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ESSAYS

Towards Governance-Based Regulation?

The WRR Report on *Toeziën op publieke belangen* in European and International Perspective

Jonathan Zeitlin

Until quite recently, the Netherlands had an outstanding reputation at home and abroad for administrative regulation and supervision ('*toezicht*') of markets and public services.¹ Over the past decade, however, that reputation has been tarnished, both internally and externally, by a series of regulatory failures and scandals across a wide range of policy domains, from food safety, chemical safety, finance, and public health to hospitals, schools, and housing corporations.² At the same time, moreover, public regulation and supervision have become increasing subjects of controversy in politics and the media, resulting in frequent and often abrupt swings in government policy, both general and sector-specific.

The WRR report on *Toeziën op publieke belangen* examines the sources of this regulatory malaise and proposes a series of broad-gauge remedies, based on an extensive series of in-depth background studies on specific sectors and cross-cutting themes. These background studies are of variable quality, generally presenting a fuller and more detailed picture of developments in inspection and enforcement services (*rijksinspecties*) than in market regulation and supervision authorities (*marktautoriteiten*). But taken together, the main report and supporting studies provide a compelling analysis of the recent evolution of the Dutch regulatory state and the dilemmas it currently faces.

At the core of the report's problem diagnosis is what it calls the 'regulatory paradox': the tendency for policy makers and the general public to focus on reducing the costs and burdens of regulation when things are going smoothly in a particular field, but to shift abruptly towards a stricter and more interventionist approach as soon as a major incident of regulatory failure occurs that spurs public outcry.³ This paradox is visible across the developed democracies, but it appears to be particularly intense in the Netherlands because of the administrative reforms introduced by successive government coalitions over the past decade,

1 'Toezicht' in Dutch is normally translated as 'supervision' or 'oversight'. The English-language literature typically uses 'regulation' as an overarching concept covering the full policy cycle from rule-making through supervision, inspection, and enforcement to evaluation and review. In this comment, I will use regulation in this overarching sense, reserving supervision for implementation oversight and enforcement.

2 For high-profile examples in each of these domains, see WRR, *Toeziën op publieke belangen*. Naar een verruimd perspectief op rijkstoezicht, rapport nr. 89, Amsterdam: Amsterdam University Press 2013, p. 21.

3 WRR report 2013, p. 23, 112, 148.

which as the WRR report amply documents, have reshaped the regulatory landscape through a series of mergers and reorganizations of inspectorates and supervisory authorities, while substantially reducing the human and financial resources available to carry out their functions.

Administrative reorganization and pressures to do more with less can lead regulatory authorities to experiment with creative new approaches and ways of working. A good example, which receives insufficient attention in the WRR report and supporting study on competition regulation,⁴ is the new Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt*, ACM). Despite being dictated primarily by cost-saving considerations, this merger between the competition authority, telecoms regulator, and consumer protection agency has resulted in an imaginative strategic rethinking and redesign, involving the mainstreaming of consumer welfare across all its regulatory activities, the formation of mixed problem-solving teams to encourage cross-fertilization between the departments, and the use of online complaints instruments and stakeholder consultations to identify emergent problems and set enforcement priorities.⁵

But frequent reorganizations and reductions in personnel can also undermine the capacity of supervisory authorities and inspectorates to make innovative forms of regulation work effectively. This is especially true of what the report calls 'system-based' or 'meta' regulation ('*systeemtoezicht*'), also known as process or management-based regulation.⁶ In this approach, as Ale and Mertens⁷ observe in their supporting study on chemical safety, high levels of expertise and regular monitoring by supervisory authorities are necessary to ensure that private risk management systems do not remain 'paper realities' but are properly implemented in practice, as well as to promote continuous improvement, identification of good and bad practices, and diffusion of lessons learned across the whole policy field.⁸ A recurrent theme, for example, in the periodic audits of Dutch food safety arrangements conducted by the European Food and Veterinary Office (FVO), discussed in the supporting study by Havinga and Van Waarden,⁹ is the failure of the NVWA (*Nederlandse Voedsel- en Waren Autoriteit*) and its predecessors to follow up in ensuring that inspected firms actually go on to correct problems detected in the implementation of their Hazard Analysis of Critical Control Points (HACCP) systems, a weakness that can also be observed in other sectors such as chemical safety.

