I. INTRODUCTION AND APPROACH

A GENERAL INTRODUCTION AND RESEARCH QUESTION

It can now safely be said that the Westphalian global legal order is no longer the leading constitutional paradigm.\(^2\) New forms of government have been emerging at the local and transnational level,\(^3\) and the nation state appears to have lost its central role.\(^4\) Amongst the new forms of government, researchers have identified Transnational Private Regulation (hereinafter: TPR).\(^5\) Though it would appear that Transnational Private Regulators (hereinafter: TPR’ors) do not impose formally binding rules, but enforce rules by private law instruments such as membership and contract, researchers have observed that these rules are often de facto binding.\(^6\) Furthermore, constitutional scholars have found that these private actors, apparently exercising some form of power, often (if not always) lack accountability.\(^7\) Although remedying this lack of accountability could be done by constitutional means, perhaps restoring voluntariness in subscription to these regimes would be better. In this essay it will be explored how competition between TPR’ors could enhance the voluntary nature of TPR and what role competition law could play in achieving the right amount of competition between them.

\(^1\) Thijmen Nuninga and Rosa Kindt are legal research master’s students at Utrecht University. The authors thank prof. L.A.J. Senden for her invaluable comments on earlier versions of this essay and her support in submitting this essay. The authors also thank mr. dr. W.B. van Bockel for comments on an earlier version of this essay.


\(^4\) De Witte 1995, p. 146.


\(^7\) Scott e.a., p. 16; D.Curtin & L.A.J. Senden, ‘Public Accountability of Transnational Private Regulation: Chimera or Reality?, Journal of Law and Society, 38, p. 164. (Curtin & Senden 2011).
Imelda Maher has written on one way in which competition law could be applied to TPR’ors: by means of applying article 101 TFEU to them. Her argument, in essence, is that the arrangements made between competitors through TPR’ors could be qualified as a cartel. After all, she adds, ‘is not contradictory to treat treat cartels as both potentially vulnerable to one form of regulation (competition law) while also performing important regulatory functions themselves.’ This is a very sound argument and this article does not aim to add to it or to criticise it. Instead, however, it proposes to treat the TPR’ors as economic actors that are in competition with each other and voluntary regimes created by governments. It is important that this difference is kept in mind when reading this essay.

In the first paragraph of this essay, the accountability deficits of fully private TPR’ors will be discussed. No attention will be paid to TPR’ors that are set up by governments. It is submitted that the link with public government brings to mind different constitutional concerns that call for an entirely different endeavour than the one undertaken here. In the second paragraph, the role competition between TPR’ors could play in addressing this accountability deficit will be discussed. It will be argued that if there is helathy competition between them, the voluntary nature of TPR will be enhanced, which will render the accountability deficit less problematic. In the third paragraph it will be discussed how article 102 TFEU could be applied to TPR’ors. In order to make this account as honest as possible, the account is written from a competition law perspective alone. In other words, any interpretative choices that must be made - which is inevitable due to the relatively novelty of the suggestion proposed - are made with competition law-based principles in mind rather than being guided by constitutional concerns. In it, it will be argued that it ought to bepossible to apply competition law to TPR’ors in a number of situations. In the fourth paragraph of this essay, the application of article 102 TFEU to TPR’ors as found in paragraph 3 will be evaluated from a constitutional perspective. It will be argued that the application of article 102 TFEU may increase competition in some instances, but that, from a constitutional point of view, this is not always enough to fully eliminate the accountability deficit. Conclusions follow.

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9 Maher 2011, p. 122.
II. THE ACCOUNTABILITY DEFICIT OF TPR’ORS

The emergence of TPR has led commentators to observe that (i) TPR’ors exercising some form of authority should ideally have some degree of legitimacy, but (ii) that such legitimacy is often lacking both formally and substantively. The exercise of regulatory power of fully private TPR’ors is not supported by any formal claim to regulatory authority, and mechanisms ensuring accountability are often lacking at this regulatory level. Nevertheless, their regulation potentially has a direct effect on a vast range of individuals.

