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

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Introduction

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

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

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

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

effectiveness of self-regulation by monopolistic social media platforms to protect citizens and societies is increasingly questioned by regulators in the EU and in the US.

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

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

Postdoc project

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

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

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

Empirical research

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