4 B. Baarsma, *Ontwikkelingen in het mededingingstoezicht*, Webpublication No. 69, The Hague: WRR 2012.

5 A.T. Ottow, *Erosion or Innovation? The Institutional Design of Competition Agencies: A Dutch Case Study*, Unpublished paper presented at George Washington University, Washington, D.C., 2013.

6 Cf. C. Coglianese & D. Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, *Law & Society Review* 2003, 37(4), p. 691-730.

7 B.J.M. Ale & F.J.H. Mertens, *Toezicht op ondernemingen in de chemische industrie*, Webpublication No. 66, The Hague: WRR 2012.

8 Cf. WRR report 2013, p. 48-50.

9 T. Havinga & F. van Waarden, *Veilig voedsel: Toezicht toevertrouwen? Sectorschets toezicht in de voedselsector*, Webpublication No. 70, The Hague: WRR 2013.

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Part of the issue here is a clash between the logic of system-based meta-regulation on the one hand and that of 'risk-based' regulation (*'risicogericht toezicht'*), another internationally influential approach embraced by many Dutch supervisory authorities.¹⁰ Thus the NVWA explains its failure to implement EU food hygiene rules correctly and follow up on problems detected with firms' HACCP systems not only by reference to the disruptive effects of recent mergers between inspectorates, but also by its principled commitment to risk-based regulation, according to which the Authority only follows up on non-conformances deemed to represent a 'major' or 'medium' threat to public health, while accepting the results of approved private risk management and quality certification systems without further controls.¹¹ A key question here, as the WRR report underlines, is how reliably regulators can distinguish *ex ante* between high and low risks in an interdependent, volatile, and uncertain world, where small non-conformances even in apparently well-performing organizations can ramify in unexpected ways to produce major hazards affecting substantial numbers of people, phenomena observable in recent food safety disasters like dioxin and toxic *e coli* (EHEC), as well as in other complex systems such as nuclear power plants, finance, or air traffic control.

Another key driver of the Dutch 'regulatory paradox' identified by the WRR report is the tension, if not outright contradiction, between the flexibility associated with innovative approaches to regulation on the one hand, and the growing tendency for government policy to impose detailed enforcement targets and methods, such as increased fines and unannounced visits, on inspectorates and supervisory authorities, on the other. This insistence on stronger sanctions and stricter enforcement of fixed rules not only clashes with the logic of both system- and risk-based approaches to regulation, but also restricts the capacity of inspectorates and supervisory authorities to contribute to improvements in the performance of regulated organizations through the provision of advice and compliance assistance, thereby ensuring that their visits are experienced as a burdensome threat rather than a learning opportunity.¹²

To overcome this paradox and alleviate the Dutch malaise, the WRR report advocates a broadened perspective on public regulation, coupled with a reinforcement of the independence, capacities, and accountability of the supervisory authorities themselves. In terms of a broadened perspective on regulation, the WRR report proposes four interrelated shifts (chs. 5-6):

- Focus on the *public interests* served by regulation, rather than on means and rule enforcement for their own sake (what could be described as a 'goal-directed' approach).
- Focus on the *outcomes* (effects and effectiveness) of regulation (including its benefits as well as costs and burdens), by adopting an 'evidence-based' approach.

10 WRR report 2013, p. 47-49.

11 Havinga & Van Waarden 2013, p. 67-69, 82, 89-91. The FVO audit reports and NVWA responses to them are available online at <http://ec.europa.eu/food/fvo/last5_en.cfm?co_id=NL>.