As Curtin and Senden have noted, legitimacy issues are often addressed by reference to the concept of accountability. The traditional concept of accountability expresses the belief that public regulatory institutions should render account publicly for the use of their mandates and the way in which they spend public money. The perceived lack of accountability in TPR’ors, then, is built upon the idea that ‘all power-wielding entities within any regulatory regime should be accountable to those affected by their rule making,’ regardless of their public or private nature.

Accountability can be ensured by having certain mechanisms in place. Bovens e.a. have identified seven elements for a social relation to be qualified as a practice of accountability:

‘[There should exist a] relationship between an actor and a forum (1), in which the actor has an obligation (2) to explain and to justify (3) his or her conduct (4), the forum can pose questions (5) and pass judgement (6), and the actor may face consequences (7).’

It would appear that the questions underlying this description are: who is accountable, to whom is that (legal) person accountable, and for what?

Curtin and Senden explain how these elements often lack in TPR’ors. First, a multiplicity of accountability relationships can be identified. This multiplicity consists of (i) the fact that private regulators often have an effect on a number of different forums that can be hard to identify, and (ii) the fact that it is often hard to identify which persons exactly should be accountable within TPR’ors. The multiplicity of relationships is troubling, as all the seven elements require a clear link between the forum and the TPR’or. Secondly, members of the forum cannot exercise influence on

11 Such as mechanisms for procedural participation or review, cf. Curtin & Senden 2011, p. 185.
12 Kingsbury e.a. 2005, p. 27.
14 Id.
16 This has been called ‘the problem of the many eyes’, see Curtin & Senden 2011, p. 183.
17 This has been called ‘the problem of the many hands’, see Curtin & Senden 2011, p. 183; see also: D.F. Thompson, Moral Responsibility of Public Officials: The Problem of Many Hands’, American Political Science Review 1980, vol. 74, p. 905-915.
the regime. There are two sides to this: (i) those affected are not formally included in the decision-making process (ex ante), and (ii) there is often no formal obligation to actually give account for the decisions made as any account giving is usually voluntary (ex ante or ex post).\textsuperscript{18} It is clear that any justification or explanation of its conduct by the TPR’or requires the forum to have access to all the relevant information and be involved in the TPR’or’s functioning. Moreover, ensuring a proper accountability regime requires more than mere transparency and participation by the forum: the element of ‘passing judgement’ presupposes evaluation and the possibility of imposing consequences. Without this, the relationship between a TPR’or and its forum/forums cannot be qualified as an accountability relationship.

III. THE ROLE OF COMPETITION

A ACCOUNTABILITY IN THE IDEAL SITUATION OF FULL COMPETITION

Although it must be accepted that fully private TPR’ors are often not fully accountable to those they affect, it will be argued below that this need not be problematic. First, it will be argued that fully voluntary creation of rules amongst private actors - which both the regulator and the regulated parties are - does not necessarily require accountability mechanisms for the regime to be legitimate. Secondly, a modest suggestion will be made that, in the ideal situation of full competition between TPR’ors, the perceived accountability deficit may not be as strong as often perceived.

It should be emphasised at the outset that the relevant competitive process referred to is that between different regulators. These regulators need not be transnational regulators or private regulators, but it\textit{ is} important that these rules are not \textit{de jure} obligatory. Furthermore, it must be emphasised that the competition between these regulators is separate from the competition between actors that ascribe to their regulations. In this article the former market will be called the \textit{regulatory market} and the latter market will be called the \textit{regulated market}. Whether these markets can qualify as ‘markets’ from a competition law point of view, will be elaborated on below.

\textit{i)} Free choice

First and foremost, it must be submitted that if a TPR’or is in fully-fledged competition with other TPR’ors or public regimes, actors remain free to opt-out or change regime. This freedom of choice may have serious implications for the need for TPR’ors to be ‘accountable’ to large forums.

