
1. Industry codes of conduct, the foundations of contract law and regulation: a bottom-up perspective

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1. INTRODUCTION

1.1 A ‘Dark Side’ of the Contractual Regulatory Space: Governance through Codes of Conduct

Private actors, such as industry organizations, non-profit organizations and (multinational) corporations, increasingly use the instrument of private regulation, including codes of conduct, as a regulatory tool across various policy domains on the global, the European and the domestic level.¹ Also in the field of (European) private law, the use of codes of conduct has been on the rise over the past decade. European and national legislatures jumped into the fray in this respect by either leaving regulation to private actors or by introducing legal references to codes of conduct in private law.² In result, codes of conduct, adopted either with

* This chapter draws partly on my doctoral thesis on the role of industry codes of conduct in European and Dutch private law. See Marie-Claire Menting, *Industry Codes of Conduct in a Multi-Layered Dutch Private Law* (doctoral thesis, Tilburg University 2016). All views in the chapter are personal.

¹ On this development in the global context, see e.g., Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011); Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008); Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace 2001) 8–30; David Vogel, ‘The Private Regulation of Global Corporate Conduct: Achievements and Limitations’ (2010) 49 *Business & Society* 68.

² For examples of references to codes of conduct in European and Dutch private law legislation, see M Menting and JBM Vranken, ‘Gedragscodes in een meergelaagd privaatrecht in Europa en Nederland’ in M Menting, JBM Vranken and MW Scheltema (eds), *Gedragscodes in internationaal, Europees en*

or without the involvement of the state, have become widespread in the private law context. The rules laid down by these codes not only concern the conduct of the regulated actors, but cover a diverse range of subject matters such as advertising, data protection, e-commerce, direct selling, consumer credit, mortgage lending, professional ethics, competition and corporate social responsibility (CSR). Most of these codes thus cover issues directly or more indirectly related to contractual business-to-business (B2B) and business-to-consumer (B2C) relationships. As such, they are part of the wider regulatory space, comprising a wide array of both legal and social rules, norms, conventions and practices, in which contracts are concluded.³

So far, however, the part of the contractual regulatory space occupied by codes of conduct has remained relatively dark. The practice and implications of governance through these codes have only recently started to attract the attention of contract law scholarship.⁴ Yet, pertinent questions lie in wait here, particularly at the intersection between the public and the private layers of the contractual regulatory space. What happens when codes of conduct and the rules of contract law meet? How do codes of conduct relate to traditional contract law doctrine? This

privaatrechtelijk perspectief. Juridische betekenis, effectiviteit en handhaving (Preadviezen 2013) (Uitgeverij Paris 2014) 11–13 and, more extensively, Marie-Claire Menting, *Industry Codes of Conduct in a Multi-Layered Dutch Private Law* (doctoral thesis, Tilburg University 2016).

³ See Florian Möslin and Karl Riesenhuber, ‘Contract Governance – A Draft Research Agenda’ (2009) 5 *European Review of Contract Law* 248, 264. See also the work of Stewart Macaulay (e.g., ‘Crime and Custom in Business Society’ (1995) 22 *Journal of Law and Society* 248; ‘Private Government’ in Leon Lipson and Stanton Wheeler (eds), *Law and Social Science* (Russell Sage Foundation 1986) and ‘Non-Contractual Relations in Business’ (1963) 28 *American Sociological Review* 55), which shows that contract law – contrary to the general perception of the legal world – in practice does not necessarily rule the roost within this amalgam of rules. Norms and customs of the business world itself can be of greater importance in governing contracts than the rules of contract law.

⁴ Recent examples include Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart Publishing 2015) (on corporate codes of conduct); Katerina Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015) (on sustainability contractual clauses) and AL Vytopil, *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing 2015) (on *inter alia* codes of MNCs), all with further references.

chapter seeks to shed light on this dark side of the regulation of transactions by examining the interaction between the traditional foundations of contract law and a specific type of code of conduct, namely industry codes of conduct. For the purposes of this chapter, the notion of industry codes refers to codes of conduct drawn up by industry organizations, either in collaboration with other actors or otherwise.⁵ Substantively, the focus will lie on industry codes that set rules of conduct for or cover subject matters related to B2B or B2C contractual relationships that the addressees of a code of conduct engage in.⁶ Within these confines, this chapter seeks to gain insight into the implications of the rise of industry codes of conduct in the contractual regulatory space. Do we need a (legal) framework for industry codes in contract law?

1.2 Approach

This chapter delves into the relation between industry codes and contract law by means of a bottom-up approach, consisting of four steps. As a first step, it is sought to gain insight into the actual practice of industry codes by identifying their main characteristics and comparing these characteristics with the practice of private contracting (Section 2). To this end, the chapter builds on a dataset concerning the design and content of European and Dutch industry codes,⁷ supplemented with relevant insights derived from the literature at this point. The second step shifts the perspective from practice to traditional contract law theory (Section 3). There is an analysis of how industry codes and traditional contract law

⁵ Industry-level codes of conduct authored solely by NGOs are outside this narrow definition.

⁶ Hence, industry codes that exclusively deal with CSR issues will not be considered.

⁷ These empirical data were gathered in the course of the empirical study into the functions of European and Dutch industry codes that I conducted as part of my doctoral thesis. The sample of industry codes studied comprised 34 European codes and 56 Dutch codes (with private law relevance), taken from different industry sectors (manufacturing; wholesale and retail; information and communication; financial and insurance activities; professional, scientific and technical activities; and administrative and supportive service activities). The dataset comprises empirical information on the drafters; target group; scope; reason; aim; type of norms; binding force; enforcement; relation with legislator and/or legislation; and accessibility of the codes. The information was gathered through a textual analysis of the codes' content. For a brief description of the methodology employed in this respect, see Menting and Vranken (n 2) 49–50. A more detailed account can be found in Menting (n 2) ch 2.

theory relate, whereby the focus lies on the principles that found the legally binding force of contracts and on the traditional public–private divide on which contract law rests. To what extent do industry codes challenge these foundations of the law of contract? Under the third step, the chapter returns to practice by taking a closer look at the actual interaction between codes and contract law (Section 4). With the courtroom being the place par excellence where this interaction takes place, this step focuses on judicial practice. By analysing a number of Dutch contract law cases in which industry codes play a role, it is sought to acquire a taste of how, if at all, the actual interaction between these codes and contract law plays out.⁸ Thereupon, the perspective is once more reversed from practice to theory under the fourth step, which seeks to tie the lines set out by the preceding three steps together (Section 5). In this section, more specifically, I will consider how the relation between contract law and industry codes can be given further shape.

2. THE PRACTICE OF INDUSTRY CODES OF CONDUCT

This section seeks to shed light on the practice of industry codes. First of all, the main characteristics of these codes will be described (Section 2.1), centred around five themes: (1) content, (2) scope, (3) foundations, (4) drafting process and (5) the relation with the public part of the regulatory space. The ensuing image will subsequently be contrasted with the practice of private contracting (Section 2.2). The section is closed with some concluding remarks on the place of industry codes in the contractual regulatory space (Section 2.3).

2.1 Characteristics

2.1.1 Content

Content-wise, there are two different, yet not mutually exclusive, ways in which the B2B/B2C industry codes on which this chapter focuses address their regulatory addressees (most notably national industry organizations, firms, members of a profession).⁹

⁸ The choice of Dutch examples has been motivated by the fact that my doctoral thesis includes an analysis of Dutch civil law judgments referring to industry codes. See Menting (n 2) ch 6.

⁹ Codes can in this respect set their own rules but may also take the legal framework as their reference point, for example by fleshing out, mirroring or

First of all, a code can impose general rules of conduct or rules that concern the conduct of its addressees vis-à-vis other actors, such as the private regulator, fellow-regulated, competitors and consumers. Thus, it is prescribed how the regulatory addressees are to behave. The focus can thereby lie on (professional) ethical values or on more concrete rules. Secondly, industry codes can have a more specific focus in that they set rules for the way in which a service is to be provided or a good is to be offered and sold. That is to say that these codes concern the B2B or B2C activities performed by the regulated actors. Some (Dutch) examples in this respect include the Dutch SMS Service Provision Code of Conduct (which details how SMS services should be provided), the Dutch Code of Conduct for Energy Suppliers (which sets out how consumers are to be approached in the pre-contractual phase)¹⁰ and the European codes on direct selling.¹¹ Codes can in this respect also concern specific topics that are of relevance to B2C or B2B relationships or cover aspects of these relationships, such as advertising,¹² the protection and processing of personal data¹³ and competition law issues. Again, one may find both

incorporating (part of) the applicable legal rules. The latter practice can even go as far as industry codes copying the legal rules verbatim. See Jurgen Braspenning and Marie-Claire Menting, 'Consumer Protection and Industry Codes of Conduct. An Exploratory Empirical Study from the Perspective of Consumer Vulnerability' (15th International Conference on Consumer Law, Amsterdam, 29 June–1 July 2015) 26–27 (not published, on file with the author). In the context of CSR issues in the global supply chain, see Doreen McBarnet and Marina Kurkchyan, 'Corporate Social Responsibility through Contractual Control? Global Supply Chains and "Other-regulation"' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 66.

¹⁰ The codes can be found at www.payinfo.nl/gedragcodes (SMS Code) and www.energie-nederland.nl/positionpaper/658/ (Code for Energy Suppliers).

¹¹ E.g., the European Codes of Conduct for Direct Selling (2011), adopted by the European Direct Selling Association (Seldia) (available at www.seldia.eu > About Seldia > Ethics).

¹² See, for instance, the IAB Europe EU Framework for Online Behavioural Advertising (available at www.iabeurope.eu/policy/iab-europe-eu-framework-for-online-behavioural-advertising/) and the different national advertising codes of conduct, such as the Dutch Advertising Code (an English version of the Code is available at www.reclamecode.nl > Voor bedrijven > English).

¹³ Noticeable is the EU regulatory framework for data protection, which includes a regime for the formal approval of codes of conduct applying this framework. See Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31, which will be replaced by the

specific rules as well as rules that are more of an ethical nature. Thus, the B2B/B2C codes central to this chapter cover the external B2C or B2B relationships that their regulatory addressees engage in by setting general rules of conduct or rules on (topics related to) the activities performed by the addressees.

Another feature of industry codes that is worthy of mention at this point is the fact that in regulating (broadly speaking) the activities of their addressees, they can deal with collective problems and may cover public interests. A notable example in this respect is that of industry codes addressing consumer protection issues but, as follows from the examples mentioned above, codes that regulate advertising or data protection can also be mentioned in this respect. This public interest element that industry codes may entail is also reflected in the characteristic that is discussed in Section 2.1.5: the fact that these codes can be employed by the legislator as a policy instrument.

2.1.2 Scope and regulatory relationships

As follows from the previous subsection, most industry codes have an external or third-party dimension: they also have effects beyond the regulator–regulated relationship.¹⁴ Generally, that is to say that the codes seek to regulate the ‘external’ conduct or activities of the regulated actors rather than the internal relationship between these actors and the private regulator. This external scope brings into play another set of actors, namely the third-party regulatory beneficiaries, on which industry codes – as the mirror image of the obligations imposed on the regulated actors – confer certain ‘rights’.¹⁵ These beneficiaries can, for example, be a

General Data Protection Regulation on 25 May 2018 (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1).

¹⁴ Fabrizio Cafaggi, ‘Private Regulation in European Private Law’ in Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Chantal Mak and Edgar du Perron (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 22; Fabrizio Cafaggi, ‘Transnational Private Regulation and the Production of Global Public Goods and Private “Bads”’ (2012) 23 *European Journal of International Law* 695, 697.

¹⁵ Fabrizio Cafaggi, ‘A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement’ (November 2014) EUI Department of Law Research Paper No 2014/145, 17–18. Cafaggi describes these beneficiaries as ‘those who are supposed to benefit from compliance with the regulation and are harmed by their violation’ (Cafaggi, ‘Private Regulation in European Private Law’ (n 14) 32).

specific group of consumers or businesses partners but can also be the public at large when a code addresses matters such as compliance with human rights or protection of the environment.

Another form of ‘third-party effect’ is that of private regulators extending the regulatory effect of their code by imposing it on third parties (third-party addressees). This practice is particularly visible in transnational supply chains, where private regulators, most notably multinational corporations (MNCs), use contractual mechanisms to spread codes throughout the supply chain not only to first-tier suppliers (by referring to or including the code in the contract itself or in ancillary documents), but also to second-tier suppliers and beyond (e.g., through perpetual clauses).¹⁶ Another way in which private regulators seek to create such a third-party effect is by including a provision in the code which stipulates that the regulated actors have to ensure that third parties, such as their employees, representatives or contractual counterparties, also have to comply with the code. An industry code can also directly impose obligations upon third parties, yet it seems that this occurs only very occasionally.¹⁷

Thus, there are two regulatory relationships in which codes play a role (see Figure 1.1). One is the internal regulator–regulated relationship, in which the commitment of an industry actor to abide by the code translates into an obligation to comply with the code vis-à-vis the regulator (see Section 2.1.3). The other is the one that is content-wise covered by the private rules: the ‘external’ relationship between the regulated actors and the third-party beneficiaries (TPBs) and the third-party addressees (TPAs), respectively.

¹⁶ Paul Verbruggen, ‘Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts’ (2014) 35 *Recht der Werkelijkheid* 79, 89. See also Vytopil (n 4) particularly pp. 117–140; McBarnet and Kurkchian (n 9). For a more general perspective on the use of contracts as regulatory instruments, see e.g., Fabrizio Cafaggi, ‘The Regulatory Functions of Transnational Commercial Contracts: New Architectures’ (2013) 36 *Fordham International Law Journal* 1557; Peer Zumbansen, ‘The Law of Society: Governance Through Contract’ (2007) 14 *Indiana Journal of Global Legal Studies* 191.