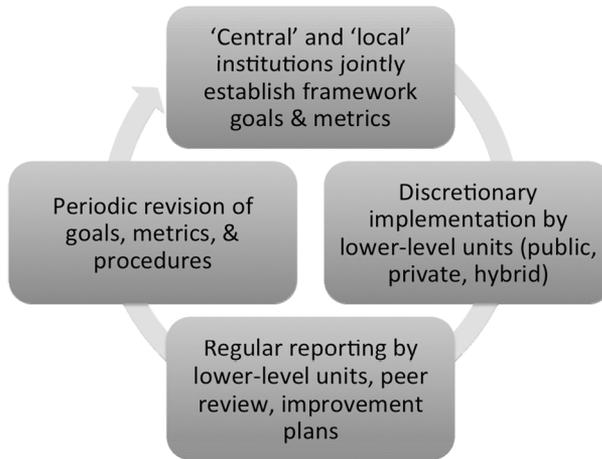
12 WRR report 2013, p. 41-43, 45-46.

- Adopt a ‘*governance-based*’ approach, based on constructive interaction with other forms of public and private regulation, and a contextualized analysis of ‘checks and balances’ within each regulated field.
- Strengthen the *reflective function* of regulation, including the capacity of supervisory authorities to propose revision of existing rules and practices based on feedback from implementation experience.

Although these proposed shifts in perspective are inevitably presented at a high level of generality, they are well-grounded in the report’s analysis of the specificities of the Dutch regulatory malaise, as well as in the broader international debate. But two important components of a convincing renewal strategy for Dutch regulation are missing: *a governance approach which would integrate these four apparently disparate elements into a mutually reinforcing architecture; and a clearer and more positive vision of how participation in broader regulatory networks, especially within the European Union, could assist the Netherlands in advancing this reorientation.* In the remainder of this comment, I will take up each of these points in turn, and explain how they are connected with one other.

A governance approach which integrates the separate elements of the WRR proposals into a coherent and mutually reinforcing architecture can be found in ‘experimentalism’, an innovative form of system-based regulation which has become increasingly widespread in public oversight of private firms and the provision of services by public institutions in the European Union and the United States. In the most general terms, experimentalist governance is a recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing these goals in different local contexts. Experimentalist governance in its most developed form involves a multi-level architecture, whose four elements are linked in an iterative cycle, as shown in the diagram in figure 1. First, broad framework goals (such as ‘good water quality’, ‘safe food’, or an ‘adequate education’) and metrics for gauging their achievement are provisionally established by some combination of ‘central’ and ‘local’ units, in consultation with relevant civil society stakeholders. Second, local units are given broad discretion to pursue these goals in their own way. In regulatory systems, the ‘local’ units are typically private actors such as firms or the territorial authorities (state regulators in the US; member state authorities in the EU) to whom they immediately respond. In service-providing organizations, the ‘local’ units are typically frontline workers, such as teachers, police, or social welfare case workers, or the district or regional entities supervising them. But, third, as a condition of this autonomy, these units must report regularly on their performance and participate in a peer review in which their results are compared with those of others employing different means to the same ends. Where they are not making good progress against the agreed indicators, the local units are expected to show that they are taking appropriate corrective measures, informed by the experience of their peers. Fourth and finally, the goals, metrics, and decision-making procedures themselves are periodically revised by a widening circle of actors in response to the problems and possibilities revealed by the review process, and the

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Figure 1

cycle repeats (for an overview and further references, see Sabel and Zeitlin 2012¹³).¹⁴

Experimentalist governance directly addresses many of the key objectives and concerns raised by the WRR report. It focuses on the advancement of broad regulatory goals and their adaptation to different local contexts rather than the enforcement of uniform fixed rules and sanctions. It mobilizes the rich evidence generated by regular monitoring and peer review of implementation experience to trigger reflexive revision and improvements not only of local plans and practices, but also of central goals and procedures. And it provides a dynamic approach to public accountability, by requiring both regulatory authorities and regulated units to justify their discretionary choices in light of the performance of similarly placed peers pursuing different means to the same general ends. Through these processes of regular monitoring, peer review, and public justification, experimentalist governance can also produce deeper and more systematic assessment of the relative effectiveness of alternative approaches to regulation and service provision than is typically possible through standard forms of academic research, which as the WRR report observes, ‘remains in baby shoes’ in this domain (*staat echter nog in de kinderschoenen*¹⁵).