If parties are truly free - which is, perhaps, a utopy - the TPR’or is essentially creating a regulation to which private actors need not be bound. Of course actors must comply with the rules once they have subscribed to them,\textsuperscript{19} but in the ideal situation of full competition the subscription itself remains voluntary. None of the actors are then bound by rules created by an unaccountable

\textsuperscript{18} Ibid., p. 184.
\textsuperscript{19} Cafaggi 2013, pt. 59
body against their will.\textsuperscript{20} It is submitted that this renders any accountability issue unproblematic. After all, in this ideal situation the TPR’or is not creating \textit{generally binding} rules. Indeed, its activity is really no different from the conclusion of contracts, and the conclusion of contracts is generally not seen as something problematic. The fact that these rules are drafted unilaterally makes it no different. If one private party wishes to be bound by rules created by another private party it is free to do so. Ideally, therefore, a contract concluded between a TPR’or and a private actor should not be treated differently. That is, if subscription has been truly voluntary. Whether that is possible will be elaborated on below.

It could of course be submitted that the (legal) persons subscribing to the regime may do so voluntarily, but those affected by it do not. In response, however, it must be asked why and how a party subscribing to a regime would be any different from everyday contracting. If party A and party B conclude a contract, and party C is affected by that contract, the legal question ought not be whether C was involved in the conclusion of the contract, but rather whether the conclusion or execution of the contract would amount to a legal wrong. Why should the subscription to a voluntary regime be different? Is it the general nature of the regime that demands it? Should the conclusions of standard contracts then be safeguarded by accountability mechanisms? Surely that would go too far and, it is submitted, so does subjecting TPR’ors to consitutional constraints if parties truly have been free in subscribing to the regimes.

\textit{ii) Filing off the sharp edges}

Secondly, it is submitted that if TPR’ors are in full competition with one another, the accountability deficit will perhaps not be as strong as often perceived. It is submitted that if a TPR’or’s regime competes with other regimes (whether public or not), these lacking elements of a relationship of accountability will be revived - at least to a certain extent. The argument runs as follows. If actors remain free to opt-out of a regime or change from one regime to another, most actors affected by a TPR’or will gain influence on the content of the regime by the exercise of their market choice. The private actors that are regulated by the TPR’or can exercise influence on the regime by negotiating less oppressive terms or by opting for another regime. Parties ultimately affected, such as consumers, can exercise some influence by their choice of products and/or services. It is submitted that, when competing with other regimes, TPR’ors are likely to adapt to these demands to ensure the competitiveness. In the ideal situation of market competition between TPR’ors, therefore, the regulated parties and the beneficiaries of the regime are both, albeit to a small extent, \textit{substantively} - though not formally - included in shaping the regime.\textsuperscript{21}

Substantive inclusion appears to file off the sharp edges of lacking accountability mechanisms. First, substantive inclusion through market demand further clarifies the forum, as all actors that can be \textit{bound}\textsuperscript{22} by the regime are somehow included in it. It should be admitted, of


\textsuperscript{21} Without requiring them to be formally included in the process, which also occurs from time to time. See: Cafaggi, \textit{New Foundations of Transnational Private Regulation}, p.8.

\textsuperscript{22} Avoid reading: ‘affected.’
course, that even if full competition exists, the parties that are merely incidentally affected – e.g. the farmers that ought to benefit from the Fair Trade Regulations - by the regime are not substantively included in the decision making process of the TPR’or.

Secondly, as for the lack of formal obligations to comply and give account, the following must be noted. Substantive inclusion through market demand creates a very strong incentive for the TPR’or to respond to demands of its constituencies. Of course this does not create a formal obligation to comply, but the stronger market forces are, the more this incentive will become a *de facto* obligation for the TPR’or. Again, one caveat is to be noted. Market competition will not - save for where there is an explicit demand for it - create an *ex post* or *ex ante* obligation to give account for its actions.

Finally, however, it should be emphasised that even in the ideal situation of full competition between TPR’ors, market forces cannot fully eliminate the accountability deficit. Even in that ideal situation the third parties that are merely incidentally affected by the regime remain in a very shady position. As argued, however, proper competition between TPR’ors’ and other regimes may file off the sharp edges of the deficit.

### B Accountability in the Actual Situation

The situation described above is an ideal situation. In it, the lack of accountability is both rendered less relevant (by the contract analogy) and reduced (by the substantive inclusion). Both effects occur as a result of the voluntariness of adoption of standard and the possibility for all those involved to choose alternatives. Unfortunately, however, the ideal situation and reality do not coincide. Caffagi e.a. have found that in many instances the adoption of rules is *de facto* obligatory. The reason for this is that many private standards function as ‘a channel to enter a market of goods or services,’ leaving private actors with no choice but to accept the regime. These limitations may be even stronger, they add, when considering those incidentally affected by such regimes. If standards are multiple, beneficiaries may exercise some influence by their choice of products (and thus standards), but where standards are few or there is only one standard, they completely lose their influence on the regime.

