that, although the regulatory strategy of the NZa and Inspectorate, which is based on the responsive regulation pyramid of Ayres & Braithwaite, leaves room for a responsive approach, interaction aimed at obtaining voluntary cooperation still takes place in the shadow of hierarchy. Failure of the external supervisors to respond to the complex context of good governance in relation to proper representation of public interests has a negative effect on internal supervisors' understanding of the regulatory approach. As a result, the internal supervisor does not feel invited to cooperate, but instead adopts a defensive attitude.

This failure to respond to the complex context of good governance is based on the NZa and the Inspectorate being unclear of what (poor) governance behaviour they might target or potentially look to alter when they consider public interest to be at risk, in situations where there is no breach of regulation nor any other indication that the particular health care provider was delivering care that was not affordable, accessible healthcare of good quality (*compare* De Kam, 2020, p. 146). Paragraph 7.3 showed how this failure is related to the one-sided, authoritarian, choices the NZa and the Inspectorate made with regard to regulatory instruments to make an object inspectable. Hence, this research

confirms the findings of De Kam that ‘Analytically pulling apart the regulatory object and the regulatory instrument that operationalizes that object allows [the researcher] to focus on the effects of the instrument, since organizations and individuals subject to regulation see themselves confronted with and are asked to respond to regulatory instruments rather than to regulatory objects as such’ (De Kam, 2020, p. 149-150). What this thesis adds are 1) new insights in how choices on how to make a regulatory object inspectable impacts the relationship with regulatees and 2) the importance of the required relational work. This relational work consists of making an effort to achieve a shared reality between the external supervisor and internal supervisor both with regard to the public interests at stake and the (legitimate) translation thereof into regulatory objects and instruments (see also chapter 2). With insights into the dialogue and associated dynamics and micro processes between internal and external supervisors, this thesis contributes to a better understanding of the required relational work between both supervisors and the way the regulatory object, instrument and relationship, as described by De Kam, are interlinked.

This thesis also contributes to the responsive regulation literature on frontline regulatory interactions (May & Wood, 2003; De Boer, 2018; Klenk, 2020). At the heart of responsive regulation theory is the assumption that the regulator responds to the conduct of regulatees in ways that are sensitive to the conditions in which regulation occurs by using different tools for supervision and intervention (for instance, more punitive or more persuasive tools) (Ayres & Braithwaite 1992; Crawford, 2006). Empirical research showed that in practice, the intentions of individual inspectors are regularly perceived differently by regulatees evidently affecting the results of the regulatory approach (Mascini & Van Wijk, 2009; Pautz et al., 2017). With the introduction of displayed behaviour, to analyse discrepancies in regulator-regulatee interaction, this thesis provides more insights into the regulator-regulatee relationship. The use of the relational signaling framework of Etienne (2012), to operationalize displayed behaviour, enabled the analysis of the ambiguities that characterized the relationship between external and internal supervisors because it allowed for a comparison between the displayed behaviour during regulatory conversations and the intention of the external supervisor, in addition to an analysis of the differences in intentions and perceptions of external supervisors compared to those of internal supervisors. In the cases studied, ambiguities appeared to arise from the use of traditional hierarchy patterns in the behaviour of the external regulator, who had not adapted regulatory behaviour to the new regulatory object, and the choice of regulatory instrument by the external regulator.

Many of the findings appear to be of interest to other sectors as well given the issues of governance and collaboration with internal supervisors raised during the interviews with



external supervisors in other sectors (chapter 3). A limitation of this thesis, however, is that the data does not support conclusions about the constitution of a regulatory object and the ensuing relationships in other sectors, where a different constellation of public and private interests may exist, with different tasks and responsibilities of external supervisors and of internal supervisors. Neither does the data support conclusions about a relationship with other regulatee representatives than internal supervisors. Future research, extended to other sectors or other relationships, could build on this research. The use of the concept of the regulatory object as defined by De Kam, and the distinction between the regulatory object, the regulatory instrument and the regulatory relationship may also be helpful in other studies to understand the dynamics in the interactions between regulator and regulatee. The same applies to the use of the relational signalling framework to identify (in)congruencies between displayed behaviour and the subjective relationship style, as it might be useful to consider other questions regarding assumptions at the base of responsive regulation in a new light as well.