¹⁷ The results of the empirical study into the functions of European and Dutch industry codes conducted in my doctoral thesis suggest that industry codes very rarely impose obligations upon third parties. See Menting (n 2). A prime example of the latter practice is the European Code of Ethics for Franchising (available at www.eff-franchise.com > Regulation > Self-regulation). This Code not only entails rules for the franchisor, but also imposes some (general) obligations on the franchisee.

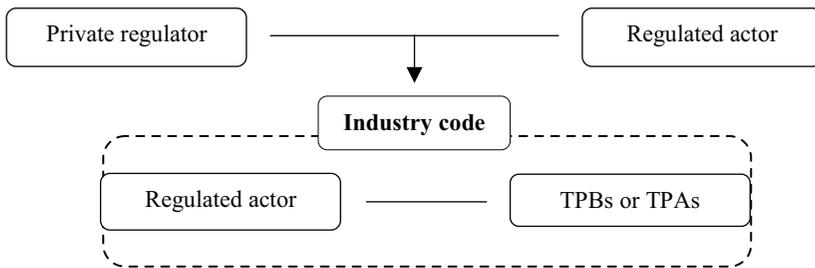


Figure 1.1 *Regulatory relationships*

2.1.3 Foundations: organizational and contractual commitments

In essence, industry codes are voluntary in nature: industry actors (e.g., companies, professionals, industry bodies) have a choice whether or not to subject themselves to the code regime,¹⁸ at least in theory.¹⁹ That is to

¹⁸ Paul Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety* (Edward Elgar Publishing 2014) 12; Cafaggi, 'Private Regulation in European Private Law' (n 14) 22; Fabrizio Cafaggi, 'Introduction: The Transformation of Transnational Private Regulation: Enforcement Gaps and Governance Design' in Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar Publishing 2012) 3; Fabrizio Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36 *University of Pennsylvania Journal of International Law* 875, 879; Vytopil (n 4) 64. These commitments can take different forms in practice. However, to avoid a too detailed discussion, I will limit the discussion to the main categories without delving into the (subtle) distinctions present within these categories.

¹⁹ In practice, subscription to an industry code is not always optional. First of all, market forces can render compliance with a code de facto compulsory, as is for instance the case when compliance forms a condition for market access or when a private regulator holds such a large market share that it can coerce its industry peers to comply with its rules (see Eyal Benvenisti and George W Downs, 'National Courts and Transnational Private Regulation' in Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar Publishing 2012) 132; Cafaggi, 'Private Regulation in European Private Law' (n 14) 22; Kernaghan Webb, 'Corporate Citizenship and Private Regulatory Regimes: Understanding New Governance Roles and Functions' in Ingo Pies and Peter Koslowski (eds), *Corporate Citizenship and New Governance: The Political Role of Corporations* (Springer Science & Business Media 2011) 44; Andreas Nölke and Jean-Christophe Graz, 'Conclusion. The Limits of Transnational Private Governance' in Jean-Christophe Graz and Andreas Nölke (eds), *Transnational Private Governance and its Limits* (Routledge 2008) 231). Secondly, an industry code can become legally binding

say that they are only governed by an industry code after they have given their consent to the rules.²⁰ This consent can take the shape of an organizational commitment or a contractual commitment,²¹ with the former being the most common in the case of industry codes.

Organizational commitments arise when a private actor wishes to become a member of an industry organization or professional body that has issued a code of conduct which applies to its members. Compliance with the code then constitutes a prerequisite for obtaining membership of the industry body. This obligation to follow the code can be imposed through the body's internal regulations (the articles of association and/or by-laws or where the code is drafted as a resolution of the body) by which members are bound.²² Sometimes (prospective) members need to undertake an additional, more express commitment, such as explicit written acceptance of the code upon joining the industry body, or signing the code itself or a 'declaration of compliance' with the code. Thus, where the relationship between the private regulator and the regulated industry actor is one of membership, the regulated actors are bound to the code by virtue of their membership. Contractual commitments, by contrast, bring about a contractual regulator–regulated relationship. This type of subscription to an industry code can take different shapes, such as the conclusion of a contract in which a code is incorporated or referred to or the signing of an agreement with the private regulator concerning compliance with the code. One could also think of the scenario where industry actors agree on a code without establishing an organizational regime and affirm their commitment to the code by signing it.²³

for industry actors (regardless of whether or not they have subscribed to the code) through public interference. This occurs, for instance, when the private regulator has been endowed with public regulatory authority or when the legislator declares a code universally binding (see Verbruggen (n 18) 273–277; Benvenisti and Downs (above) 132; Nölke and Graz (above) 231; Ivo Giesen, *Alternatieve regelgeving en privaatrecht* (Kluwer 2007) 60–62).

²⁰ Petra Buck-Heeb and Andreas Dieckmann, *Selbstregulierung im Privatrecht* (Mohr Siebeck 2010) 257; Webb (n 19) 44. See also Giesen (n 19) 62–66, who lists 'consensus' as one of the three ways in which private regulation can gain binding force.

²¹ Cafaggi, 'Introduction' (n 18) 3. See also Cafaggi, 'A Comparative Analysis of Transnational Private Regulation' (n 15) 12–13.

²² Zayènne D van Heesen-Laclé and Anne CM Meuwese, 'The Legal Framework for Self-regulation in the Netherlands' (2007) 3 *Utrecht Law Review* 116, 130.

²³ Cafaggi, 'Introduction' (n 18) 3; Cafaggi, 'A Comparative Analysis of Transnational Private Regulation' (n 15) 17.

What happens when one has opted for subscription to an industry code through either an organizational or a contractual commitment? Some industry codes merely serve as guidelines or as a (European) reference document for the (domestic) codes of the regulated actors and as such do not seek to impose obligations upon the regulated actors.²⁴ In the vast majority of cases, however, the aforementioned element of voluntariness ceases to exist when a regulatory scheme is joined: opting in then means that the subscribing actor becomes bound by the code,²⁵ at least in its relationship with the private regulator. For it is in this relationship that the obligation to abide by the code rules is assumed: the commitments are undertaken by the regulated vis-à-vis the regulator. Organizational commitments, more specifically, are thereby rooted in the law of associations. Generally, compliance is a membership obligation that can be enforced by the industry body through both internal procedures and civil action.²⁶ Contractual commitments, on the other hand, fall within the realm of contract law. Provided that the legal criteria for contract formation have been met, compliance with a code is a contractual and hence legally enforceable obligation between the contracting parties i.e., the private regulator and the regulated actors.²⁷ However, as has been set out in Section 2.1.2, the scope of an industry code is often not limited to this internal relationship: industry codes frequently concern the relation between the regulated actors and TPBs. A complicating factor in this respect is the fact that these regulatory beneficiaries stand outside the regulator–regulated relationship and are as such not the direct addressees of the organizational or contractual commitment of the regulated actors. Do these commitments nonetheless also create legal

²⁴ As can be reflected in the lack of monitoring and enforcement mechanisms. See P van der Zeijden and R van der Horst, *Self-Regulation Practices in SANCO Policy Areas: Final Report* (EIM Business & Policy Research 2008) 20. Some industry codes explicitly state that no legal consequences are to be attached to (non-compliance with) its rules. On the legal implications of such disclaimers, see Section 3.1.3.

²⁵ Cafaggi, 'Introduction' (n 18) 3; Cafaggi, 'Private Regulation in European Private Law' (n 14) 22.

²⁶ Van Heesen-Laclé and Meuwese (n 22) 132; Cafaggi, 'The Many Features of Transnational Private Rule-Making' (n 18) 930, fn 215; CHC Overes, TJ van der Ploeg and WJM van Veen, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij* (Kluwer 2013) 139–140.

²⁷ Cafaggi, 'Introduction' (n 18) 3. See also Cafaggi, 'Private Regulation in European Private Law' (n 14) 22; Cafaggi, 'The Many Features of Transnational Private Rule-Making' (n 18) 930, fn 215.

obligations in relation to the TPBs?²⁸ Furthermore, can industry codes impose obligations on TPAs? From a (traditionalist) contract law perspective, some pertinent questions lie in wait at this point, as will be detailed in Section 3.1.

2.1.4 Drafting process

Typically, the process of drafting and adopting an industry code is dominated by the trade association or professional organization that has taken the initiative to develop the code. In their role as private regulators, these bodies decide upon the creation and adoption as well as on the eventual content of the code. The regulated actors can be, but are not necessarily, involved in this process, either through associational structures (e.g., when a code is to be approved by the general assembly before entering into force), or through participation in the code negotiation processes in contractual regimes. However, it can also be that they join the regulatory regime at a later stage, once the drafting process is already closed. Then possibilities to exert influence on the adoption and content of a code are lacking.

All this is not to say that (representatives of) the TPBs, eventual TPAs and other public and private stakeholders (e.g., the state, NGOs) are by definition sidelined. In fact, the development of industry codes is often triggered by these stakeholders, which can pressure the industry to create, adopt or revise their regulatory arrangements.²⁹ These actors may also have a more direct say in the drafting process, either through consultation or cooperation, or where the code is the result of a joint effort of several industry stakeholders. However, with clear rules defining the participatory rights of the affected third parties and other external stakeholders lacking, actual inclusion and participation of these actors in the drafting process is not a given in conventional industry self-regulatory regimes.³⁰

²⁸ Industry codes are often part of a regulatory regime which includes a private complaint handling scheme to which the regulatory beneficiaries can resort in case of violations of the code. In these cases, codes have at least 'internal', non-legal binding force.

²⁹ E.g., Tim Büthe, 'Global Private Politics: A Research Agenda' (2010) 12 *Business and Politics* 1, 3–16. On the contribution of the state and third parties to the effectiveness of industry self-regulation, see Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19 *Law & Policy* 363, 396–405.

³⁰ Cafaggi, 'The Many Features of Transnational Private Rule-Making' (n 18) 891–899 suggests that matters are different at the transnational level. Here, more inclusive private regulatory regimes are on the rise and the involvement of stakeholders in the regulatory process is becoming much more common.

the more so since these regimes are often of a closed nature.³¹ With the exception of multi-stakeholder initiatives, the affected parties generally remain outside the industry body that has drawn up the code.³² Yet, it is this body that, as the private regulator, holds the ultimate and autonomous power to decide upon the contents and application of the code (unless the regime is of a co-regulatory nature). Viewed from this perspective, the process of drafting and adopting an industry code may in the end remain a fairly unilateral undertaking.³³

2.1.5 Interaction with the public regulatory sphere

Another feature of industry codes is that they can stand in a particular relationship of interaction with the public regulatory sphere, both at the European and the domestic level. This interaction can be limited to the drafting stages, when comments or actions of public actors may trigger the industry to develop a code, but can also result in codes going into a 'partnership' with the public regulatory sphere. Such a regulatory partnership can be initiated by the industry itself, for instance when tailor-made private rules are created to complement or specify legal rules or when a code is created to avoid the enactment of proposed legislation, without the legislator explicitly seeking to use the legislative proposal as a means to steer the industry in this direction. Another source of public-private

³¹ Fabrizio Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space' in Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (Kluwer Law International 2006) 18–20.

³² Cafaggi, 'Private Regulation in European Private Law' (n 14) 32; Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space' (n 31) 18–19; David Vogel, 'Private Global Business Regulation' (2008) 11 *Annual Review of Political Science* 261, 269–270. See also Cafaggi, 'A Comparative Analysis of Transnational Private Regulation' (n 15) 14.

³³ This observation corresponds with the fact that private regulation is often criticized for merely serving the self-interest of the regulated actors (e.g., Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) 141–142; Gunningham and Rees (n 29) 366–370; Buck-Heeb and Dieckmann (n 20) 231–233). However, the presence of private interests does not imply that private rules cannot pursue public interest objectives (Anne-Lies Verdoodt, *Zelfreguleren in de journalistiek: De formulering en handhaving van deontologische standaarden in en door het journalistieke beroep* (KU Leuven 2007) 43–44). As regards industry codes, this can be reflected in the content of the codes (cf. Section 2.1.1) and in their use as policy instruments (below, Section 2.1.5). Whether this public interest element is effectively materialized in practice (or constitutes a mere exercise of window-dressing) *inter alia* depends on the presence of effective enforcement and sanctioning mechanisms.

interaction resulting in a regulatory partnership between the public and the private sphere can be found with the governmental search for smart and light-touch alternatives to traditional command-and-control regulation, as set out in EU and national legislative policies of the last decades. European and national legislators may, for example, leave regulation entirely to private actors, leave room for private regulation when enacting legislation or adopting policy, delegate public regulatory authority to private bodies, formally approve existing codes or use the threat of legislative intervention to pressurize the industry towards adopting regulatory measures.³⁴ This reliance on industry-wide codes (as well as on other private regulatory instruments) to attain certain policy goals has led to several instances in which such codes have been employed as alternatives for or as complements to public regulation. In the field of private law, more specifically, this policy has resulted in several European Directives encouraging the creation of industry-level codes or introducing references to codes of conduct in national legislation. Furthermore, it has led to the adoption of several industry codes as regulatory alternatives or complements, covering topics relevant to private law relationships.³⁵

2.2 Codes and Private Contracting

Against the backdrop of the discussion of the characteristics of industry codes, this section turns to the question of how these codes relate to private contracting, which represents the conventional form of creating binding obligations under contract law. Simplified, contracts can in their chief form be understood as bilateral agreements concluded on the basis of offer and acceptance with the purpose of conducting a transaction (in

³⁴ See e.g., Fabrizio Cafaggi and Andrea Renda, 'Public and Private Regulation. Mapping the Labyrinth' (2012) CEPS Working Document, no 370, 5–9; Fabrizio Cafaggi and Agnieszka Janczuk, 'Private Regulation and Legal Integration: The European Example' (2010) 12 *Business and Politics* 1, 21–26; Ian Bartle and Peter Vass, 'Self-regulation within the Regulatory State: Towards a New Regulatory Paradigm?' (2007) 85 *Public Administration* 885; Gunningham and Rees (n 29) 365–366, 401–402; Luc Huyse and Stephan Parmentier, 'Decoding Codes: The Dialogue Between Consumers and Suppliers Through Codes of Conduct in the European Community' (1990) 13 *Journal of Consumer Policy* 253, 258–266.