If it is accepted that the accountability deficit can be overcome in the ideal situation but that practice does not resemble this situation, the logical next step would be to ask whether and how the ideal situation can be achieved. The ideal situation can be achieved, it is submitted, by ensuring competition between TPR’ors. Competition law traditionally seeks to promote and maintain competition by regulating anti-competitive conduct between companies. In the next paragraph inquiry will be made into what role competition law can play in creating or recreating the ideal situation.

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23 Ranging from financial standards to human rights standards.
24 Caffagi 2013, pt. 61.
25 Ibid.
IV. THE ROLE OF COMPETITION LAW: A COMPETITION LAW PERSPECTIVE

In this paragraph the applicability of the doctrine of abuse of dominant position to fully private TPR’ors will be assessed.\(^{26}\) It should be emphasised that this is nothing more than a theoretical exercise. Due to the relatively novel nature of TPR’ors, a purely descriptive account appears impossible. Rather the account below must be interpretative and - when choices are warranted - normative in nature. To avoid that the account below is too coloured by the authors’ views, the general goals of competition law (i.e. safeguarding competition by preventing actors from behaving independently from economic pressure)\(^{27}\) will be leading in this analysis. Constitutional concerns are avoided.

A  THE TPR’OR AS AN UNDERTAKING

As is well known, ‘the categories of actors to which the competition rules apply’\(^{28}\) are made up by ‘undertakings.’ The European Courts have interpreted this concept as applying to “all entities engaged in economic activity, regardless of their legal status and the way in which they are financed”.\(^{29}\) Conversely, a fully private entity that is engaged in activities that are inseparably connected to the performance of a public task, is not considered an undertaking (despite its private nature).\(^{30}\) By issuing private regulation, private TPR’ors manoeuvre somewhere in between.

The main activity of a TPR’or is issuing regulation. It is submitted, however, that a TPR’or’s activity has a fundamentally dual nature. First, by creating and spreading regulation, the TPR’or effectively “sells” regulation to interested parties. The regulation then resembles a product or a service that must be sold. If the TPR’or provides enforcement and/or compliance checks, that is very similar to providing a service. The market on which this activity occurs shall be called the regulatory market. Secondly, by issuing regulation and controlling market actors, the TPR’or also inevitably exercises some influence on the market that it seeks to regulate. In this essay, this market – on which the TPR’or has influence but on which it does not operate like the regulated parties do - shall be called the regulated market.

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\(^{26}\) Reasons for not including an assessment of Article 101 TFEU and TPR’ors can be found in the first paragraph.


IATA is “a trade association representing the airline industry worldwide”. IATA’s activities consist of both accreditation and standard setting. Through its standard setting in the field of, for example bar-codes used on boarding passes, it has played an important role in the standardisation of those bar-codes - in fact, it publishes the Global Bar Coded Boarding Pass. This piece of standard setting thus influences the market it seeks to regulate, in that all members of IATA must comply with that standard. Those standards are at the same time actual goods sold by IATA to those interested, making their standards goods on a market.

Although the effects of the TPR’or’s activity may be felt on two markets, it cannot possibly be argued that the TPR’or is a market player on the regulated market. After all the TPR’or does not engage in whatever activity (e.g. air travel) the regulated parties are engaged in.

Case law has established that the characteristic features of what constitutes economic activity is (1) the offering of goods or services on the market, provided that (2) that activity could, at least in principle, be carried on by a private undertaking in order to make profits. If these requirements are sufficiently met it is irrelevant that the body is not in fact profit making or has not been set up for an economic purpose. The main activity of a TPR’or on the regulatory market appears to constitute such an economic activity as it is similar to providing a service, it can be done by other private entities too, and it could – at least theoretically – be done with a view to making profits.