Finally, this thesis contributes to research strands focused on process-oriented literature exploring more deliberative models to deal with complex regulatory issues where traditional prescriptive regulation is too rigid and ill-suited (Parker, 2002; Gilad, 2010; Sabel & Zeitlin, 2012; Mills & Koliba, 2015; Rutz, 2017; Sabel et al., 2018). Earlier research showed the difficulties of a process-oriented regulatory regime in a context that requires a balancing act of democratic, administrative, and market accountability mechanisms (Mill & Koliba, 2015; Rutz, 2017; Stoopendaal & Bovenkamp, 2018). This thesis unravels the way the NZa and the Inspectorate apply a regulatory focus on good governance to supervision embedded in the three tiers of Gilad, and more particularly, unravels the way how a regulatory focus on good governance as a regulatory object might contribute to the socially responsible role that healthcare providers have in society. This thesis revealed relational pitfalls in making good governance, as a new regulatory object, inspectable. Yet, it also provides opportunities for improving the hampered relationship by starting dialogues and reflection, for instance by starting with good examples of good governance instead of examples of poor governance. During the observed Good Governance project, reflexive regulation by looking at good examples and sharing them was discussed within the project team. Although such conversations did not take place during the observation period of the research in chapter 5, the NZa is working on more deliberative methods of supervision and regulation, on good governance as well as on other subjects (for example the study into the possibilities offered by funding to encourage appropriate use of care and digital care). It is of interest for future research to study how this new path of constructing good governance develops and how regulations and supervision can be structured in such a way that accountability is given for the provision

of care, while retaining the scope to do justice to the complexity of the weighting of good governance that contributes to public interests (Bal et al., 2015; Pautz et al., 2017).

### 7.5.2 Practical contributions: 6 ideas

This thesis also makes practical contributions. I present these contributions in the form of six ideas that might facilitate the exploration of interaction in supervisory practices. These ideas are based on the experiences of the NZa reflecting on the findings of the study described in chapter 6, and their internal debates on their experiences of regulatory conversations in good governance cases, as well as other cases where they had to rely on the voluntary cooperation of regulators. Although formulated in the imperative mood, they are merely guidelines to consider when reflecting on supervisory practices. The first three ideas might inspire *external supervisory agencies* that wish to explore a relationship with internal regulators, in general along with some remarks that apply in particular to the NZa and the Inspectorate. The second three ideas might facilitate *external and internal supervisors* who wish to interact with each other.

*Three ideas for external supervisory agencies:*

1. Discuss internally what type of regulatory relationship suits the object of regulation and the way in which you want to make it inspectable (chapter 5 & 6):
  - What type of supervisor do you want to be, in which situation (intention)?
  - Who do you want to invite to contribute to the regulatory object?
  - What behaviour of external supervisors is then appropriate?
2. Do not stay at home during the process of exploring a relationship. Instead, go out and build a relationship together with those you want to involve in supervision (chapter 5).
  - Work towards a shared reality between the external supervisor and internal supervisor with regard to the public interests at stake; and with regard to the legitimate translation thereof into regulatory objects and instruments.
  - This is of particular importance when the construction of a new regulatory object involves debatable concepts, such as ‘good governance’ or ‘representation of public interests’ (chapter 3 and 5).
3. The ‘poor governance cases’, as studied in Chapter 6, are embedded in a very complex regulatory context, which makes it difficult to shape the interaction between external and internal supervision in these cases. There are alternative ways of shaping interaction between external and internal supervision in the context of good governance (chapter 1 and 6).
  - One alternative is to learn from *good* governance: what is going well and why it is going well (paragraph 7.4). Explore the possibilities of more deliberative ways of

supervision. Promote reflection in practice and focus on learning processes that enhance interaction in the public and private spheres (chapter 2).

- One alternative is to enter into a dialogue on how executives and internal supervisors have organized systems, organizational behaviour and culture, and learning processes to ensure that their organization can provide good, accessible and affordable care when an actual deficiency is identified (chapter 4).
- Interaction could also take place during incidents where the members of internal supervisory boards prefer to be given the opportunity to resolve a problem that has led to an incident before external supervisors impose formal measures.
  - Particularly in situations where executives fail.
  - With the knowledge of the executives.

*Three ideas for external and internal supervisors during interaction:*

4. Be aware of the boundaries of roles and responsibilities (chapter 3 and 4).
  - The external supervisor should not take over the role of the internal supervisor.
  - The internal supervisor is not an extended arm of external supervision.
  - Internal supervisors indicate that the relationship with the external supervisor can put pressure on or even damage their relationship with executives. This could hinder the work of internal supervisors in the future. Explicit attention should be paid to this during interaction.
5. Be hospitable (chapter 5):
  - Be receptive and adopting: Take off the glasses you normally see the world through and try to see the interaction from the other person's perspective.
  - Discuss the trust you can have in each other and be transparent in your intentions.
    - For example, be aware that information exchanged in confidence can also lead to formal enforcement (in the context of the legal obligation of external supervisors to take enforcement action in case of violations) or to an intensified supervision regime.
6. Be congruent in your conversations (chapter 6)
  - Avoid ambiguity and misunderstanding by discussing how you see the relationship (vertical or horizontal; normative or social, figure 6.1) with colleagues and with other participants in the conversation.
  - Become aware of any discrepancies between your intentions and behaviour by reflecting on it with colleagues, making use of Etienne's relational signalling framework (table 6.1).
  - Display behaviour that is congruent with your intentions.