³⁵ For examples in the context of European and Dutch private law, see Menting and Vranken (n 2) 11–23 and, more extensively, Menting (n 2) ch 4.

a broad sense).³⁶ Viewed in the light of the code characteristics, this brief description already suggests that contrasting the practice of contracts with that of industry codes is likely to yield differences rather than similarities.

2.2.1 Form

A first benchmark in addressing how industry codes and contracts relate from a conceptual perspective is the form that both instruments take. While contracts generally take the shape of bilateral (or multilateral) agreements brought about through offer and acceptance, the form that an industry code assumes depends on whether there is an internal or external regulatory relationship. Within that distinction, the nature of the commitment undertaken by the regulated actors (organizational or contractual) is also of relevance.

In the internal relationship between the private regulator and the regulated actors, the practice of industry codes assumes a bilateral character. This practice bears most resemblance to that of private contracting in internal relationships founded on contractual commitments. After all, in such contractual regimes the obligation to comply with the code in effect comes about through offer and acceptance of (a contract which includes) the code. Thus, in internal contractual regimes an industry code might conceptually be qualified as a 'regulatory contract'.³⁷ A different picture may emerge when a regulated actor has undertaken to comply with an industry code through organizational commitments. If, for instance, a Dutch legal perspective is adopted, neither the relationship between the regulator and the regulated nor the code can be qualified as a contract (for the purposes of contract law), even though the aforementioned bilateral element is equally present. According to the prevailing doctrine under the Dutch law of associations, a membership relation is a legal relationship *sui generis*, governed by the

³⁶ Article II.-1:101(1) Draft Common Frame of Reference (DCFR) provides the following definition: 'A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act.' However, several contract law systems are also familiar with the concept of 'unilateral contracts'. On the notion of 'contract' from a comparative perspective, see Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon and Stefan Vogenauer, *Cases, Materials and Text on Contract Law* (2nd edn, Hart Publishing 2010) 39–76.

³⁷ Cafaggi, 'A Comparative Analysis of Transnational Private Regulation' (n 15) 15–19, who coins the notion 'regulatory contract'. Whether or not a valid contract has been concluded of course depends on whether the legal requirements for contract formation have been met.

law of associations.³⁸ Within this relationship, compliance with a code is a membership obligation that ensues from and is covered by the internal regulations of the private regulator. Thus, conceptually, the code can be said to assume an ‘associational’ rather than a contractual nature.³⁹

Matters are once again different when industry codes are considered in the external regulatory relationship between the regulated actors and the TPBs. As noted above, industry codes commonly seek to regulate the behaviour of industry actors or (aspects of) the activities performed by these actors in the context of B2C or B2B relations. Viewed from this perspective, the code rules in fact display a commitment of the regulated actors to the TPBs. As the code rules are targeted at the regulated actors, this commitment is arguably not aimed at establishing a bilateral relationship with the regulatory beneficiaries through offer and acceptance (mutual consent). Rather, the TPBs are the passive recipients of this commitment; the ‘coming into effect’ of the code for the regulated actors is as such not dependent upon these beneficiaries having accepted the code rules. Accordingly, an industry code does not *as such* take the shape of a bilateral agreement in the regulated actor–TPB relationship. Instead, the commitment that speaks from the content of a code could be conceived of as a unilateral declaration of the regulated industry actors to the regulatory beneficiaries.⁴⁰ Viewed from this perspective, an industry code can be said *in itself* to take the shape of a ‘unilateral self-commitment’⁴¹ in the relationship between the regulated industry actors and TPBs.⁴²

³⁸ Overes, Van der Ploeg and Van Veen (n 26) 134; GJC Rensen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 2. Rechtspersonenrecht. Deel III. Overige rechtspersonen. Vereniging, coöperatie, onderlinge waarborgmaatschappij, stichting, kerkgenootschap en Europese rechtsvormen* (Kluwer 2012) no. 14; FC Kollen, *De vereniging in de praktijk* (Kluwer 2007) 129, 174. The accession to the association, however, is contractual: it is established through offer and acceptance and is as such governed by contract law. However, this contract has no effect beyond the accession: membership obligations are set by the association’s internal regulations, which govern the membership relationship. See Overes, Van der Ploeg and Van Veen (n 26) 128–129; Rensen (above) nos. 13, 60.

³⁹ Cf. Kollen (n 38) 174.

⁴⁰ Cf. Beckers (n 4) 58. In the vast majority of cases, this declaration will be publicly voiced, e.g., through a statement on the website of an industry actor that has subscribed to an industry code.

⁴¹ *ibid* 82 (with regard to corporate codes of conduct).

⁴² However, as will be discussed in Section 3.1, this is not to say that the notion ‘contractual’ cannot come into play.

In the relation between the regulated and TPAs, finally, industry codes take an in-between position in that they are in effect an attempt to (unilaterally) create obligations for the TPAs, yet need the consent of these regulatory addressees in order to actually bring about legally binding obligations (see Section 3.1.2).

2.2.2 Drafting process

In a similar vein there are differences between the drafting process of an industry code and the way in which contracts are negotiated, drafted and concluded. The conclusion of a contract follows from a bilateral (or multilateral), consensual negotiation process involving the contracting parties. However, when an industry code comes to govern a contractual B2C or B2B relationship, its content is not negotiated by the contracting parties. Often a code is developed *ex ante* in the course of a negotiation process unrelated to this contractual relationship, and thus pre-exists the relationship. Furthermore, external input into the drafting process, if any, is likely to stem from external stakeholders other than the eventual other parties to the contract.

2.2.3 Content

How do industry codes of conduct and contracts relate in terms of their content? It should be noted in this regard that the practice of private law contracting is not unfamiliar with regulatory standard setting. As Verbruggen points out, commercial contracts ‘have always included clauses and provisions setting down the expected safety and quality of the exchanged commodity, thus requiring the seller to behave in certain ways to adequately perform its contractual obligations vis-à-vis the buyer’.⁴³ Private actors, most notably MNCs, increasingly take this practice of employing contracts as vehicles for regulatory governance to the next level by including regulatory standards concerning public interest matters in their commercial contracts in an attempt to control their contractual counterparts or third parties in the supply chain.⁴⁴

However, when leaving aside this practice of governance by contract, industry codes of conduct and (conventional) contracts do differ in terms of their content. Contracts are not regulatory instruments in and of themselves. In their ‘traditional’ form, they structure private relationships

⁴³ Verbruggen (n 16) 82. See also Cafaggi, ‘The Regulatory Functions of Transnational Commercial Contracts’ (n 16) 1571–1572.

⁴⁴ Verbruggen (n 16) 82–83, who notes that these standards ‘go beyond regulating simple safety and quality attributes of the exchanged commodity only’ (p. 82). See also the literature referred to in n 16 above.

with the purpose of, broadly speaking, facilitating (predominantly) bilateral exchange between contracting parties. They entail the conditions for the individual transaction at hand (e.g., the price, details of the product, terms of delivery) and as such form the basis of contractual relationships. Industry codes, by contrast, do not bring about contractual relationships, but rather form a regulatory framework (context) for such relationships. They are a form of regulation and have a collective nature. Codes almost by definition have a regulatory objective. They include rules of conduct or rules on the activities to be performed and their scope of application, accordingly, is broader than the individual transaction. In doing so, industry codes of conduct can address public interest matters that traditionally belong to the governmental sphere. Contracts are generally not concerned with such matters, albeit that contracting practice has to take account of those public interests embodied in mandatory contract law.⁴⁵

2.2.4 Interaction with the public regulatory sphere

The fact that industry codes may affect the public (interest) sphere also sets them apart from traditional contracts, albeit that contracts can also be employed as a governance tool by the government as a contracting party.⁴⁶ When the interaction with the public sphere is initiated by the state (i.e., when industry codes are relied upon as policy instruments in one way or another), the codes concerned assume a hybrid nature. Although still developed and adopted by private actors, either within a legal framework setting the conditions in this respect or otherwise, these codes can, arguably, no longer be considered purely private initiatives. At the same time, however, they cannot be considered public regulatory measures either. Private regulators lack public regulatory authority and codes are adopted without there being, from a public law perspective, an inclusive institutionalized adoption procedure in place. Accordingly, without public interference by the legislature (e.g., through legislative references to codes or through the conferral of public regulatory authority upon private regulators) or the judiciary at this point, the nature of industry codes remains linked to that of their origins: private or semi-private.

⁴⁵ Cf. Cafaggi, 'The Many Features of Transnational Private Rule-Making' (n 18) 883, 937; Buck-Heeb and Dieckmann (n 20) 256.

⁴⁶ On this practice, see e.g., Jody Freeman, 'The Contracting State' (2000) 28 Florida State University Law Review 155; Hugh Collins, *Regulating Contracts* (Oxford University Press 1999), ch 13.

2.3 Place of Industry Codes in the Contractual Regulatory Space

So, where does this leave us as regards the place of industry codes of conduct in the contractual regulatory space? As follows from the discussion in the previous subsections, most industry codes seek to regulate the behaviour of the subscribing industry actors vis-à-vis third parties by setting rules of conduct or rules pertaining to the activities performed by these actors. As such, the codes in effect guide and structure (part of) the (contractual) B2C or B2B relationships that the regulated actors engage in. The practice of industry codes thereby differs significantly from the conventional practice of contracting, both form-wise and content-wise. Industry codes do take the shape of private instruments yet are functionally different from private contracts. They have a regulatory purpose rather than the objective of conducting a transaction; they are negotiated in a way that differs from regular contracts and in some instances entail a public (interest) element. All this makes it difficult to readily place industry codes in the private part of the regulatory sphere. Yet the codes cannot be fit nicely into the jacket of the public sphere either for some elements characteristic of this sphere are equally lacking. The rules are drafted by private rather than public actors, generally on the basis of private autonomy rather than public authority and through a process that does not resemble the process of drafting and adopting public regulation. Accordingly, industry codes cannot be equated with public regulatory measures either. Thus, holding an in-between position between private contract and public regulation, industry codes of conduct occupy their own part in the contractual regulatory space. They introduce a 'new' form of governance into this regulatory space.⁴⁷

3. THE RELATION BETWEEN INDUSTRY CODES AND CONTRACT LAW

Industry codes and contract law are part of the same regulatory space, where they both structure and guide contractual relationships. Accordingly, a contractual relationship might be governed by both legal and

⁴⁷ Admittedly, this 'newness' is relative: the origins of private regulation can be traced back to the Middle Ages, where guilds held regulatory power. See Cafaggi, 'The Many Features of Transnational Private Rule-Making' (n 18) 884–888 (with further references); RAJ van Gestel, *Zelfregulering, milieuzorg en bedrijven: naar eigen verantwoordelijkheid binnen kaders* (Boom Juridische Uitgevers 2000) 25–27.

self-regulatory norms. Which set of norms is seen as ruling the roost within the contractual regulatory space depends on the perspective that one takes. For the contracting parties, this space may be comprised of rules and norms other than the rules of contract law.⁴⁸ From the perspective of contract lawyers and contract law scholars, by contrast, the contractual regulatory space is often perceived as being more or less equivalent to the law of contract.⁴⁹ Under this traditionalist perspective, regulatory signals transmitted by industry codes and other private, non-legal forms of regulation more often than not remain unnoticed,⁵⁰ notwithstanding the fact that these private rules are as much a part of the regulatory space as the legal rules on contract. These observations prompt the question of how industry codes and contract law relate. Because of the somewhat peculiar position that the codes occupy in the contractual regulatory space, in between private contracts and public regulation, they lack fit with the instruments that the contractual regulatory space is traditionally perceived as being equivalent to i.e., private contracts and public regulation. As such, industry codes are likely to challenge the classical divides on which contract law rests (e.g., binding–non-binding, public–private).

This section takes a closer look at the interplay between industry codes and contract law by analysing how the practice of these codes relates to some of the foundations of contract law. These foundations underlie (most of) the contract laws within the European Union as is reflected in the fact that they echo through in the Principles of European Contract Law (PECL) and in the Draft Common Frame of Reference (DCFR), which serve as the benchmarks for this part of the chapter.⁵¹ First, it is

⁴⁸ See e.g., the contributions of Stewart Macaulay mentioned above in n 3.

⁴⁹ Morgan calls this ‘the lawyer’s customary assumption of “legal centralism” – the assumption which places law at the centre of activity under consideration’ (Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Contract Law* (Cambridge University Press 2013) 71).

⁵⁰ That is not to say that contract lawyers and contract law scholars are entirely unaware of the extra-legal sphere in which codes of conduct reside. As Mitchell notes: ‘Lawyers and judges are generally not unaware of the wider contract context beyond documents and rules, but there is lacking any real penetration of the socio-legal findings into the law, despite indications that occasionally suggest otherwise’ (Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing 2013) 6).