Next, it worth discussing the resemblance of the TPR’or to public (regulatory) entities. This resemblance could be taken to suggest that the TPR’or is and cannot be an undertaking. After all, in several cases the CJEU decided that prima facie undertakings were not subjected to competition law as the concerned entities that were engaged in activities that were connected with and inseparable from the exercise of public powers. Moreover, in a number of cases concerning

31 www.iata.org, last visited on 7 November 2013.
39 Based on the activities relevant for the case at issue: competition law is applicable to those activities that can be separated from those that are exercised as a public authority, which is why each relevant activity should be considered individually, see Eurocontrol, para. 30.
pension funds and social security schemes\textsuperscript{40}, the European Courts made a distinction between entities operating in competition with commercial enterprises in the same sector (which are undertakings even if the scheme has a social objective) and entities which, fulfilling an exclusively social function, carry out an activity which is based on the principle of solidarity.\textsuperscript{41} The European Courts have described this principle as “the redistribution of income between those who are better off and those who, in view of their resources, would be deprived”.\textsuperscript{42} In other words: if an entity can be said to be carrying out activities pursuing the principle of solidarity, that entity is excluded from competition law. The question then becomes, of course, whether this reasoning could or should be applied to a TPR’or.

It is submitted that it should not. Although the regulation issued by a TPR’or is similar to that issued by a public or publicly endorsed entity, a TPR’or (at least, the ones that are subject of this essay) is fully private in nature, and has no connections to public entities or governmental agents. They may issue regulation, but it is a private regulation. Moreover, although they may have a certain interest in regulating a certain market, this interest will almost never be the furthering of solidarity in the sense of the principle of solidarity described above. No TPR’ors that engage in such redistribution of wealth are known to the present authors.

Hence, it would appear that creating, selling and enforcing the regulation can be considered to be an economic activity, and thus the TPR’ors that create, sell, and enforce those regulations can qualify as undertakings under competition law. Furthermore, it would appear that, despite TPR’or’s resemblance to public entities, TPR’ors can best be qualified as undertakings.

B Dominance and the Market: Which Market?

In order for article 102 TFEU to have any say over TPR’ors, the TPR’or needs to qualify as a dominant market player. The ECJ has defined dominance as constituting a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained in the relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, customers and consumers.\textsuperscript{43} It should not be understood to cover only those situations in which the competitive process is eliminated, in other words, it should not be understood to cover only (quasi-)monopolist firms.\textsuperscript{44}


\textsuperscript{41} Jones & Sufrin 2008, p. 130.

\textsuperscript{42} Joined Cases C-159/91 and C-160/91 Poucet et Pistre v Assurances Generales de France, para. 10.


Dominance must exist in relation to a certain market. With regard to defining the market the Commission has stated that "[t]he objective of defining a market in both its product and geographic dimension is to identify the actual competitors of the undertakings involved that are capable of constraining their behaviour and preventing them from behaving independently of an economic pressure". As can be deduced from this statement, the undertaking at issue needs to be a competitor on the relevant market. As discussed above, in the case of TPR’ors this is only true for the regulatory market. Determining the scope of that market requires determining the level of interchangeability of the product. In the case of TPR’ors, the ‘service’ can only be regulation aimed at or connected to one regulated market. This means that the regulated market will necessarily help define the scope of the regulatory market. Nevertheless, it should be kept in mind that the market which is relevant for dominance is the regulatory market, not the regulated market.

Traditionally, two types of evidence are needed to establish whether an undertaking is dominant on its market: (i) the market share possessed by the undertaking and (ii) whether other factors serve to reinforce its dominance, in particular the existence of market barriers. The market share will be central to determining market power. Whether a TPR’or actually has a dominant position depends, of course, on the specific situation of that TPR’or. Nevertheless, it can be submitted here that TPR’ors such as IATA and the IASB are the only (relevant) regulators in their field. There is, in other words, a good chance that these actors actually are dominant on their self-created markets.

C Abuse and Effects on Two Markets

As has been argued above, the activity of a TPR’or is dual in nature as it extends, at least de facto, to both the regulatory and the regulated market. Although it cannot be argued that the TPR’or is a market player on both, this does call to mind the situation where a dominant undertaking is active on two markets. In that situation, in order to fall under article 102 TFEU, activity on both markets may constitute abusive behaviour and the negative effects of that abuse may be felt on both markets too. It will be argued below that, as there is a very strong link between the dominant position on the regulatory market and the activity on the regulated market, this may be the case for TPR’ors too.