The last remarks I would like to make here is that my observations during the research showed how long each of the parties can work on a vision of collaboration without actually contacting each other. Talking *about* collaboration has taken more time overall than talking *during* collaboration. I hope that the insights that this thesis provides into the possibilities and sensitivities of interaction between external supervision and internal supervision, in general, and those in the good governance cases in the health care sector, in particular, facilitate the establishment of interaction. It is unlikely, and unnecessary, that external and internal supervisors will be spotted making inroads at each other's offices, but hopefully they will find each other in those areas where interaction can contribute to the quality of supervision both externally and internally.





# R

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## SUMMARY

Since the introduction of a health care system based on the principles of managed competition in 2006, healthcare in the Netherlands has increasingly developed into a sector where the government creates the preconditions and care providers are responsible for the care within these preconditions (Ministry of Health, 2005; Van Kleef, 2012). Numerous positive developments allegedly stem from this managed competition system, such as declining waiting lists for a number of types of care and more freedom of choice for patients, but there were also less positive developments. Incidents have occurred in the healthcare sector where some healthcare organizations lost sight of the quality or safety of care or took too many risks with public funds (Ministry of Economic Affairs, 2014). As a result of these incidents, the function of supervision within healthcare has come to the fore in the past decade (Strating et al., 2020). This trend was also visible in other semi-public sectors, where similar incidents had occurred.

Several reports have been written indicating how the quality of supervision could be improved (WRR, 2010; Halsema et al., 2013; RVZ, 2013; WRR, 2015). As one of the points where improvement could be made, the Minister of Health argued in favor of strengthening supervision through interaction between external and internal supervision, in the context of good governance (Permanent Committee for VWS, 2015; Ministry of Public Health, 2016a). External supervision is carried out by the Inspectorate, the public regulator of the quality and safety of care, and the Dutch Healthcare Authority (NZa), which is responsible for public regulation of the accessibility and affordability of care and the transparency of healthcare markets. By also entering into a dialogue with members of the internal supervisory board – in addition to the directors who, as those with ultimate responsibility for the healthcare organization, are the first point of contact for the external supervisors – the external supervisor gains a picture of how the internal supervisor organizes its responsibility towards the executive board, and vice versa (Ministry of Health, 2014). If the external supervisor has confidence in the way the organization is governed, according to the Minister, the external supervisor can show restraint with regard to its own supervisory activities (Vaste commissie voor VWS, 2015a). This assignment heralded a shift from traditional supervision of organizational output to a new regulatory object: supervision the (good) governance of an organization.

Since then, both external and internal supervisors have wondered how an appropriate relationship can be shaped, and opinions of how to interaction, or whether there should be interaction at all, differ (De Ridder, 2013; Stoopendaal et al., 2014; Stoopendaal et al., 2016; Stoopendaal & Bovenkamp, 2018; Frissen & Meurs, 2020; Schraven, 2019). At the start of this thesis, building a relationship between external supervisors and internal



supervisors in healthcare – but also in other semi-public sectors – was still in the starting blocks. There was little practical experience to get an idea of what such a relationship might look like. Existing scientific literature also failed to provide an answer, since scholars pay little attention to the relationship between external and internal supervision (De Ridder, 2013; De Waal, 2020).

This thesis aims to fill this gap. The aim of the thesis is to increase the understanding of the relationship between external and internal regulators. This thesis focuses on building a new relationship between external and internal supervision and the way this relationship develops in general and in the Dutch healthcare sector in particular. In so doing, it seeks an answer to the following question:

*How can external and internal supervisors complement, reinforce or replace each other in their goal of overseeing organizations?*

The five studies of this thesis each highlight a different aspect of the research goal, using different research methods. Together, the studies provide an in-depth understanding of the construction of good governance as a new regulatory object and the construction of the associated new relationship between external and internal supervisors.

The first study, *'Public interests in healthcare. How to safeguard and determine them?'* (chapter 2) is based on a literature review. Since the aim of the interaction between external and internal supervision is to contribute to the better safeguarding of public interests (Ministry of Economic Affairs 2014; Ministry of Health 2015; Ministry of Health, Welfare and Sport 2016), this research aims to find answers to the question which public interests in the field of health care can be distinguished and how these are safeguarded. We found that public interests cannot be precisely defined because they are contextual and can shift over time. Internal supervisors cannot be expected to safeguard the public interests. To better secure public interests, government and healthcare providers could explore the possibilities to cooperate. Opportunities of experimentalist governance are a promising starting point for such cooperation, to explore and pursue public interests together.