⁵¹ The differences between the EU contract law systems at this point can be found in the way in which the legal binding force of contracts is eventually construed on the basis of a national system’s technical specificities.

focused on the fundamental principles that constitute the basis for the legally binding force of contracts. Here, the principle of privity of contract and the ‘will/reliance principle’, which both ensue from the principle of private autonomy, will be discussed (Section 3.1). Can these principles serve as a starting point for the interpretation of industry codes as legally binding instruments? Secondly, the manner in which industry codes challenge the traditional public–private divide on which contract law rests is discussed (Section 3.2). Thus, it is sought to identify in general ‘foundational’ terms some of the sore points that may come up when codes and contract law meet.⁵²

3.1 What Is Binding and What Is Not: Legal Obligations under Contract Law?

Generally, codes of conduct are perceived as voluntary instruments in the sense that they are not legally binding.⁵³ From a traditionalist perspective, codes indeed do not have legally binding force in and of themselves, due to their private origins. For Dutch private law, Vranken has conceptually captured this issue in terms of the exclusive ‘framework of legislation and adjudication’.⁵⁴ The exclusiveness of the framework reflects the implicit assumption that legislation and adjudication are the only sources of law on which private law builds. Norms originating from other sources only assume legally binding force when this force is, at some point or

⁵² Hence the objective is not to conduct an exhaustive analysis. For a more comprehensive analysis of the relation between codes and contract law, see e.g. the related (yet slightly different) assessments of Beckers (n 4) (on the possibilities of interpreting corporate codes of conduct as legal obligations under German and English private law); Peterková Mitkidis (n 4) (on the legal effects and enforceability of sustainability contractual clauses in contract law) and Vytopil (n 4) (on, *inter alia*, the contractual binding force of MNCs’ codes under Dutch, English and Californian law). All three contributions provide a wealth of further references to contributions on this topic.

⁵³ Although opinions are divided, see Vytopil (n 4) 65 and Carola Glinski, ‘Corporate Codes of Conduct: Moral or Legal Obligation?’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 120, both with further references.

⁵⁴ JBM Vranken, *Exploring the Jurist’s Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation* (Kluwer 2006) 64. More extensively: JBM Vranken, *Mr. C. Asser’s Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen Deel. Een vervolg* (Kluwer 2005) 79–103.

another, assigned to them by either the legislator or the judge.⁵⁵ Thus, industry codes can have legally binding force yet cannot acquire this force on their own merits.⁵⁶

This becomes apparent when looking at the binding nature of industry codes in the internal relationship between the private regulator and the regulatory addressees. In this relationship codes are indeed characterized by their voluntary nature yet this voluntariness pertains to the subscription to the code regime rather than to their binding force.⁵⁷ For, as was argued in Section 2.1.3, the law of associations and the law of contract, respectively, may lend legally binding force to the commitments undertaken by the regulatory addressees. Thus, industry codes may have associational or contractual legally binding force in the internal regulator–regulated relationship. However, this observation leaves open the status of industry codes in the external relationship between the regulated actors and TPBs or TPAs. In the light of the foregoing, establishing this status is a fairly straightforward matter when a code is made part of a B2C or B2B contract through reference or incorporation in the contract itself or in the general terms and conditions applicable to the contract. In these cases, the legally binding force of a code towards (now former) TPBs or for TPAs is a direct consequence of the code taking the shape of a contract term.⁵⁸ However, due to a lack of empirical data with respect to industry codes at this point,⁵⁹ it remains rather opaque whether regulated actors actually use this technique of directly inserting a code in their external contractual B2B/B2C relationships. This observation brings into play another scenario, namely that in which a

⁵⁵ Vranken, *Exploring the Jurist's Frame of Mind* (n 54) 66, 78, 80.

⁵⁶ General terms and conditions, for instance, also have private origins yet become legally binding when the legal requirements to that end have been met. As such, they are formally incorporated in the framework of legislation and adjudication.

⁵⁷ Cf. M Koelemeijer, 'Gedragscode: effectief instrument voor maatschappelijk verantwoord ondernemen?' [2004] *Tijdschrift voor Ondernemingsbestuur* 11, 12.

⁵⁸ E.g., Peterková Mitkidis (n 4) 153–163; Beckers (n 4) 47–58. Furthermore, as noted in n 19 codes can gain legal binding force through public interference. When this interference takes the shape of the legislator declaring a code universally binding, the binding force of the code is not limited to the signatories.

⁵⁹ For an empirical analysis of the techniques used by MNCs with respect to their codes of conduct in relation to their supply partners, see Vytopil (n 4) 117–140. On sustainability contractual clauses, see Peterková Mitkidis (n 4) 153–233. Cf. also Beckers (n 4) 48–58, with further references.

code is not contractually embedded this way, i.e. (initially) maintains its shape as a unilateral self-commitment vis-à-vis TPBs or as a unilateral attempt to bind TPAs. Although this does not by definition stand in the way of industry codes assuming legally binding force in external relationships,⁶⁰ this binding force in most instances comes into being only after a struggle with contract law theory, as will be discussed in this section (which thus focuses on the legal relevance of industry codes vis-à-vis TPBs and TPAs).⁶¹

3.1.1 Contract law and the unilateral nature of industry codes

The struggle over the binding nature of industry codes is sparked by the unilateral nature that these codes have in external relationships. As set out in Section 2.2.1, in itself no contractual relationship is established between the regulated actors and the TPBs/TPAs in respect of an industry code. As such, a code in effect ‘hangs’ above the B2B or B2C contracts concluded by a regulated actor and thus regulates these contracts on the part of the regulated actor only. This practice conflicts with contract law’s focus on bilateral commitments established on the basis of mutual consent (offer and acceptance) when it comes to determining whether legal obligations have been created. As such, the unilateral nature and appearance of industry codes complicates their conceptualization under the law of contract. Furthermore, when a code is not contractually embedded⁶² but appears as a unilateral self-commitment vis-à-vis TPBs or as a unilateral attempt to bind TPAs, one is faced with the pertinent question as to whether or not to conceive the code as a source of legal obligations in these external relationships.⁶³

In terms of fundamental contract law principles, contract law theory raises two barriers at this point, which both have their roots in the principle of private autonomy: the principle of privity of contracts and interplay between will and reliance in the creation of contractual obligations. Which of these two barriers has to be dealt with depends on the starting point that one takes: that of industry codes as an internal (associational or contractual) commitment vis-à-vis the private regulator

⁶⁰ Buck-Heeb and Dieckmann (n 20) 230. Cf. Vytopil (n 4) 64.

⁶¹ See also the related assessments of Beckers (n 4), Peterková Mitkidis (n 4) and Vytopil (n 4).

⁶² Contractual embedding is hereby understood in a broad sense as encompassing both instances of contractual reference to or incorporation of a code and the interpretation of a code as a contract term. See nn 58 and 59 and the accompanying text.

⁶³ Beckers (n 4) 107.

or that of industry codes as direct unilateral declarations of the regulated actors towards TPBs/TPAs. The question whether the *internal* commitment between the private regulator and the regulated actors can give rise to legal effects in relation to actors that are outside this relationship is a question as to the third-party effects of a code. Accordingly, it is the principle of privity that comes to the fore in these cases (Section 3.1.2). When the issue of legally binding force is linked to codes in their appearance as *direct* unilateral declarations, matters become different. If this is the case, the position of TPAs and TPBs transforms from that of third parties to direct addressees or beneficiaries. Accordingly, the principle of privity does not raise an obstacle at this point. Rather, the ‘will/reliance principle’ complicates the matter. For the sake of simplicity and clarity, I will in this respect focus on the legal effects of industry codes as unilateral self-commitments vis-à-vis TPBs (Section 3.1.3).

3.1.2 The doctrine of privity of contract

When it is asked whether industry codes of conduct create binding obligations for TPAs and vis-à-vis TPBs *from the internal relationship* between the private regulator and the regulated actors, contract law theory will immediately put up the doctrine of privity of contract (or *relativité du contrat*). This doctrine limits the legal effects of a contract to the contracting parties: it entails that a contract (in principle) only creates rights and obligations for actors that are a party to the contract. Accordingly, and following on from the principle of private autonomy, contracts usually only generate legally binding effects upon third parties that become contracting parties themselves by agreeing to the contract terms.⁶⁴ Thus, the principle of privity forms an obstacle for industry codes assuming binding legal force vis-à-vis *third party* addressees and beneficiaries directly from the internal regulator–regulated relationship.⁶⁵ Yet, national contract laws include several contractual tools to circumvent the relative binding force of contracts to which it can – at least in theory – be resorted to stretch the legal effects of an industry code beyond the subscribing actors.⁶⁶

⁶⁴ Ewan McKendrick, *Contract Law: Text, Cases and Materials* (6th edn, Oxford University Press 2014) 946; Verbruggen (n 16) 83.

⁶⁵ Cf. Verbruggen (n 16) 89.

⁶⁶ For a more detailed account of the contractual techniques that can be employed in this respect, see e.g., Marie-José van der Heijden, *Transnational Corporations and Human Rights Liabilities: Linking Standards of International Public Law to National Civil Litigation Procedures* (Intersentia 2012) 173–208 (Dutch contract law); Verbruggen (n 16) 88–91.

With regard to TPAs, a private regulator can make use of a perpetual clause to oblige the regulated actors to include in their contracts with a third party a clause that not only requires this third party's compliance with the code, but also imposes an obligation on the third party to pass on this requirement in every subsequent contract.⁶⁷ A practice that bears resemblance to this is that of codes directly obliging the subscribing actors to demand compliance with the code from third parties. Illustrative is the Dutch SMS Service Provision Code of Conduct, which stipulates that

if a party to this Code of Conduct concludes an agreement with a party that has not adopted this Code of Conduct and if such agreement provides for services covered by this Code of Conduct, the former party will impose the obligation to comply with the provisions of this Code of Conduct on the latter party under such agreement.⁶⁸

The success and effectiveness of the aforementioned techniques depend on cooperation from the side of the TPAs. Their consent is indispensable in materializing the aforementioned obligations. Furthermore, the private regulator runs the risk that TPAs, in breach of their contractual or membership obligation, fail to pass on the compliance clause.⁶⁹

When it comes to the legal effects of industry codes in relation to TPAs, third-party beneficiary clauses may be of help.⁷⁰ Being a *contractual* clause, however, such a clause only enters the stage when the industry code itself is classified as a contract or is contractually incorporated.⁷¹ Hence it is of prime relevance that an industry code assumes a contractual nature, either through a contractual commitment in the internal relationship between the private regulator and the regulated or through its incorporation in a contract between these actors. Then, if the technical specificities of national contract law so allow, a code may be

⁶⁷ Van der Heijden (n 66) 189–190; Verbruggen (n 16) 89–90.

⁶⁸ Article 2(1) SMS Code of Conduct (21 May 2016) (available at www.payinfo.nl/gedragscodes).

⁶⁹ Verbruggen (n 16) 89–90; Vytopil (n 4) 73.

⁷⁰ Cf. article II-9:301(1) DCFR: 'The parties to a contract may, by the contract, confer a right or other benefit on a third party ...' and article 6:110(1) PECL: 'A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case ...'.

⁷¹ Cf. Beckers (n 4) 126–129, 379; Marina van Driel, *Zelfregulering: hoog opspelen of thuisblijven* (Kluwer 1989) 141–142.

interpreted and constructed as entailing third-party beneficiary clauses that confer legally enforceable claims (the mirror image of the obligations imposed on the regulated actors) on the TPBs.⁷² Again, the Dutch SMS Service Provision Code of Conduct forms an interesting example, this time because of a qualification given to this code in Dutch civil case law. In a case brought before the Arnhem District Court, the Code was considered to entail third-party beneficiary clauses, whereby the Court *inter alia* referred to the preamble to the Code in which it could be read that the Code sought to protect third parties (i.e., the purchasers of SMS services).⁷³ This case is discussed in more detail in Section 4.1.1 below.

3.1.3 Intention (will) vs. reliance

As set out in Section 3.1.1, the question whether codes create legally binding obligations in their guise of (publicly declared) unilateral self-commitments of the regulated actors to TPBs brings into play a different barrier. Here, the potential source of conflict between the practice of industry codes and contract law lies in the fact that national contract law systems, following the principle of private autonomy, lay down as a condition for the establishment of legal obligations the presence of the intention (or will) to create legally binding obligations.⁷⁴ Some industry codes include in this respect a disclaimer that explicitly states that the code rules are not legally binding or uses similar words to that effect. When the disclaiming statement is unequivocal and clearly visible at the outset of the code, with the code leaving no room for any reasonable expectations as to the opposite (see below), it is likely that a strong case can be made for the required intention being absent.⁷⁵ Other codes,

⁷² A complicating factor in this respect is that the majority of commitments undertaken in respect of industry codes are of an organizational nature. Cf. Cafaggi, 'A Comparative Analysis of Transnational Private Regulation' (n 15) 13. For a general analysis of German, English, French and Dutch contract law at this point, see Beale and others (n 36) 1173–1250. In the context of corporate private regulation, see Peterková Mitkidis (n 4) 196–200; Beckers (n 4) 126–144; Vytopil (n 4) 72–73, 87–89, 103–104. Cafaggi (n 16) 1568, 1592–1595 and Verbruggen (n 16) 90–91 discuss the matter in the context of governance by contract.

⁷³ Rb. Arnhem 26 March 2008, ECLI:NL:RBARN:2008:BC8904.

⁷⁴ Beale and others (n 36) 57–58. Cf. article II.-1:101 DCFR (cited above in n 36).

⁷⁵ Conversely, if the disclaimer is weak (e.g. due to vague phrasing or a lack of visibility) compared to the overall impression created by the code as to its legally binding effect (e.g. strong committing language), a code may still induce reasonable reliance in this respect on the side of beneficiaries and the disclaimer

however, remain silent in this respect. Then the issue of whether legal obligations have been created in the external regulated actor–TPB relationship becomes a matter of interpretation, guided by the external appearance of a code and the actions of the regulated actors in respect of the code. After all, in establishing whether a legal obligation has been created, contract law theory builds not only on a party’s intention to be legally bound (will), but also on the reasonable expectations raised in this regard (reliance). Reasonable reliance as to the intention to be legally bound aroused by certain statements or conduct of the other party to the contract is protected under most contract laws.⁷⁶ Accordingly, the question becomes whether, broadly speaking, the practice of industry codes gives rise to reasonable reliance on the part of the regulatory beneficiaries as to the regulated actor’s intention to be legally bound to a code in external B2C/B2B relationships.⁷⁷

In most contract laws, the intention of the parties has to be determined objectively i.e., ‘from the party’s statements or conduct as they were reasonably understood by the other party’.⁷⁸ Accordingly, the existence of such reasonable reliance has to be established by taking account of all the circumstances of the case.⁷⁹ Focusing on the outward appearance of industry codes at this point and without engaging in a fully fledged analysis, the practice of industry codes can be said to include elements

may, accordingly, not have the intended effect. See Beckers (n 4) 266–269. Glinski (n 53) 123 notes in this respect that such disclaimers ‘can only destroy the addressee’s expectations if they are as visible and prominent as the confidence-building features’.