48 The Court has stated that in principle the existence of a very large market share (between 40 and 50 percent, based on United Brands and Hoffmann-La Roche) which is held for a significant period of time would in itself be indicative of dominance.
It is well-established case law that dominance, abuse, and the negative effect on competition need not all be implemented on the same market. Where a “normal” undertaking is active on two markets and dominates one of them, Whish identifies four situations that can be objectionable under competition law: (i) abuse and the negative effect on competition occur on the dominated market, (ii) abuse is implemented on the dominated market, but the negative effect on competition is felt on the non-dominated market, (iii) abuse is implemented on the non-dominated market, but the negative effect on competition is felt on the dominated market, and (iv) the abuse and the negative effect on competition both occur on the non-dominated market. The table below may help to envision these situations.

<table>
<thead>
<tr>
<th>Market A</th>
<th>Market B</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Dominance + Abuse + Negative Effect</td>
<td>Dominance + Abuse + Negative Effect</td>
</tr>
<tr>
<td>2 Dominance + Abuse</td>
<td>Negative effect</td>
</tr>
<tr>
<td>3 Dominance + Negative Effect</td>
<td>Abuse</td>
</tr>
<tr>
<td>4 Dominance</td>
<td>Abuse + Negative Effect</td>
</tr>
</tbody>
</table>

In analysing whether these four situations could also arise and be objectionable amongst TPR’ors, it would seem fruitful to divide the four situations above into two groups: one in which the abuse takes place on the regulatory market (i.e. the former two situations), and one in which the abuse takes place on the regulated market (i.e. the latter two situations). This is mainly due to the fact

49 Note that abuse and the negative effect on competition are conceptually distinct. The former refers to a certain action or behaviour, whereas the latter only refers to the effect of that behaviour.


52 Table based on: Whish 2009, p. 204.

53 Furthermore, if this model is to be applied to the special case of TPR’ors, it should be noted that the regulatory market is the dominated market (“Market A” in the table above), and the regulated market is the second market (“Market B” in the table above).

54 Note that Whish, on whose work this table is based, does not use the term ‘negative effect (on competition),’ but the term ‘benefit.’ It is submitted that the two are just two sides of the same coin. In this essay the term ‘negative effect on competition’ is preferred over ‘benefit’ as the latter could be taken to imply that a TPR’or is an actor on the regulated market. Again it must be emphasised that this is not the case.
that these situations share theoretical basis. Note that if this model is to be applied to the special case of TPR'ors, the regulatory market must be the dominated market ("Market A" in the table above), and the regulated market must be the second market ("Market B" in the table above).

i) Abuse on the regulatory market

In the first situation described above - i.e. where dominance, abuse, and the negative effect on competition all occur on the regulatory market\(^{55}\) - classical instances of exclusionary behaviour or abuse may occur. In theory a TPR’or may engage in all kinds of abusive behaviour,\(^{56}\) the detailed discussion of which would go beyond the enterprise of this article. The most likely form is the conclusion of exclusionary dealing arrangements\(^{57}\) or, in other words, clauses that prevent opt-outs. It would seem attractive for TPR’ors, in order to increase compliance and enhance effectiveness, to work with such clauses.\(^{58}\) Although the ECJ has not adopted a _per se_ approach to exclusivity dealings, the standard appears to be very strict.\(^{59}\) Short of an objective justification, which will be discussed below, therefore, it would seem that contractual exclusivity dealings of TPR’ors could certainly be objectionable under article 102 TFEU.