The second study, *'Involvement of internal supervisors in the practice of external supervision'* and the third study *'Interaction between external and internal supervisors. Collaboration in the event of incidents in healthcare.'* (chapters 3 and 4) are qualitative studies based on document analysis and interviews. By interviewing inspectors from multiple external supervisors and internal supervisors of healthcare providers, we looked at the views of both supervisors on the relationship between internal and external supervision

and what they think are opportunities and obstacles to interaction. In the interviews, both external and internal supervisors indicated that interaction could help with supervision, by sharing their views on potential problems and coordinating who has which task and responsibility. Getting to know each other in good times could help solve problems when the pressure is on. When internal supervisors solve a problem, some external supervisors adjust their role accordingly. Despite these possibilities, there was still hardly any contact between both parties. External supervisors were concerned collaboration could lead to becoming too closely involved in seeking a solution with the supervisory board, running the risk of capture. The hesitancy of internal supervisors mainly emanated from their awareness that they must take care not to encroach on the role of the executives. Because of their shared discomfort, the relationship between external and internal supervisors was at best tentative, in practice, and more often than not absent. Both external and internal supervisors are increasingly working on exploring the relationship, but structural policy is still scarce.

The fourth study, *'Exploring the start of cooperation between internal and external supervisors. Insights from the practice perspective.'* (chapter 5) is an ethnographic study where we report on our observations of the process of the NZa to work from a vertical to a more horizontal, collaborative supervisory practice that involves interaction with internal supervisors. In this study, we analyse this transition from a practitioner's point of view, observing the NZa Good Governance project. Using insights from regulatory governance theory, we analyse how the NZa differentiated and aggregated its activities to control its task to collaborate and to grow curiosity and hospitality to get to know internal supervisors.

The fifth study *'Ambiguous signaling in regulatory conversations. How miscommunication and hierarchy hinders voluntary regulated collaboration'* (chapter 6) is a case study in which we analyse governance conversations between external and internal supervisors in three cases where the good governance of a healthcare provider was disputed. We focused on the actual interactions between both supervisors during these conversations and how external supervisors in the healthcare sector tried to obtain voluntary cooperation from internal supervisors, to alter organizational governance practices. The conversations examined were characterized by ambiguity: there was a discrepancy between the goal that external supervisors wanted to achieve and the relational signals they sent during conversations, and a discrepancy between the views of the external supervisors and the internal supervisors about the type of relationship they were involved in. These discrepancies lead to irritation and incomprehension among the conversation partners; a good relationship has not yet been built up and the supervisory objective intended by the external supervisor was not achieved. If the intentions and behavior of

the parties were better coordinated, regulatory conversations would probably run more smoothly. To achieve this, inspectors could adopt a more ‘decentralized’ understanding of their role in that context and involve internal supervisors in reflective dialogues about each other’s position in their (supervisory) relationship.

In the final chapter, I synthesize all research findings. The studies reveal how the choices made about the way in which the external supervisor makes good governance, a new object of regulation, inspectable influence the relationship between the external supervisor and the person(s) he wishes to involve in the inspection – in this case: the relationship with the internal supervisors. Interaction between internal and external supervisors in good governance cases – where external supervisors consider public interests to be at risk, although the behaviour of the regulatee is legal – are suitable for heterarchical cooperation between external and internal supervisors. Yet, in practice, this interaction turned out to take place in the shadow of hierarchy, leading to ambiguous conversations and miscommunication between external and internal supervisors. Failure of the external supervisors to respond to the complex context of good governance in relation to proper representation of public interests has a negative effect on internal supervisors’ understanding of the regulatory approach. As a result, the internal supervisor does not feel invited to cooperate, but instead adopts a defensive attitude. This observation shows that relational work is required in shaping a new regulatory object, and making that new object inspectable. This relational work consists of the pursuit of a shared reality between the external supervisor and the internal supervisor, both with regard to the public interests at stake and with regard to their (lawful) translation into regulatory objects and instruments. The thesis therefore concludes with a number of practical ideas on the basis of which external supervisory organizations and individual external and internal supervisors can shape this relational work.