⁷⁶ See article II.-4:102 DCFR: ‘The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party’s statements or conduct as they were reasonably understood by the other party’ and article 2:102 PECL: ‘The intention of a party to be legally bound by contract is to be determined from the party’s statements or conduct as they were reasonably understood by the other party’. From a general, comparative contract law perspective, see e.g., Beale and others (n 36) 44–58.

⁷⁷ Noticeable at this point is the detailed, insightful analysis conducted by Beckers (n 4) 233–265 on the socially binding effect of corporate codes and her argument that private law needs to be responsive to this effect.

⁷⁸ Article II.-4:102 DCFR and article 2:102 PECL. See also Jan M Smits, *Contract Law: A Comparative Introduction* (Edward Elgar Publishing 2014) 64–70.

⁷⁹ Smits (n 78) 67–69. Cf. also AS Hartkamp and CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht* (Kluwer 2014) nos. 134–138, 161.

that may give rise to reasonable reliance on the side of TPBs.⁸⁰ Quite a number of industry codes are published and accessible to the general public. Furthermore, it is not uncommon for private regulators to launch a public statement (e.g. on their website) that they have adopted a code of conduct, to be complied with by the subscribing actors. Moreover, codes can and are being used as a marketing tool, advertised by both private regulators and regulated actors (e.g. through a trademark or quality label).⁸¹ The wordings of a code may also contribute to the creation of reasonable expectations on the side of TPBs, particularly where these wordings are of a promissory or committing nature.⁸² This is the case, for instance, when terms such as ‘bound by’ and ‘undertake to comply’ are used (without a reservation as to the legally binding force being made) and when the obligations of the regulated actors are determinable and set out in clear, specific terms. Additionally, it may be pointed out that industry codes are often coupled with private enforcement mechanisms, which may add to the expectation that the regulated actors considered themselves (also) to be legally bound by the code. Arguably, such external ‘actions’ from the side of the regulated actors, which are not uncommon in the practice of industry codes, make a case for the reasonable reliance of TPBs on compliance with and the legally binding force of industry codes, notwithstanding the actual intentions of the private regulator and the regulated actors to create a binding effect.

⁸⁰ On this issue, see e.g., Glinksi (n 53) 121–129; Vytopil (n 4) 74. Cf. in the context of contract interpretation, Alan Barron, ‘Reasonable Expectations, Good Faith and Self-Regulatory Codes’ in Geraint Howells, Annette Nordhausen, Deborah Parry and Christian Twigg-Flesner (eds), *The Yearbook of Consumer Law 2007* (Ashgate 2007).

⁸¹ Glinksi (n 53) 122. Cf. Barron (n 80) 19, who submits that through such advertising a code is ‘a feature of pre-contractual negotiations’ and ‘sets the background parameters for future dealings between the parties’, which ‘gives rise to a reasonable expectation of compliance’.

⁸² Glinksi (n 53) 123; Carola Glinksi, ‘Bridging the Gap: The Legal Potential of Private Regulation’ in Olaf Winter, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008) 44; Beckers (n 4) 239–247. (Empirical) analyses of the language used in self-regulatory instruments can for instance be found with Martin Herberg, ‘Codes of Conduct und kommunikative Vernunft. Rechtssoziologische Überlegungen zu den umweltbezogenen Selbstverpflichtungen transnationaler Chemiekonzerne’ (2001) 22 *Zeitschrift für Rechtssoziologie* 25; Vytopil (n 4) 117–140; Peterková Mitkidis (n 4) 175–187; Beckers (n 4) 233–248.

However, the practice of industry codes may equally include elements that render it difficult to make a case for reasonable reliance. The publicity given to a code might, for instance, diminish significantly after its introduction and the code may be smoothed over, consigned to a less visible corner of the regulated actor's website. The fact that codes can be (mainly) composed of aspirational norms (e.g., 'strive for') or drafted in general and vague terms may also form an obstacle.⁸³ The use of disclaiming language and the lack of monitoring and enforcement mechanisms may add to that. One could also think of a code being publicly known as being a mere exercise of window dressing from the start (e.g., regulated actors are known for structural non-compliance with a code without there ever being any sanctions from the side of the private regulator).⁸⁴

In conclusion, it can be said that the requirement of intention (will) does not by definition lead to a conflict between the contractual legal sphere and the practice of industry codes. In fact, it is a fundamental contract law principle, namely that of the protection of reasonable reliance, that may open up the legal sphere. However, this is only a first step. Following traditional contract law doctrine, a code can only create a legal obligation as a unilateral self-commitment vis-à-vis TPBs when it has a 'contractual foundation'. That is to say that in order to bind a regulated actor to the code in its external B2B/B2C (contractual) relationships in such a case, traditional contract law doctrine would still require a translation of the binding force of a code pursuant to the reasonable reliance of TPBs into such an obligation on the basis of the available contract law concepts.⁸⁵ In other words, codes are still to be conceptually fitted in with the categories of contractual obligations that fall within the realm of contract law. Due to the codes' unilateral nature, this is not likely to be plain sailing in all cases, albeit that matters eventually depend on the national contract law system at hand.⁸⁶

⁸³ Cf. the literature referred to above in n 82. However, as Beckers points out, there are fields (e.g. environmental protection, human rights and workplace standards) where vague and flexible phrasing is needed in order for the private regulatory norms to be effective. See Beckers (n 4) 243–246.

⁸⁴ Cf. Peterková Mitkidis (n 4) 184–185.

⁸⁵ Beckers (n 4) 269, 299.

⁸⁶ The analysis conducted by Beckers in this respect shows that under German and English contract law this exercise might lead to conceptual difficulties and might require conceptual stretching when *corporate* codes are concerned. See Beckers (n 4) 269–305 (exploring the options of interpreting and

3.1.4 Industry codes and open-ended legal standards

To conclude this section, two ways in which industry codes may assume legally binding force without the need to fit them into existing contract law concepts may be highlighted. Since industry codes set rules of conduct for a certain industry or for a group of actors, a first possible avenue for rendering these codes legally binding is to classify them as custom (or usage) when they meet the formal requirements that exist in this respect.⁸⁷ Secondly, codes can be enforced in a more indirect fashion when used as a specification for and interpretation of open-ended legal standards in contract law, such as ‘proper business conduct’, acting according to ‘the common opinion’ within a certain field or ‘reasonable and fair’ behaviour. As open-ended legal standards are meant to open up the legal contractual sphere for social reality,⁸⁸ this practice at first blush seems to cause less of a ‘struggle’ than the aforementioned ones. However, one cannot use an industry code in this respect without reason: there needs to be a legally relevant link between the code and the industry actor concerned. Put differently, the specification of open-ended legal standards presupposes an (*ex ante*) judgement on the legally binding force or legal relevance of a code. Thus, although this practice may seem to be less of a ‘struggle’ than the aforementioned ones, one is still faced with the issue of whether or not to mark industry codes as legally relevant.⁸⁹

enforcing corporate codes as contracts, as enforceable contract terms (cf. n 89 below) and as relied-upon binding promises). Cf. also the analysis of Vytöpil (n 4).

⁸⁷ One can speak of custom ‘if in a certain class of persons, with regard to a certain kind of contracts, a certain line of conduct is taken and is expected to be taken’ (Arthur S Hartkamp, Marianne MM Tillema and Annemarie EB ter Heide, *Contract Law in the Netherlands* (Kluwer Law International 2011) 96). This line of conduct should continue to be followed (Hartkamp and Sieburgh (n 79) nos. 382–383). For a global perspective on the relation between (transnational) private regulation and custom, see Cafaggi, ‘The Many Features of Transnational Private Rule-Making’ (n 18). However, as Buck-Heeb and Dieckmann indicate, difficulties may arise when an industry code is revised. Does the qualification as customary law still hold or is it to be sent back to the drawing board until sufficient time has passed to (re-)establish the element of continuity? See Buck-Heeb and Dieckmann (n 20) 88, 306–308.

⁸⁸ Vranken, *Exploring the Jurist’s Frame of Mind* (n 54) 74: ‘The references are a way of opening windows on the social reality in which the rule has a function and to which it must constantly be adapted, to avoid it becoming obsolete (too) soon.’

⁸⁹ For the sake of completeness, it can be pointed out that TPBs may also seek recourse to other legal avenues to enforce industry codes of conduct, most

3.2 Blurring of the Public–Private Divide in the Contractual Regulatory Space

Industry codes pose a challenge not only to the fundamental principles underlying (contractual) legally binding force, but also to the public–private divide on which contract law is founded in two respects. The first challenge lies in the fact that industry codes are a form of private regulation that may affect third parties (TPAs and TPBs). This practice does not square well with the traditional conception of regulation i.e. that the enactment of rules is the prerogative of public actors. Accordingly, the regulatory nature of industry codes blurs the boundaries between what is traditionally perceived as the public part of the contractual regulatory space and the private part of this space.

The second challenge is posed by the fact that industry codes can embody a public interest element. The codes do not always (solely) concern the private interests of the industry, but can (also) deal with public interest matters. Additionally, private regulators may enter into a regulatory partnership with public authorities, as is for instance the case when public regulatory agencies refer to private codes in laws and regulations. As a result, the practice of these codes assumes a hybrid nature: private instruments with a private law origin are employed to

notably in the field of tort law, where the code rules can be used to flesh out the standard of due care (see e.g. Vytopil (n 4), ch 7; Beckers (n 4) 149–185). As Gliniski (n 53) 124–128 indicates, possible grounds of enforcement can also be found in interpreting non-compliance with an industry code as misleading advertising (under Directive 84/450/EEC on misleading advertising [1984] OJ L 250/17) or as an unfair commercial practice (under article 6(2)(b) of Directive 2005/29/EC on Unfair Commercial Practices [2005] OJ L 149/22). On the latter practice, see e.g., Beckers (n 4) 186–213. Additionally, attention may be drawn to article 2(2)(d) of the Consumer Sales Directive (Directive 1999/44/EC [1999] OJ L 171/12), which stipulates that ‘consumer goods are presumed to be in conformity with the contract if they ... show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling’. As Beckers (n 4) 63–67 (with further references) points out, this provision could be used to read a publicly declared code into a (consumer sales) contract. See also Gliniski (n 53) 124–126. Additionally, in view of the narrow focus of the Directive, Beckers points at the general rules on contract interpretation as a potential, yet less explored avenue for interpreting (corporate) codes of conduct as contract terms (Beckers (n 4) 67–81, 283–290). See also Barron (n 80).

regulate matters of public interest. Thus, also in this respect, public and private elements become intermingled.⁹⁰ In the Dutch context, one could, for example, think of advertising, regulation of which is predominantly in the hands of the advertising industry, represented by the Advertising Code Authority which operates on the basis of the Dutch Advertising Code.⁹¹ A different example can be found with the Dutch codes on consumer credit (drawn up by the Dutch Banking Association (NVB) and the Dutch Finance Houses' Association (VFN), respectively), which entail rules for responsible lending. The Netherlands Authority for the Financial Markets considers these codes, together with the rules set forth by the Dutch home shopping association (Thuiswinkel.org) in this respect, as the minimum standard elaborating the open-ended legal standard for responsible lending, laid down in article 4:34 of the Dutch Financial Supervision Act.⁹² At the European level, attention can be drawn to the Supply Chain Initiative, supported by the European Commission. This Initiative has led to the adoption of a set of Principles of Good Practice to address the issue of unfair B2B trading practices in the food supply chain, which is currently not (directly) regulated by EU law and is addressed differently, if at all, at Member State level.⁹³

In the traditional understanding of private law, however, the regulatory sphere is perceived as one in which public and private elements are separated. Private law is concerned with providing a facilitative framework, rooted in the principles of private autonomy and freedom of contract, for private actors pursuing their private individual interests. Public interests, insofar as not included in mandatory private law

⁹⁰ E.g., Cafaggi, 'Private Regulation in European Private Law' (n 14) and Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space' (n 31). Cf. also Peterková Mitkidis (n 4) 43 ('a fusion of public and private regulators, interests and regulatory tools').

⁹¹ An English version of the Code is available at www.reclamecode.nl > Voor bedrijven > English.

⁹² See <http://afm.nl/nl-nl/professionals/doelgroepen/kredietaanbieders/normen>. The codes can be found at www.nvb.nl/thema-s/sparen-lenen-beleggen/418/consumptief-krediet.html (NVB); www.vfn.nl/nl/gedragscodes (VFN); www.thuiswinkel.org/bedrijven/lidmaatschap/voorwaarden/inkomens-en-lastentoets-voor-kredietverstrekkende-webshops (Dutch Home Shopping Association).

⁹³ See <http://www.supplychaininitiative.eu/> and Commission, 'Tackling unfair trading practices in the business-to-business food supply chain' (Communication) COM(2014) 472 final.

provisions, are not a matter for traditional private law.⁹⁴ However, several developments at the national and European level, such as the introduction of statutory provisions to protect the weaker party to a contract (e.g. employees, tenants, consumers),⁹⁵ the horizontal effect of fundamental rights,⁹⁶ and the influence of what has been labelled as European regulatory private law,⁹⁷ have eroded and are eroding this strict public–private divide by introducing public interest elements as well as regulatory elements into the private law legal order. Yet the blurring of the public–private divide by industry codes is of a different order. Whereas the aforementioned developments generally concern the introduction of public interests by public actors through regulatory intervention,⁹⁸ in case of industry codes *private* actors introduce a public interest element into the contractual regulatory space. The ‘blurring’ caused by the practice of industry codes thus lies in the fact that ‘in the private sphere,

⁹⁴ Barbara Filippo, ‘Wanneer moet paternalisme worden verkozen boven autonomie in het contractenrecht? Beschouwingen over een goede balans, mede aan de hand van het huurbeschermingsrecht’ in WH van Boom, W Dijkshoorn and ML Tuil (eds), *Autonomie en paternalisme in het privaatrecht* (Boom Juridische uitgevers 2008) 6–8; Beckers (n 4) 335–338.