In the second situation described above - i.e. where the abuse is implemented on the regulatory market and the negative effects on competition are felt on the regulated market\(^{60}\) - it would seem that it would also be objectionable if the TPR’or uses its dominance to distort competition on the regulated market. After all, the goal of competition law is to ensure the competitive process.\(^{61}\) The most likely abusive behaviour to be conducted by the TPR’or would be aimed at intensifying the TPR’or’s grip on the regulated market (and thus enhancing its position on

\[^{55}\text{Cf. e.g. standard cases such as: Case 322-81 Michelin v Commission [1983] ECR 3461; Case 85/76 Hoffmann-La Roche & Co v Commission [1979] ECR 461.}\]

\[^{56}\text{Such as tying, bundling, or other non-pricing abuses. It would seem unlikely that the TPR’or would engage in pricing abuse, though due to the diverse nature of TPR’ors, this possibility should not be excluded. For a list of possible exclusionary abuses see Wish 2009, p.205.}\]


\[^{58}\text{Note that compliance and effectiveness are distinct concepts, but that increased compliance will at least help increasing effectiveness, see: Cafaggi 2010, p.9.}\]

\[^{59}\text{Whish 2009, p.675.}\]

\[^{60}\text{Cf. e.g. Case 6/73 Commercial Solvents v Commission [1974] ECR 223; Case 311/84 Centre Belge d’Etude de Marché de Télémarketing v CTL [1985] ECR 3261.}\]

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the regulatory market). The dominant position of the TPR’or on the regulatory market can be used to engage in tying practices or bundling practices. An example may help to clarify this:

IATA regulates a broad range of issues such as operation, training, and safety. Its Dangerous Goods Regulations have become the global standard for carrying dangerous goods. Airlines will need to comply with these standards. If IATA would, for instance, make the accreditation under the DGR dependent on the condition that the Carriers also subscribe to IATA’s Carbon Offset Programme, this could change the competition conditions on the market for Air Travel. This would resemble classic tying practices. Although such compliance may be easy for larger airlines, this need not necessarily be the case for smaller airlines.

ii) Abuse on the regulated market

That the TPR’or may engage in behaviour on the regulated market that could constitute abusive behaviour - i.e. the third and fourth situation - is far from straightforward. Two questions must be raised. First it must be asked whether it is possible to say that a TPR’or engages in any activity on the regulated market. Secondly, if a TPR’or can engage in some activity on the regulated market, the question arises whether and how could this constitute an abuse?

As for the first question, the following can be noted. It must again be emphasised that strictly speaking, the TPR’or is not a market player on the regulated market. However, it would seem that due to the dual nature of TPR’ors’ activity, TPR’ors can exercise great influence on the regulated market too. It must be admitted that a TPR’or’s conduct not only incidentally affects the market structure of the regulated market, the only aim of its conduct is to regulate that structure. This very strongly resembles actions dominant undertakings that are active market players on that market could engage in: they too set the rules for competition on a specific market. That this is the case can also be seen from the antitrust investigations IATA has been subjected to. The very special nature of the activity of TPR’ors thus at least strongly hints at the conclusion that the TPR’or could engage in activity on the regulated market. Whether this constitutes an abuse of the dominant position on the regulatory market will be explored below.

As for the second question, first, a theoretical inquiry into the possibilities of abusing a dominant position on non-dominated market must be made. After that, a more detailed inquiry into what specific behaviour may constitute abuse under article 102 TFEU in the third and fourth situation respectively must be conducted.

62 See e.g., Case C-12/03 P Commission v Tetra Laval BV [2005] ECR-I 987; Case C-210/01 General Electric v Commission [2005] ECR II 5575; Note that this may also lead to a distortion of competition on a new regulatory market (for advertising rules), but that this is conceptually distinct from the distortion on the regulated market. The regulatory market may be unaffected by this conduct.

63 De Londras & Senden 2013, p. 68
64 De Londras & Senden 2013, p. 75
65 http://www.iata.org/whatwedo/environment/Pages/carbon-offset.aspx
66 Cf. Whish 2009, p. 204
67 De Londras & Senden 2013, p. 68.
One major question is raised in the third and fourth situation, even in the regular case: if the abuse is not occurring where the dominant position is held, is it truly an abuse of that dominant position? The ECJ has held that certain special circumstances, this may be the case. Two key cases appear relevant: British Gypsum for the third situation and Tetra Pak II for the fourth situation. It would seem that in both British Gypsum and Tetra Pak II the question the ECJ deemed relevant was whether a sufficiently strong link between the abuse and the dominant position could be established. Such a link can be more easily established in the third situation, as the goal or effect of the abuse on the non-dominated market is to strengthen the firm’s position on the dominated market. That relation alone, however, is not enough.