## SAMENVATTING

Sinds de introductie van een zorgstelsel gebaseerd op de principes van gereguleerde concurrentie, in 2006, heeft de zorg in Nederland zich steeds meer ontwikkeld tot een sector waar de overheid de randvoorwaarden scheidt en zorgaanbieders verantwoordelijk zijn voor de zorg binnen deze randvoorwaarden (Ministerie van Volksgezondheid, 2005; Van Kleef, 2012). Het stelsel van gereguleerde concurrentie leidde tot tal van positieve ontwikkelingen, zoals afnemende wachtlijsten voor een aantal zorgvormen en meer keuzevrijheid voor patiënten. Gereguleerde concurrentie leidde ook tot minder positieve ontwikkelingen, waar soms zorginstellingen de kwaliteit of veiligheid van zorg uit het oog verloren of te veel risico's namen met publieke middelen (Ministerie van Economische Zaken, 2014). Door deze incidenten is de functie van toezicht binnen de zorg, en overigens ook binnen andere semi-publieke sectoren, het afgelopen decennium op de voorgrond gekomen (Strating et al., 2020).

Er zijn meerdere rapporten verschenen die aangeven hoe de governance van semi-publieke organisaties verbeterd kan worden teneinde publieke belangen beter te borgen (WRR, 2010; Halsema et al., 2013; RVZ, 2013; WRR, 2015). Als een van de punten waar verbetering mogelijk was, pleitte de minister van Volksgezondheid, Welzijn en Sport (VWS) voor versterking van het toezicht door interactie tussen extern en intern toezicht, in het kader van goed bestuur (Vaste commissie voor VWS, 2015b; Ministerie van Volksgezondheid, 2016a). Extern toezicht wordt gehouden door de Inspectie, de publieke toezichthouder op de kwaliteit en veiligheid van zorg, en de Nederlandse Zorgautoriteit (NZa), die belast is met het publieke toezicht op de toegankelijkheid en betaalbaarheid van zorg en de transparantie van zorgmarkten. Waar normaal de bestuurders van zorgorganisaties het eerste aanspreekpunt zijn voor deze externe toezichthouders, zouden de Inspectie en de NZa een completer beeld van een zorgorganisatie krijgen wanneer zij (ook) de dialoog aangaan met de interne toezichthouder van een zorgorganisatie. Door het gesprek aan te gaan, krijgen externe toezichthouders een beeld van hoe interne toezichthouders hun verantwoordelijkheid jegens de raad van bestuur inrichten en uitvoeren, en krijgen interne toezichthouders een beeld van de rol en verantwoordelijkheid van de externe toezichthouders (Ministerie van Volksgezondheid, 2014). Als de externe toezichthouder vertrouwen heeft in de wijze waarop de zorgorganisatie wordt bestuurd, kan de externe toezichthouder volgens de minister terughoudend zijn bij het eigen toezicht (Vaste commissie voor VWS, 2015a). Deze opdracht luidde een verschuiving in van traditioneel toezicht op de output van de organisatie naar een nieuw toezicht object: het toezicht op de governance van een organisatie.

Zowel externe als interne toezichthouders vragen zich sindsdien af hoe een passende relatie vorm kan krijgen, en de meningen over interactie, of dat er überhaupt interactie moet zijn, verschillen (De Ridder, 2013; Stoopendaal et al., 2014; Stoopendaal et al., 2016; Stoopendaal & Bovenkamp, 2018; Frissen & Meurs, 2020; Schraven, 2019). Bij de start van dit onderzoek stond het opbouwen van een relatie tussen externe toezichthouders en interne toezichthouders in de zorg – maar ook in andere semi-publieke sectoren – nog in de startblokken. Er was weinig praktijkervaring om een idee te krijgen hoe zo'n relatie eruit zou kunnen zien. Ook bestaande wetenschappelijke literatuur gaf geen antwoord: er is weinig onderzoek gedaan naar de relatie tussen extern en intern toezicht en wat er gebeurt als deze twee toezichthouders elkaar ontmoeten (De Ridder, 2013; De Waal, 2020).

Dit proefschrift beoogt dit hiaat op te vullen. Het doel van het proefschrift is om het begrip van de relatie tussen externe en interne toezichthouders te vergroten. Dit proefschrift richt zich op het bouwen van een nieuwe relatie tussen extern en intern toezicht en de manier waarop deze relatie zich ontwikkelt in het algemeen, en in de Nederlandse zorgsector in het bijzonder, en zoekt een antwoord op de volgende vraag:

*Hoe kunnen externe en interne toezichthouders elkaar aanvullen, versterken of vervangen in hun doel om toezicht te houden op organisaties?*

De vijf onderzoeken van dit proefschrift belichten elk een ander aspect van het onderzoeksdoel, gebruikmakend van verschillende onderzoeksmethoden. Samen zorgen de onderzoeken voor een diepgaand begrip van de constructie van goed bestuur als een nieuw regelgevend object en de constructie van de daarmee samenhangende nieuwe relatie tussen externe en interne toezichthouders.