⁹⁵ In the context of Dutch contract law, see e.g., EH Hondius, ‘De zwakke partij in het contractenrecht; over de verandering van paradigma van het privaatrecht’ in T Hartlief and CJJM Stolker (eds), *Contractvrijheid* (Kluwer 1999) and the different contributions in MW Hesselink, CE du Perron and AF Salomons (eds), *Privaatrecht tussen autonomie en solidariteit* (Boom Juridische uitgevers 2003). See also Beckers (n 4) 339–340. For a critical perspective, see T Hartlief, ‘Vrijheid en bescherming in het contractenrecht’ [2003] *Contracteren* 5.

⁹⁶ See for the national context e.g., Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International 2008); Olha O Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Sellier European Law Publishers 2007) and with regard to the European level e.g., Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014); Stefan Grundmann (ed), *Constitutional Values and European Contract Law* (Kluwer Law International 2008).

⁹⁷ E.g., Hans-W Micklitz, ‘A Self-Sufficient European Private Law – A Viable Concept?’ in Hans-W Micklitz and Yane Svetiev (eds), *A Self-Sufficient European Private Law – A Viable Concept?* (EUI Working Papers – LAW 2012/31); Hans-W Micklitz, ‘The Visible Hand of European Regulatory Private Law’ (2008) 28 *Yearbook of European Law* 3.

⁹⁸ European regulatory private law is also shaped through instruments other than the traditional regulatory ones. See Micklitz, ‘The Visible Hand’ (n 97) 40–43.

both private and public interests are furthered and have to be distinguished' rather than just private interests.⁹⁹ Furthermore, it is possible to detect a more formal spill-over effect from the public sphere onto the private sphere where industry codes are relied upon by governments as policy instruments.¹⁰⁰

Nonetheless, the aforementioned regulatory nature and possible public interest element notwithstanding, industry codes eventually maintain their form as private instruments, which leaves them in the realm of private law (contract law for our purposes).¹⁰¹ Accordingly, the room for manoeuvre for private regulators and their industry codes is determined by the boundaries of the law of contract. This is the crux of the matter from a traditional perspective. This becomes apparent when taking a closer look at the legitimizing principles for the legally binding force of industry codes. Contract law in this respect principally builds on the overarching principle of private autonomy, as curtailed by fundamental principles (such as good moral and public order) and mandatory legal rules.¹⁰² Yet from a traditionalist perspective, the (public) regulatory role of industry codes calls for a different set of legitimizing values, linked to democratic principles such as participation, transparency and accountability.¹⁰³ Considering that private regulation is often criticized for escaping precisely the principles of democratic legitimacy and (public) accountability,¹⁰⁴ one might question whether the contract law framework is in itself 'sufficient' to found the legally binding force of industry codes

⁹⁹ Beckers (n 4) 344–345 (emphasis added). See also Peterková Mitkidis (n 4) 42.

¹⁰⁰ Cf. Peterková Mitkidis (n 4) 42. Beckers (n 4) 344–345 argues that although *corporate* codes in fact sidestep the public–private divide in the private sphere, they do leave intact the formal distinction between the public and the private sphere as they are 'in fact formally related to private relations without being related to the formal arena political decision making'.

¹⁰¹ Cf. Beckers (n 4) 345.

¹⁰² Cf. articles II.-7:301–302 DCFR and articles 15:101–102 PECL.

¹⁰³ Cafaggi, 'The Many Features of Transnational Private Rule-Making' (n 18) 933–934, 937–938. Cf. Verdoodt (n 33) 44–47.

¹⁰⁴ On this matter, see e.g., Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97, 98–99; Deirdre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality' (2011) 38 *Journal of Law and Society* 163; Colin Scott, 'Beyond Taxonomies of Private Authority in Transnational Regulation' (2012) 13 *German Law Journal* 1329; Baldwin, Cave and Lodge (n 33) 142–146; Verdoodt (n 33) 44–47. See also Colin Scott, 'Regulating Private Legislation' in Fabrizio Cafaggi and Horatia Muir-Watt (eds), *Making European Private Law: Governance Design* (Edward Elgar Publishing 2008).

which affect (a broad range of) third parties, particularly when the codes regulate public interest matters or function as policy instruments.¹⁰⁵ For leaning on the principle of autonomy, contract law does not take stock of the aforementioned (public law) concerns. Matters are complicated further by the fact that flaws as to democratic legitimacy and accountability can result in one-sided industry codes, i.e. codes that only serve the interests of the industry, at the expense of the interests of third parties.¹⁰⁶ Thus, from a traditionalist perspective, it can be questioned whether contract law is sufficiently equipped to deal with the (public) regulatory role of industry codes and the ensuing blurring of the traditional public–private divide.

3.3 Concluding Remarks

This section has shown that industry codes, to a varying degree,¹⁰⁷ challenge the very nature of traditional contract law in several respects. A first challenge was found in the issue of whether codes can be perceived as legally binding commitments under contract law. The fact that codes appear as unilateral self-commitments in external relationships not only creates the possibility of a conceptual misfit with the traditional focus of the law of contract on bilateral legal obligations (which occurs when the requirements for contract formation cannot be met), but also leads codes to stumble upon the doctrine of privity of contract, which limits third-party effects, or the ‘principle of will and reliance’. These fundamental principles of contract law may constitute serious bottlenecks when it comes to the legally binding force of industry codes; industry codes do not readily assume legal relevance vis-à-vis TPBs and TPAs. However, traditional contract law theory does provide some avenues for interaction with industry codes of conduct. Third-party beneficiary clauses and perpetual clauses may be used to circumvent the principle of privity, provided that codes may be interpreted in this way. Additionally, the ‘principle of will and reliance’ may allow for the creation of legally

¹⁰⁵ Cf. Cafaggi, ‘The Many Features of Transnational Private Rule-Making’ (n 18) 933–934, 937–938, who argues in light of the third-party effect of transnational private regulation that only a combination of private autonomy and procedural requirements makes the rules legitimate.

¹⁰⁶ Verdoodt (n 33) 41–42.

¹⁰⁷ Whether or not the practice of industry codes poses challenges to contract law depends, as explained in this section, on the eventual contractual embeddedness of the codes, the ‘type’ of industry codes at stake (public element or not) and the relationship covered (internal or external).

binding obligations, as may open-ended legal standards and the notion of custom. Thus, although there are frictions between the aforementioned fundamental contract law principles and industry codes, contract law also embodies concepts and principles that can be used as starting points for defining and interpreting these codes as legally binding instruments.

The second challenge lies in the fact that industry codes affect third parties and in the public regulatory role that these codes can play. Thus blurring the public–private divide within the contractual regulatory sphere, the hybrid nature of industry codes and their impact on third parties brings along issues of democratic legitimacy and accountability that traditional contract law theory is not concerned with, but which may become pressing in certain instances from a traditionalist perspective.

In sum, industry codes of conduct disrupt the conventional binding–non-binding and public–private divide on which contract law rests. Yet, does this lead to actual problems in contract law practice? The next subsection will shed some light on the matter by discussing the way in which Dutch courts have dealt with industry codes.

4. WHEN THE PUBLIC AND THE PRIVATE SPHERE MEET: EXAMPLES FROM DUTCH JUDICIAL PRACTICE

This section turns to the actual dynamics of the regulatory environment by briefly analysing confrontations between Dutch civil courts and industry codes of conduct in contract law cases.¹⁰⁸ Thus, the perspective is shifted from that of the fundamental principles of contract law (traditional contract law theory) to a case law perspective. The focus in this respect will be on three industry codes¹⁰⁹ which have been applied by Dutch courts in different contract law cases.¹¹⁰ The reason for opting

¹⁰⁸ This section builds on the broader case law analysis (comprising rulings of Dutch district courts, courts of appeal and the Supreme Court in civil law cases) that I conducted as part of my doctoral thesis, on the basis of which I have sought to establish the Dutch judicial approach to industry codes. See Menting (n 2) ch 6.

¹⁰⁹ The SMS Service Provision Code of Conduct, the European Code of Ethics for Franchising, as applied by the Dutch Franchise Association and the Rules concerning trade on the options exchange.

¹¹⁰ The judgments have been taken from the case law analysis conducted in my doctoral thesis. Accordingly, the discussion of these judgments draws on their discussion in the thesis (Menting (n 2) ch 6).

for judgments involving these three codes is that they all concern contract-related disputes and display different (methodological) approaches. As such, they are examples that may serve as an illustration of what might happen when the private and the public parts of the contractual regulatory sphere meet in practice.

4.1 Examples from Dutch Judicial Practice

4.1.1 SMS Service Provision Code of Conduct

A first example is the SMS Service Provision Code of Conduct, which regulates the provision of SMS services (through rules on, *inter alia*, the information to be provided to customers, the (de)registration procedure, complaint handling and the mutual obligations of the subscribing actors). The Code has been agreed upon by operators and service providers and applies in the mutual relations between operators, service providers, SMS service providers and content providers that have signed it. On several occasions Dutch lower courts have taken account of the Code in cases revolving around the question whether a consumer was bound to pay the excessive costs for SMS services, which rose quickly after the consumer registered for the service. Interestingly, different techniques have been applied in this respect.

In a judgment delivered by the Arnhem District Court several provisions of the Code were marked as third-party beneficiary clauses, incorporated in the contractual relationship between the consumer and his operator. The Court started its line of reasoning by qualifying the Code as an agreement to which both the operator and the SMS service provider in question were a party. After having established that this agreement included rules to the benefit of third parties,¹¹¹ the Court concluded that these rules met the legal criteria for third-party beneficiary clauses.¹¹²

¹¹¹ I.e., end-users (of the SMS services), which are defined by article 1 of the Code as ‘the user of a fixed or mobile connection with which SMS services can be purchased’.

¹¹² In this case, article 6:253(4) Dutch Civil Code was applicable: ‘An irrevocable stipulation which, with respect to the third person, has been made by gratuitous title, is deemed accepted if it has come to the attention of the third person and he has not rejected it without delay’. Translation taken from Peter PC Haanappel and Ejan Mackaay (eds), *Nieuw Nederlands Burgerlijk Wetboek: het vermogensrecht (zakenrecht, verbintenissenrecht en bijzondere overeenkomsten)* = *New Netherlands Civil Code: patrimonial law (property, obligations and special contracts)* = *Nouveau Code Civil Néerlandais: le droit patrimonial (les biens, les obligations et les contrats particuliers)* (Kluwer Law and Taxation Publishers 1990).

Thereupon it held that the principle of good faith, which contracting parties have to observe, required the provider to employ the Code's rules to the benefit of the consumer. As the operator had failed to do so, it had not acted in good faith and the consumer won his case.¹¹³

In another case the Dordrecht District Court applied the Code in the context of the (restrictive effect of the) principles of reasonableness and fairness relied upon by the defendant (a consumer). In doing so the Court first established that the applicability of the Code to the relation between the operator and the consumer was beyond dispute. Thereupon it held that the operator had failed to live up to its obligations under the Code in dealing with the complaint of the consumer about the excessive costs for an SMS service. This finding, considered together with another rule of the Code, led the Court to conclude that it would be unacceptable according to the principles of reasonableness and fairness for the defendant to have to pay the high costs of the SMS service.¹¹⁴

The Leeuwarden District Court adopted yet another approach: it based its decision directly on the Code, i.e. without 'transforming' it into a contract law concept or linking it to an open-ended legal standard. First, the Court held that the Code 'is by now well-known in social and economic life, and broadly accessible, that is at least via Internet'.¹¹⁵ It added that both the operator and the SMS service provider were signatories to the Code and that the Code's applicability to their business relationship had not been contested in the dispute at hand. Turning to the Code's contents, the Court found that the SMS service provider had violated the Code and that in light of the Code and the ensuing protection of the consumer, it had been logical for the operator to check dubious practices at this point.¹¹⁶ However, the operator had failed to do so, which eventually led to a decision in favour of the consumer.

¹¹³ Rb. Arnhem 26 March 2008, ECLI:NL:RBARN:2008:BC8904. See also Rb. Utrecht 16 July 2008, ECLI:NL:RBUTR:2008:BF8825 (preliminary relief proceedings), with reference to this judgment.

¹¹⁴ Rb. Dordrecht 27 December 2012, ECLI:NL:RBDOR:2012:BY8127, para 8.

¹¹⁵ Rb. Leeuwarden 11 February 2009, ECLI:NL:RBLEE:2009:BH2709, para 3.4 (author's translation).

¹¹⁶ Rb. Leeuwarden 11 February 2009, ECLI:NL:RBLEE:2009:BH2709, para 3.7.

4.1.2 European Code of Ethics for Franchising

The judicial (non-)application of the European Code of Ethics for Franchising, as applied by the Dutch Franchise Association,¹¹⁷ provides further illustrations of the possible sources of actual interaction and conflict between industry codes and contract law. Compliance with the Code is a prerequisite for franchisors that wish to become members of the Dutch Franchise Organization (*Nederlandse Franchise Vereniging*, hereafter NFV). The Code entails obligations not only for these franchisors, but also for franchisees.¹¹⁸ Worth noting is that the website of the NFV reads that the Code can have a radiating effect and that judges can use the contents of the Code in their assessment.¹¹⁹ Against this backdrop, district courts have applied the Code as an argument in several disputes between franchisors and franchisees on the franchise contracts concluded between them.