These architectural features of experimentalist governance are closely bound up with my second critical point about the treatment of EU regulation in the WRR report. To be sure, the report underlines at various points the involvement of Dutch supervisory authorities and inspectorates in broader European and inter-

13 C.F. Sabel & J. Zeitlin, *Experimentalist Governance*, in: D. Levi-Faur (ed.), *The Oxford Handbook of Governance*, Oxford: Oxford University Press 2012, p. 169-183.

14 An abridged version of this text is available online at: <<http://www.toptechniekbedrijf.nl/files/Bijlage6%20Toelichting%20Experimentalist%20Governance-V02.pdf>>.

15 WRR report 2013, p. 64; cf. also pp. 57-62.

national networks, while urging the former to consider more explicitly how they can make better use of the latter in carrying out their own regulatory tasks.¹⁶ But EU regulation and regulatory networks figure mainly in the WRR report and supporting studies as a ‘complicating factor’ and source of unnecessary ‘limitations’ for national supervisory authorities, or even as ‘Trojan horses’ covertly preparing the ground for further European integration,¹⁷ rather than as valuable resources for peer review, information sharing, and mutual learning. This inward-looking and defensive approach, reflecting more general trends in Dutch politics and public opinion, is all the more surprising since EU regulation in many of the sectors discussed in the WRR report (such as food safety, chemicals, competition, finance, energy, telecommunications, data privacy, and environmental protection) is characterized by extensive experimentalist features, if not a full-blown experimentalist architecture, while also enjoying a high international reputation.¹⁸ EU regulation is far from perfect, even in the cases which most closely approximate the experimentalist model, and some of the criticisms raised in the WRR report and supporting studies are well-founded. Thus, for example, it runs counter to the logic of experimentalist governance for EU food hygiene rules to specify that physical inspections in slaughterhouses must be carried out by fully qualified veterinarians rather than by NVWA-approved auxiliaries.¹⁹ And it is also reasonable to be concerned about whether the pursuit of a uniform set of rules in European banking and capital markets regulation in the wake of the financial crisis, understandable as it may be from a single market perspective, ‘might also threaten the emergence of an adaptive and dynamic supervisory system, in which [national] supervisors have an appropriate degree of discretion to respond to emerging threats to financial stability’.²⁰ But the iterative and reflexive architecture of EU experimentalist governance provides regular opportunities for the identification and correction of such design flaws, especially when national regulators and stakeholders actively participate in its peer review and evaluation processes. In an increasingly interdependent and uncertain world, positive engagement with such experimentalist governance processes within and beyond the EU may thus offer national authorities with limited resources like those of the Netherlands their best chance of overcoming the regulatory failures and malaise so pervasively documented in the WRR report.

16 WRR report 2013, p. 25-26; 127-128, 130, 154.

17 WRR report 2013, p. 25, 39; Havinga & Van Waarden 2013, p. 88-91.

18 For further details and examples see C.F. Sabel & J. Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, *European Law Journal* 2008, 14(3), p. 271-327; C.F. Sabel & J. Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford: Oxford University Press 2010.

19 Havinga & Van Waarden 2013, p. 90.

20 P. Cavelaars, J. de Haan, P. Hilbers & B. Stellinga, *Key Challenges for Financial Supervision after the Crisis*, Webpublication No. 71, The Hague: WRR 2013.