Het eerste onderzoek *'Publieke belangen in de zorg: Wie borgt ze, wie vult ze in?'* (hoofdstuk 2) is een onderzoek op basis van literatuuronderzoek. Aangezien het doel van de interactie tussen extern en intern toezicht is om bij te dragen aan een betere borging van publieke belangen (Ministerie van Economische Zaken 2014; Ministerie van Volksgezondheid 2015; Ministerie van VWS 2016), beoogt dit onderzoek antwoorden te vinden op de vraag welke publieke belangen op het gebied van de gezondheidszorg zijn te onderscheiden en hoe deze worden geborgd. We hebben geconstateerd dat publieke belangen niet precies kunnen worden gedefinieerd omdat ze context gebonden zijn en in de tijd kunnen verschuiven. Van interne toezichthouders kan niet worden verwacht dat zij verantwoordelijk zijn voor het borgen van publieke belangen. Om publieke belangen beter te borgen zouden overheid en zorgaanbieders de mogelijkheden tot samenwerking kunnen onderzoeken. Mogelijkheden van experimenteel bestuur zijn

een veelbelovend startpunt voor een dergelijke samenwerking, om samen publieke belangen te verkennen en na te streven.

De tweede studie *'De plaats van het interne toezicht in de praktijk van het externe toezicht.'* en de derde studie *'Interactie tussen externe en interne toezichthouders. Samenwerking bij incidenten in de zorgverlening.'* (hoofdstuk 3 en 4) zijn kwalitatieve onderzoeken op basis van documentanalyse en interviews. Door inspecteurs van meerdere externe toezichthouders, en interne toezichthouders van zorgaanbieders te interviewen, hebben we gekeken naar de visie van beide toezichthouders op de relatie tussen in- en extern toezicht en wat volgens hen kansen en belemmeringen voor interactie zijn. In de interviews gaven zowel externe als interne toezichthouders aan dat interactie zou kunnen helpen bij het houden van toezicht, door hun visie op mogelijke problemen te delen en af te stemmen wie welke taak en verantwoordelijkheid heeft. Elkaar leren kennen in goede tijden, zou kunnen helpen om problemen op te lossen als zich een incident voordoet en de druk op het contact groot is. Sommige externe toezichthouders gaven aan terughoudend te zijn met hun toezichtactiviteiten wanneer zij zien dat interne toezichthouders een door hen gesignaleerd probleem al oplossen. Ondanks dat zowel externe, als interne toezichthouders aangaven dat contact tussen hen zou kunnen bijdragen aan beter toezicht, gaven beide toezichthouders aan dat er in de praktijk nog nauwelijks daadwerkelijk contact was tussen hen. Externe toezichthouders waren bang dat samenwerking ertoe zou kunnen leiden dat ze te nauw betrokken raken bij het zoeken naar een oplossing met de interne toezichthouders; het risico van *capture*. De aarzeling van interne toezichthouders kwam vooral voort uit het besef dat ze moeten oppassen de rol van de bestuurders niet aan te tasten. Vanwege hun gedeelde onbehagen was de relatie tussen externe en interne toezichthouders in de praktijk nog pril, en vaak nog afwezig. Beide soorten toezichthouders werkten wel ieder voor zich aan het verkennen van de relatie, maar van een structureel beleid was vaak geen sprake.

De vierde studie, *'Verkenning van de start van samenwerking tussen interne en externe toezichthouders. Inzichten vanuit het perspectief van de praktijk.'* (hoofdstuk 5) is een etnografisch onderzoek, waarin we rapporteren over onze observaties van het proces van de NZa om van een verticale naar een meer horizontale, samenwerkende toezichtpraktijk te werken, waarbij interactie is met interne toezichthouders. In dit onderzoek analyseren we deze transitie vanuit het oogpunt van de individuele externe toezichthouders, waarbij we kijken naar het project Goed Bestuur van de NZa. Aan de hand van inzichten uit de theorie over samenwerken op het gebied van regelgeving analyseren we hoe de NZa haar activiteiten heeft gedifferentieerd en geaggregeerd om haar taak om samen te werken te beheersen en nieuwsgierigheid en gastvrijheid te kweken om interne toezichthouders te leren kennen.