A judgment of the District Court of The Hague provides a first example in this respect. In this case, the franchisee had terminated the franchise agreement, to which the Code was declared applicable by the franchisor. One of the arguments put forward by the franchisee in this respect was that the franchisor had not provided him a written financial forecast as required by the Code and had thus failed to perform his obligations under the agreement. This argument was dismissed by the Court, which held that the franchisor, by declaring the Code applicable to the agreement, was indeed under an obligation to provide such a forecast, yet only when information in this respect was available.¹²⁰ The Franchise Code was employed in a more or less similar fashion in a case revolving around the interpretation of a clause in a franchise agreement concerning the correctness of the information provided by the franchisor. Here, the Utrecht District Court held that the franchisee in his interpretation of this clause could attach significance to, *inter alia*, the fact the franchisor was bound by the Code and by the Code's rule on, in short, the provision of information by the franchisor to the franchisee in particular. The franchisee could perceive the contested contractual clause as fleshing out this

¹¹⁷ The Code can be found at www.nfv.nl/Erecode/.

¹¹⁸ Article 4.3 of the Code reads that a copy of the Code is to be handed to future individual franchisees so as to enable them to enter into a binding franchise agreement with full knowledge.

¹¹⁹ www.nfv.nl/Erecode/.

¹²⁰ Rb. Den Haag 23 October 2013, ECLI:NL:RBDHA:2013:14241, paras 4.2–4.4.

rule, which is 'endorsed by franchisors in the Netherlands'.¹²¹ The franchisor, in his defence, did not contest the significance of the Code, yet claimed that he had not violated the Code at this point. The Court, however, was of a different opinion.¹²²

While the Franchise Code has thus been applied as an argument in the interpretation and termination of franchise agreements, it was denied a legally relevant role in a judgment of the Noord-Nederland District Court. A point of contention between the parties to the proceedings was whether the franchisor was legally bound by the Code. According to the franchisee, this question was to be answered in the affirmative whereas the franchisor claimed that he was not bound by the Code in his performance under the contract and that he had not violated the Code.¹²³ The Court held that the Code 'sets forth a guideline for a fair and reasonable specification of the franchise relation, whereby account is taken of the interests of both the franchisor and the franchisee'. However, the Code did not include legally binding obligations and to that extent 'amount[ed] to a standard of decency at the most'.¹²⁴ Accordingly, the Court ruled that the Code must be disregarded in addressing the alleged breach of contract by the franchisor.¹²⁵

The latter judgment sharply contrasts with the ones in which the very same Franchise Code was deemed to have legal relevance. A possible explanation might be that, unlike in the other two judgments, the applicability and binding force of the Code was a point of contention in this case.¹²⁶ However, it appears that this matter could have been solved in a fairly straightforward manner by establishing whether the franchisor was a member of the NFV. If not, the question on the legal relevance of the Code might have been turned into one of radiating effect (which the Code may have according to the NFV website). Yet these issues were not brought up. The statement that the Code does not include *legally* binding obligations suggests that it was rather the lack of a legal nature of the

¹²¹ Rb. Utrecht 12 December 2012, ECLI:NL:RBUTR:2012:BY6869, para 2.32.

¹²² Ibid.

¹²³ Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307, paras 5.7–5.8.

¹²⁴ Ibid, para 5.15 (author's translation). In a later case, identical wording was used to reject the argument that the Code included a term directed at (candidate) franchisees and hence had third-party effects (Rb. Overijssel 13 November 2015, ECLI:NL:RBOVE:2015:5020, paras 5.4–5.5).

¹²⁵ Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7307, para 5.15.

¹²⁶ As already noted in the brief analysis of this case in Menting (n 2) ch 6.

Code, due to its private origins, that motivated the Court's dismissive stance. In light of the other judgments as well as the reference to the possible legal relevance of the Code on the NFV website, this is a rather remarkable stance – unless neither membership nor radiating effect of the Code was present.

4.1.3 Rules concerning trade on the options exchange

The last example from Dutch judicial contract law practice is the ruling of the Supreme Court (Hoge Raad) in the *Kouwenberg/Rabo* case.¹²⁷

Before elaborating on this ruling, a few words should be devoted to article 79 of the Dutch Judiciary Organization Act (*Wet op de Rechterlijke Organisatie*, hereafter RO).¹²⁸ In brief, this provision lays down two grounds for cassation: procedural defects and infringements of the law. The definition of 'law' under the second ground for cassation, which is of particular relevance when it comes to private regulation, runs along traditional lines. Leaving out the subtle distinctions, law within the meaning of article 79 RO denotes rules enacted by the legislator or the judiciary.¹²⁹ Accordingly, private regulation (such as industry codes) does in itself not constitute 'law' for the purpose of article 79 RO. The results of a classification of a rule as 'law' within the meaning of article 79 RO are that alleged infringements of this rule constitute a ground for cassation and that the rule is eligible for full review in cassation. The latter implies that the Supreme Court can assess the correctness (*juistheid*) of the interpretation and application of the rule by the lower court.¹³⁰ When a rule cannot be qualified as 'law', the Supreme Court's

¹²⁷ HR 11 July 2003, ECLI:NL:HR:2003:AF7419, *NJ* 2005/103.

¹²⁸ For the purposes of this chapter, I will leave this at a very broad sketch of the main features of this provision in relation to industry codes of conduct. For a more detailed analysis, see Menting (n 2) ch 6.

¹²⁹ The Supreme Court has formulated the following criteria which should be met in order to speak of 'law' for the purposes of article 79 RO: a rule is classified as such (i) when the regulatory power on the basis of which the rule was adopted is derived from legislation (sufficient legal basis for the rule), (ii) when the rule can be regarded as an external, generally applicable rule directed to everyone, and (iii) when the rule has been duly published. See recently HR 24 November 2006, ECLI:NL:HR:2006:AY9222, *NJ* 2006/644, para. 3.3.2.

¹³⁰ K Teuben, *Rechtsregelingen in het burgerlijk (proces)recht* (Kluwer 2004) 85, 103, 192, 203, 209–210, 347–348; E Korthals Altes, 'De wereld van J.B.M. Vranken. Een vervolg (II, slot)' [2005] *Weekblad voor Privaatrecht, Notariaat en Registratie* 914, no. 25; Giesen (n 19) 45–51.

assessment is limited to the comprehensibility (*begrijpelijkheid*) of the reasons given in the disputed lower court judgment in respect of the rule.¹³¹

The central issue in *Kouwenberg/Rabo* was whether a bank had failed to fulfil its duty of care towards a client involved in option trading by not adhering strictly to the overdraft limit of the client's account. The client in this respect *inter alia* invoked the rules on overdraft limit included in the (now obsolete) Rules concerning the trade on the options exchange (*Reglement voor de handel op de optiebeurs*, hereafter RHO), setting forth an obligation for the bank to trade in options on behalf of a client only after the client had provided the cover required by the options exchange.¹³² The Supreme Court started its line of argument by agreeing with the decision of the appellate court that this obligation did not go as far as automatically prohibiting banks from option trading in all cases where the required cover could not be provided. Subsequently it brought into play article 79 RO, finding that 'the RHO, which concerns private regulation, does not meet the criteria developed in Supreme Court case law in order to be qualified as law'.¹³³ Thereupon the Court listed several criteria, including the RHO, which had to be run through when assessing a bank's duty of care towards its clients. On the basis of this list of criteria, the Court concluded that the bank had not fulfilled its duty of care towards its client.

As Vranken points out in his critical assessment of the ruling, this conclusion 'could have been reached much more easily by directly applying the Rules [the RHO]', which specify precisely the duty of care in dispute.¹³⁴ The Supreme Court, however, refrained from fully applying the self-regulatory rules of the RHO. With a clear motivation on this point lacking, it is difficult to ascertain what is behind this. The reference to article 79 RO suggests that the non-legal nature of the rules may have played a role in this respect, yet other reasons are equally conceivable.¹³⁵

4.2 Three Judicial Techniques

The exploration into the relation between industry codes and the fundamental principles of contract law revealed that even though these principles are capable of facilitating contract law relevance of industry

¹³¹ Korthals Altes (n 130) no. 25; Giesen (n 19) 45–51.

¹³² Vranken, *Exploring the Jurist's Frame of Mind* (n 54) 72.

¹³³ *Kouwenberg/Rabo* (n 127) para. 3.5.3 (author's translation).

¹³⁴ Vranken, *Exploring the Jurist's Frame of Mind* (n 54) 72.

¹³⁵ Vranken, *Algemeen Deel**** (n 54) 91, indicating that the approach of the Court might also have been motivated by its interpretation of the RHO.

codes, some friction continues to exist (to a greater or lesser extent) between the practice of these codes and the law of contract (see Section 3). With the caveat that the current section does not allow for firm conclusions, the brief discussion of the case law examples from Dutch contract law practice suggests that some nuance should be added to this observation. More specifically, the examples show that there can be interaction between industry codes and contract law: codes can give rise to legal obligations without challenging the foundations of contract law.

This interaction can run along different lines, whereby the Dutch (lower) courts have employed three different ‘techniques’ to draw the code at issue into the legal sphere. First, industry codes can be applied in the context of open-ended legal standards. In the example of the SMS Code, more specifically, the Court used the Code to colour the principles of reasonableness and fairness. Secondly, codes can gain legal relevance by fitting them into the legal jacket of contract law concepts, in the examples discussed the concept of third-party beneficiary clauses. Thirdly, the examples show that codes can be relied upon in a direct fashion by referring to them as self-standing arguments.¹³⁶ All three techniques basically have the same result: codes of conduct gain legal relevance in the dispute at hand and are accordingly enforced by the courts.¹³⁷ Equally similar to all three techniques is the fact that the courts in the cases discussed apparently did not have to go to extraordinary lengths in relying upon the codes (perhaps with the exception of the ‘third-party beneficiary clause construction’).¹³⁸ In light of the discussion in Section 3.1, the ease with which the lower courts have proceeded in

¹³⁶ This follows from the more exhaustive case law analysis in my doctoral thesis, where it was identified that these techniques represent the main responses of Dutch *lower* courts to industry codes of conduct. See Menting (n 2) ch 6.

¹³⁷ Cf. Giesen (n 19) 130, who argues that legal binding force, enforcement and the formation of law through private regulation run in parallel.

¹³⁸ The fact that the interpretation of code rules as third-party beneficiary clauses as well as the technique of using codes of conduct as a specification of open-ended legal standards are employed in a ‘struggle-free fashion’ does at first blush not come as a surprise, for these are precisely the classical avenues for interaction that contract law itself provides. Yet it should be kept in mind that industry codes of conduct – as well as other forms of private regulation – are of a different nature than the customs, proper business conduct and contractual third-party beneficiary clauses that contract law is conventionally concerned with (cf. Section 2.2 and Vranken, *Exploring the Jurist’s Frame of Mind* (n 54) 74–78). Moreover, as indicated in Section 3.1.4, also the use of an industry code as an interpretation of an open-ended legal standard necessitates an (*ex ante*) judgement of the code’s legal status and binding force.

using the third technique is remarkable. Contrary to what traditional contract law theory suggests, the examples of lower court decisions in which industry codes have been applied directly show that codes do not necessarily need to be squeezed into the conceptual framework of (the fundamental principles of) contract law in order to be interpreted as legally binding. Actually, the decisions remained silent in this respect and did not display any concerns as to the private, non-legal origins of the rules. Instead of referring to (the lack of) contractual embedding of a code or to contract law notions such as the principle of privity, will and reliance, or the rules on contract formation, the courts only refer to the binding force or applicability of the code in question, or to the fact that these matters have remained undisputed.

What is behind the three judicial techniques?¹³⁹ First and foremost, procedural and contextual factors (e.g. the facts of the case, the nature of the dispute and existing lines of case law) will play a role, but also the way and context in which a code has been relied upon by the parties to the proceedings is relevant in this respect. This makes it difficult to ascertain why a certain approach has been adopted, the more so since the rulings lack a clear explanation on this point. The rulings suggest that industry codes are readily applied when their binding force or applicability is beyond dispute¹⁴⁰ but it does not become clear what this binding force or applicability denotes. From a contract law perspective, a reference to or inclusion of a code in a contract or in general terms and conditions form the simplest sources of the binding force or applicability of a code.¹⁴¹ Yet with the judgments remaining silent on this point, it cannot be ruled out that the source in this respect lies in the fact that codes take the shape of unilateral self-commitments. This scenario might pose greater challenges to the interpretation of codes as legally binding obligations, as set out in Section 3.1. However, when the parties to the proceedings agree upon the binding force or applicability of a code, there is arguably no need for the courts to address these challenges.

¹³⁹ For a more extensive analysis see Menting (n 2) ch 6.

¹⁴⁰ The case law analysis in my doctoral thesis suggests that this is a broader trend in the case law of the *lower* civil courts (i.e. district courts and courts of appeal) involving industry codes of conduct. When there is agreement between the parties to the proceedings on the applicability of an industry code or when the binding force of a code can be (undisputedly) established, courts apply the private rules without further ado. See Menting (n 2) ch 6.

¹⁴¹ Cf. Rb. 's-Gravenhage 23 October 2013, ECLI:NL:RBDHA:2013:14241 where the franchisor had declared the Franchise Code applicable to the franchise agreement.

This brings us to the judgments displaying a tension between the practice of industry codes and contract law, and the judgment in which the Franchise Code was denied legally binding force in particular. In this case, there was no consensus on the binding force of the Code. Consequently, the District Court had to form its own opinion on the legal relevance of the Code. As submitted in Section 4.1.2, this issue could have been solved in a fairly straightforward fashion by looking at NFV membership or at the radiating effect of the Code. However, the Court did not go down this route, nor did it bring into play contract law mechanisms and principles. Instead, it referred to the non-legal nature of the private rules as an argument for denying them legally binding force. Likewise, it appears that the private origins of the RHO in relation to the threshold for appeal in cassation raised by article 79 RO made the Supreme Court hesitant in its approach towards the RHO in *Kouwenberg/Rabo*.¹⁴² These observations, together with the fact that Dutch lower courts have employed different techniques in assigning legal relevance to the same industry code, show that the relation between industry codes and contract law is not as clear cut as the brief discussion of the three judicial techniques perhaps suggests.