De laatste studie *'Ambigue signalering in reguleringsgesprekken. Hoe miscommunicatie en hiërarchie de vrijwillige gereguleerde samenwerking belemmert.'* (hoofdstuk 6) is een case study waarin we bestuursgesprekken tussen externe en interne toezichthouders analyseren in drie gevallen waarin het goed bestuur van een zorgaanbieder ter discussie stond. Tijdens deze gesprekken hebben we ons gericht op de daadwerkelijke interacties tussen beide toezichthouders, en hoe externe toezichthouders in de zorgsector vrijwillige medewerking van interne toezichthouders probeerden te krijgen om bestuurspraktijken te veranderen. De onderzochte cases kenmerkten zich door ambiguïteit: er was een discrepantie tussen de intentie – gestoeld op solidariteit – waarmee de externe toezichthouders het gesprek ingingen en hun doel wilden bereiken, en het autoritaire gedrag dat zij tijdens de gesprekken lieten zien. Daarnaast hadden de externe toezichthouders een meer verticale, hiërarchische, opvatting over de relatie met de interne toezichthouders met wie zij in gesprek waren, terwijl de interne toezichthouders uitgingen van een meer horizontaal relatie type, waarbij zij verwachtten dat zij in de externe toezichthouder een bondgenoot zouden aantreffen om samen mee op te trekken. Deze discrepanties leidden tot irritatie en onbegrip bij beide gesprekspartners; er is in de onderzochte cases geen goede relatie opgebouwd en het toezichtsdoel dat de externe toezichthouder beoogde werd niet behaald. Zouden intenties en gedrag van partijen beter op elkaar afgestemd worden, dan zouden bestuursgesprekken wellicht soepeler verlopen. Om dit te bereiken zouden inspecteurs een meer 'decentraal' begrip van hun rol in die context aan kunnen nemen en interne toezichthouders betrekken bij reflectieve dialogen over elkaars positie in hun (toezicht)relatie.

In het laatste hoofdstuk overdenk ik de uitkomsten van de onderzoeken en breng ik deze samen. De onderzoeken brengen aan het licht hoe de keuzes over de wijze waarop de externe toezichthouder goed bestuur, als nieuw object van regulering, inspecteerbaar maakt, de relatie met de interne toezichthouders beïnvloedt. Interactie tussen interne en externe toezichthouders in goed bestuur zaken – waarbij externe toezichthouders van mening zijn dat publieke belangen gevaar lopen, maar zonder dat sprake is van een duidelijke overtreding door de ondertoezichtgestelde – leent zich voor heterarchische, samenwerking tussen externe en interne toezichthouder. Toch bleek deze interactie in de praktijk plaats te vinden in de schaduw van hiërarchie, hetgeen tot ambigue gesprekken en miscommunicatie leidde tussen externe en interne toezichthouders. De interne toezichthouder voelde zich niet begrepen en de samenwerking kwam niet op gang, tot frustratie van de betrokken externe en interne toezichthouders. Deze constatering laat zien dat er relationeel werk is vereist bij het vormgeven van een nieuw object van regulering, en het inspecteerbaar maken daarvan. Dit relationele werk bestaat uit het streven naar een gedeelde realiteit tussen de externe toezichthouder en de interne toezichthouder, zowel voor wat betreft de publieke belangen die in het geding zijn als

voor wat betreft de (rechtmatige) vertaling daarvan naar regulerende objecten en instrumenten. Het proefschrift besluit dan ook met een aantal praktische ideeën aan de hand waarvan externe toezichthoudende organisaties, en individuele externe en interne toezichthouders dit relationele werk kunnen vormgeven.





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## ABOUT THE AUTHOR

Leonie Schakel was born in Rotterdam, the Netherlands, in 1976. She grew up in Zwolle until she moved to Utrecht to study at Utrecht University. Leonie studied Law & Economics and Economic Public Law and graduated with a doctoraal (masters) degree for both studies in April 2000.

In March 2000, she started working at the Dutch Competition Authority, assessing mergers and anti-competitive business practices. From that position, she was seconded as a policy advisor at the Ministry of Economic Affairs in 2002. She represented the Netherlands internationally at the Organisation for Economic Co-operation and Development (OECD), the European Commission, and the Air Traffic Working Group of the European Competition Authorities (ECA). During her time at the Netherlands Competition Authority, she further developed her professional knowledge in the field of competition and completed the Grotius Academy Postgraduate course in Competition Law.

In 2006, Leonie started working at the Dutch Healthcare Authority (NZa). Until 2013, she served as a policy advisor, contributing to the development of the new tasks assigned to the NZa in 2006 in the field of market supervision. From 2010 to 2012, she was responsible for the development of the program for monitoring healthcare markets and data quality. In 2012, Leonie was deputy manager of the Economic and Medical Bureau (EMB), the department within the NZa where a lot of research is done. During her time at the EMB, she became interested in the profession of conducting research herself.

It was around the same time that the Rotterdam School of Management, Erasmus University (RSM), invited the NZa to have a researcher participate in the 'Modern Toezicht' (Modern Regulation) research group, in which eight employees from different external supervisors participated to work on a PhD research individually. The Modern Toezicht research group was led by Prof.dr. Muel Kaptein, professor of Business Ethics and Integrity Management at RSM and dr. Martin de Bree, researcher at RSM. The NZa offered Leonie the opportunity to participate in this Modern Toezicht research group. After defining the research topic, Leonie found Roland Bal and Annemiek Stoopendaal, from the Erasmus School of Health Policy & Management (ESHPM), willing to guide her as PhD supervisors. Consequently, in 2014 she began studying for a PhD degree at ESPHM, conducting research into the possibilities of interaction between external and internal supervision.

At the start of her research, Leonie made the switch from policy advisor at the supervision department, to the legal department of the NZa, where she has been working as a lawyer ever since.



## PORTFOLIO

### *Peer reviewed academic papers (in this theses)*

- Kasdorp AE, Schakel LA (2021) Ambiguous signaling in regulatory conversations. How miscommunication and hierarchy hamper voluntary regulatee cooperation. *Administration & Society*, September 2021.
- Schakel LA (2017) Interaction between state supervisors and supervisory boards, Cooperation in case of incidents in healthcare provision. In: J Boertjens, M Mikkers, W Sauter & P Vincke. *Healthcare Fraud, Corruption and Waste in Europe: National and Academic Perspectives*. Den Haag: Eleven International Publishing.
- Schakel LA & Stoopendaal AMV (2017) De plaats van het interne toezicht in de praktijk van het externe toezicht. *Tijdschrift voor Toezicht*, 8(3), 5-15.
- Schakel LA, Stoopendaal AMV & Bal RA (2016) Publieke belangen in de zorg. *Tijdschrift voor Toezicht*, 7(2), 10-28.

### *Other publications*

- Schakel LA (2019) Boekbespreking 'Governance in beweging'. *Tijdschrift voor Toezicht*, 2019(1), 44-46.
- Schakel LA (2010) Elektronisch Netwerken doe je samen. *Zorg en Financiering*, 9(6), 9-14.
- Schakel LA & Cats L (2007) Keten zorg begrensd door de mededingingsrechtelijke spelregels? *Rechtspraak Zorgverzekering (RZA)*, Jubileumspecial 2007, 78-89.
- Schakel LA (2007) Aanmerkelijke Marktmacht (AMM) in de Zorg. *Zorg en Financiering*, 6(1), 10-22.

### *Courses*

- Modern Toezicht research group (Rotterdam School of Management), participating 2013-2022
- English Business Grammar, 2020
- Atlas.ti, 2019
- Data Science level 1, Analysis in R, 2018
- Scientific Integrity in Research in Management, 2015
- Research Impact and Relevance, 2014

***Conference presentations***

- The European Partnership for Supervisory Organisations in Health Services and Social Care (EPSO), Taskforce meeting, 4 November 2020
- NVTZ, Werkconferentie Wetenschappelijke Adviesraad 'Relatie intern versus extern toezicht', 4 June 2018
- 'Modern Toezicht' Research Group Fourth Conference, 15 March 2018
- NVTZ, Regiobijeenkomst Zuid-Holland & Zeeland 'Intern versus extern toezicht', 6 April 2017
- Belastingdienst, Conferentie "Innovatie in het toezicht", 22-23 March 2017
- Inspectorate, Colloquium, 17 November 2016
- 'Modern Toezicht' Research Group Third Conference – 4 February 2016
- VIDE Jaarcongres, 21 April 2015
- 'Modern Toezicht' Research Group First Conference, 25 September 2014





Many organizations in the Netherlands are supervised: by external supervisors - public regulators that supervise their regulatory compliance - and often also by internal supervisors - the members of the supervisory board that advises and supervises the executives. Remarkably, there is little contact between these external and internal supervisors, and they are barely familiar with each other's tasks and responsibilities, even though they often seem to have objectives in common. This begs the question: can external and internal supervisors complement, reinforce or substitute each other in their goal of supervising organizations?

'External and Internal Supervision - In search of a connection' studies the possibilities and pitfalls of collaboration between external and internal supervisors, with a focus on supervision in the health care sector. The book presents and discusses findings from interviews with external and internal supervisors, as well as from ethnographic fieldwork at the Dutch Healthcare Authority (Nederlandse Zorgautoriteit). It is of interest to external supervisors, members of the executive and supervisory boards of regulated organizations and policymakers, in the healthcare sector as well as in other sectors that feature both external and internal supervisors.