Finally, it should be noted that none of the case law examples refers to the (democratic legitimacy and accountability) issues signalled in Section 3.2. Although, arguably, there was no need to address these concerns in the cases discussed as they were not brought up by the parties to the proceedings, the lack of references at this point does raise the question whether these issues are indeed problematic from a contract law perspective (cf. Section 5.2).

¹⁴² Vranken, *Exploring the Jurist's Frame of Mind* (n 54) 72. See also Menting (n 2) ch 6. In other rulings, by contrast, the Supreme Court adopted a more open stance towards industry codes. A detailed analysis of the Court's case law at this point can be found in Menting (n 2) ch 6. See also Vranken, *Exploring the Jurist's Frame of Mind* (n 54) 72–74; I Giesen, 'De omgang met en handhaving van "meervoudigheid van maatschappelijke normstelsels": een analyse van recente rechtspraak' (2008) 139 *Weekblad voor Privaatrecht, Notariaat en Registratie* 785.

5. TYING THE LINES TOGETHER: TOWARDS A FRAMEWORK FOR INDUSTRY CODES IN CONTRACT LAW?

5.1 A Grey Area within the Contractual Regulatory Space

Following the rise of global, European and national industry codes concerning B2B and B2C private law relationships, the regulation of contractual relationships is no longer solely a matter for the law of contract: industry codes have become an important part of the contractual regulatory space. However, the relationship between these codes and contract law is far from clear cut. Due to their position in between private contract and public regulation and the particular shape that they assume in external relationships (unilateral self-commitment), industry codes pose serious (conceptual) challenges to the classical binding–non-binding and public–private divide on which the law of contract is founded. At the same time, however, contract law does include principles (will/reliance) and concepts (open-ended legal standards and contractual instruments to create legal third-party effects) that offer a lead for opening up the contractual legal sphere for industry codes.

A similar ambiguity echoes through in the Dutch case law examples discussed in Section 4. On the one hand there are cases in which the private, non-legal nature of the codes – in line with a traditionalist perspective – seems to have been a reason for courts to withhold the code at issue legal relevance. On the other hand, however, the brief case law analysis showed that the lack of conceptual fit between the practice of industry codes and contract law does not per se stand in the way of the legally binding force and enforceability of these codes. Dutch lower courts do not seem to be particularly concerned about fitting codes in with legal, contract law categories: codes of conduct have been applied both within and outside the existing conceptual categories.¹⁴³ In fact, the practice of the Dutch lower courts is at points arguably very much in line with classical contract law theory. This is not only reflected in the fact that the lower courts use the possibilities for interaction provided by

¹⁴³ With the caveat that the source of the binding force remains opaque in court decisions where judges, in assigning legal relevance to a code, took account of the fact that the parties to the proceedings agreed upon the binding force of the code or upon its applicability to their relationship. Accordingly, it cannot be ruled out that courts have remained within the boundaries of contract law in these cases as the binding force might stem from contractual embedding of the code.

contract law (such as the ‘third-party beneficiary clause construction’ and the use of private rules to flesh out open-ended legal standards), but also in the practice of direct referencing to industry codes. After all, by building on the consensus of the parties to the proceedings on the binding force or applicability of an industry code when directly referring to industry codes, Dutch lower courts in effect proceed along the lines of the overarching fundamental contract law principle of private autonomy.

Thus, the regulatory role of industry codes has created a grey area within the contractual regulatory space, causing frictions and leaving contract law doctrine puzzled as to whether, and if so how, to deal with these codes. Arguably, given the codes’ regulatory importance for contractual relationships, contract law has to show itself responsive to industry codes and assign these codes a place within the legal part of the contractual regulatory space. Still, however, the question remains whether, and if so, how this place of industry codes of conduct in the contractual regulatory space should be given further shape. In view of the challenges that industry codes pose to the foundations of contract law (i.e. the legally binding force of these codes and the democratic legitimacy issues ensuing from the blurring of the public–private divide – see Section 3) do we need a (legal) framework for these codes? The previous sections suggest in this regard that these challenges may be coped with on the basis of existing contract law principles and concepts. Put differently, contract law might already entail a framework for industry codes itself. Therefore, in the next section I will briefly explore the ‘contract law framework’ that echoes through in the foregoing, partially drawing on a broader discussion on the issue included in my doctoral thesis.¹⁴⁴ Following the focus on already existing contract law principles and concepts, the perspective taken is that of the civil courts. After all, it is eventually up to the courts to employ these principles and concepts when faced with industry codes.

5.2 A ‘Contract Law Framework’ for Industry Codes

In briefly exploring the existing ‘contract law framework’ for industry codes, I will draw a distinction between the contract law mechanisms that can be used to address the issue of legally binding force and the mechanisms that can be used in respect of the legitimacy issues that industry codes might have.

¹⁴⁴ Menting (n 2) ch 7.

5.2.1 Framework for legally binding force

A first fundamental contract law principle that can play an important role in ‘regulating’ the legally binding force of industry codes in contract law is *the principle of private autonomy*. Following this principle, legal relevance can be assigned to an industry code if consensus exists between the regulated actor and a TPB or TPA in respect of – broadly speaking – the (legal) applicability of an industry code (cf. the Dutch case law discussed in Section 4.1). After all, with consensus forming a legitimizing principle within contract law,¹⁴⁵ a code gains legally binding force if there is consensus in this respect, vis-à-vis both TPAs and TPBs. However, as will be discussed below, whereas such consent is indispensable when an industry codes seeks to impose obligations on third parties (cf. Section 3.1.2), a lack of consensus on the applicability of a code does not necessarily stand in the way of industry codes assuming legally binding force vis-à-vis TPBs.

The fact that consensus, following the principle of private autonomy, constitutes a legitimizing factor within the law of contract already indicates that the ‘binding force issue’ is more difficult to address when there is no consensus on the applicability of an industry code between the regulated actor and a TPB or TPA. Whether and how contract law can be used to respond to this issue in such ‘hard’ cases depends on the reasons behind the lack of consensus.

One could in this respect first of all think of a case in which an industry actor has subscribed to an industry code on the basis of a contractual or organizational commitment, yet argues that the code lacks *legally* binding force in external relationships vis-à-vis TPBs (e.g. with the argument that the rules are only internally binding or are of an advisory nature). In these cases the code in effect retains its shape as unilateral self-commitment. However, this does not by definition have to

¹⁴⁵ Consensus (in a broad sense) functions as a legitimization and as a factor for binding force, according to Giesen (n 19) 66, footnote 76, with reference to G Bachmann, ‘Privatrecht als Organisationsrecht’ in *Jahrbuch Junger Zivil-Rechtswissenschaftler* (Richard Boorberg Verlag 2002) 17–19. Cf. Colin Scott, Fabrizio Cafaggi and Linda Senden, ‘The Conceptual and Constitutional Challenge of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 1, 17. However, consent does not always reflect a free choice; as noted in n 19, compliance with a code can be de facto compulsory. Then tensions do exist between the practice of industry codes and the principle of private autonomy as the element of choice is in fact lacking. Cf. Fabrizio Cafaggi and Katharina Pistor, ‘Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation’ (2014) 9 *Regulation & Governance* 95 on the right to self-determination in relation to transnational private regulation.

be a stumbling block for courts to assign external legal relevance to the code. As the discussion in Section 3.1 has shown, courts can resort to the *will/reliance doctrine* and *open-ended legal standards* to interpret the code as legally binding. Whereas the argument under the will/reliance doctrine in this respect builds on reasonable reliance on the side of the TPB that the code in question (also) has external binding force (cf. Section 3.1.2), the argument under the ‘open-ended legal standards route’ could be that the code is of such significance within the industry that it should be of legal relevance in external relationships, for instance as a reflection of common proper business conduct or according to the principles of reasonableness and fairness.¹⁴⁶ Additionally, the code may be interpreted as *custom* and gain legal relevance accordingly (cf. Section 3.1.4).¹⁴⁷

Matters become more difficult if the lack of consensus on the applicability of an industry code vis-à-vis a TPB results from the fact that an industry actor has not subscribed to the code. A complicating factor in respect of the legally binding force of an industry code in this regard is the lack of a contractual or organizational commitment from the side of the industry actor, i.e. the fact that this actor has not consented to be bound by the code. Hence, it is unlikely that courts can successfully employ the will/reliance doctrine to interpret the code as legally binding upon the industry actor unless this actor has clearly and unequivocally given the (wrong) impression that he was bound by the code. Accordingly, the question of the legally binding force is turned into one of the third-party effects of the code. This brings into play the principle of privity, which in most cases constitutes an obstacle in this respect (cf. Section 3.1.2). Yet there is a route that one can go down in circumventing this principle besides using a perpetual clause, namely that of the *radiating effect* of the code, effectuated via *open-ended contract law standards*. Here, the argument could be that the code is of such importance for a significant part of the industry that non-subscribing industry actors are also bound by the code rules (cf. above). However, due to the far-reaching consequences of this route (i.e., imposing rules on an actor without his consent), this option is likely to be used only in exceptional cases.¹⁴⁸

¹⁴⁶ Menting (n 2) ch 7.

¹⁴⁷ Cf. Giesen (n 19) 70–71. See also Menting (n 2) ch 7.

¹⁴⁸ A Dutch example in this respect is Rb. ’s-Gravenhage 24 July 2004, ECLI:NL:RBSGR:2004:AQ5353 (preliminary relief proceedings). In this judgment the private rules on pharmaceutical advertising were held to apply to a company that was not a member of the trade association that had subscribed to

5.2.2 Framework for legitimacy

Section 3.2 of this chapter signalled that industry codes, by disrupting the traditional public–private divide, bring along issues of democratic legitimacy and accordingly raised the question whether contract law is well equipped to deal with the (public) regulatory role of industry codes of conduct. In the light of the foregoing, it can be responded that from a *contract law* perspective, the issue of democratic legitimacy does not play a role. This becomes apparent when considering that TPBs *benefit* from industry codes and that TPAs can only be bound by an industry code after they have given their *consent* to the rules (e.g. through acceptance of the code). Furthermore, in the ‘hard’ cases discussed above, it is the judiciary that lends legally binding force (and legitimacy) to an industry code.¹⁴⁹ This suggests that the challenge of accommodating the public element of industry codes’ regulatory role in fact only arises when one adopts a public law perspective.

Nonetheless, what does remain problematic in relation to TPAs is the risk of one-sided industry codes that only serve the interests of the industry, albeit that this might be mainly a theoretical situation as most industry codes grant ‘rights’ to third parties (cf. Section 2.1.2). To address this issue civil courts, may, however also resort to contract law and apply general principles such as ‘reasonableness and fairness’, or to the ‘unfairness test’, which applies to negotiated contract terms (such as

these rules. The court based its argument in this respect on, *inter alia*, the consistent application of the rules by civil courts and the private regulatory body, the fact that the validity of the rules was generally accepted in case law and the fact that the company ‘had not disputed that almost the entire pharmaceutical industry is bound by the Code of Conduct and the decisions of the CGR [the Foundation for the Code for Pharmaceutical Advertising]’ (para 3.3, author’s translation).

¹⁴⁹ At this point, a conceptual parallel can be drawn between industry codes as contract terms in a broad sense and three contractual clauses that contract law is familiar with: general terms and conditions, perpetual clauses and third-party beneficiary clauses. The parallel with standard terms hereby refers to industry codes as ‘un-negotiated’ terms in the relationship between the regulator and the regulated, while the comparison with the latter two clauses concerns the lack of involvement of eventual TPAs and TPBs, respectively, in the drafting process of the code. Like industry codes of conduct, these contractual instruments can all be negotiated without the third parties that they seek to address (either to their benefit or to impose obligations) being present in the negotiation process. The legitimacy of these instruments lies in the principle of private autonomy as reflected in the consent that constitutes a precondition for their binding force. See Verbruggen (n 16) 92.

general terms and conditions),¹⁵⁰ to ensure that the obligations imposed on the TPAs of the code are well balanced.

5.3 Conclusion

In sum, the brief discussion in this section shows that – somewhat paradoxically – contract law itself already includes concepts and principles that can be used as starting points in addressing the challenges that the practice of industry codes of conduct poses to its own foundations. Viewed from this perspective, no (additional) legal framework for industry codes is needed in contract law. The existing contract law framework can ‘facilitate’ the legal relevance of industry codes, the conceptual frictions between industry codes and the foundations of contract law notwithstanding. Yet, given these frictions, an important precondition in this regard is the willingness of courts to – where necessary – create a fit between the practice of industry codes and contract law concepts on the basis of the possibilities offered by contract law in this regard. As the discussion in Section 5.2 has shown and the Dutch case law examples discussed in Section 4 illustrate, this may in some cases require judicial readiness to look beyond the non-legal, private nature of the codes and to refrain from using this private nature as an argument to *a priori* refrain from interpreting the codes as legally binding, which may imply that courts will have to think outside the confines of existing conceptual frameworks. It will, however, take time for the relationship between industry codes and contract law to fully crystallise. Given the regulatory importance of industry codes in the contractual regulatory space, it is nonetheless unavoidable to continue to rethink the relationship between industry codes and (the foundations of) contract law. This chapter has shown that in doing so one does not (always) have to go too far afield in this regard as contract law itself already offers possibilities to give further shape to this relationship and accordingly to make the dark side of the contractual regulatory space a little less dark.

¹⁵⁰ Cf. articles II.-9:403–408 DCFR and article 4:110 PECL.