In British Gypsum, the ECJ allowed the third situation to fall within the realm of competition law, yet only under strict circumstances. British Gypsum held a dominant position on the plasterboard market, but not on the horizontally related plaster market. It gave priority treatment to customers on the plaster market if they remained loyal to British Gypsum on the plasterboard market. The Court of First Instance held that the conduct on the plaster market was abusive as it was capable of impairing the competitive process on the plasterboard market. It would appear the CFI was building this argument for a large part on the fact that the two markets shared many of its players and the fact that customers on the plaster market were dependent on their suppliers in general. (see para 92 of the judgment) The result was that an abuse on the plaster market could indeed strongly influence competition.

In Tetra Pak II, the ECJ allowed the fourth option to fall within the realm of article 102 TFEU. Tetra Pak held a dominant position in the market for aseptic machinery and cartons. It conducted tying and predatory pricing practices on the market for non-aseptic cartons, where it was not dominant. Unlike in British Gypsum this was done to benefit its position on the non-aseptic cartons market. The ECJ held that this conduct nevertheless constituted an infringement of article 102 TFEU. The court emphasised that article 102 TFEU requires a connection between the abuse and the dominance, which is normally absent in the fourth situation. Nevertheless, it held that in very special circumstances such a link could exist. In Tetra Pak the link was constituted mainly by the large market shares Tetra Pak held on both markets and the fact that the two markets shared most of its customers.

It would seem that in British Gypsum, British Gypsum’s powerful position on both markets and the relation between the markets also appeared necessary to establish a link. In the fourth situation, such a link is less easily established. After all, the abuse is neither aimed at nor has the effect of strengthening the dominant firm’s position the dominated market. The ECJ recognises this. Indeed, the ECJ emphasised in Tetra Pak II that such a link will normally be absent in the

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fourth situation.\textsuperscript{74} Nevertheless it also held that in very special circumstances such a link could be established. In \textit{Tetra Pak II} the power of the firm in question on the respective markets, the similarity of products of the markets, and the fact that the markets shared many of their customers established the link.\textsuperscript{75} This is indeed similar to \textit{British Gypsum} and it would appear justified to formulate a general rule that if sufficiently strong links between abuse and dominance exist, abuse implemented on a non-dominated market may fall within the realm of competition law. A sufficiently strong link will be established by reference to (i) the goal or effect of the abuse, (ii) the degree of influence the dominant undertaking holds on the non-dominated market, and (iii) the degree of the similarity of the markets. The approach in \textit{Tetra Pak II} implies that if one of these factors is lacking or insignificant, it may be offset by stronger presence of the others.

As for the third situation specifically, it must be submitted that the abusive behaviour on the regulated market must consist in some alteration of the \textit{content of the regulation}. This is the only possible form of abuse, as the TPR'or's activity on the regulated market is limited to regulation. Furthermore, in the third situation, this abuse must have a negative effect on competition on the regulatory market. It is submitted that this is very well possible, as long as the regulation is altered in a way that would strengthen the dominant position of the TPR'or on the regulatory market. A hypothetical example may help to illustrate this:

IATA engages in, amongst other things, the accreditation of airlines.\textsuperscript{76} If IATA were to require the regulated parties to print the certification mark on all air travel tickets – which it does not! –, this may increase visibility of accreditation. This changes the market conditions of the regulated market as it will now always be clear which airlines are certified and which are not. This may become a \textit{de facto} condition for entry on the regulated market, but will also benefit the position on the regulatory market. Drawing on rational choice theory in law and economics,\textsuperscript{77} the following consequences can be imagined. The increased visibility of the mark may lead to consumer demand for certified products.\textsuperscript{78} The increased demand for certified products may lead to an increased demand for certification. The increased demand for certification would lead to the strengthening of the IATA's dominant position on the regulatory market.\textsuperscript{79} Competition will have been impaired.

It must be emphasised here that it is hard to argue \textit{in abstracto} that a sufficiently strong link between the abuse and the dominant position exist if a TPR'or engages in an activity like in the example above. Nevertheless, some general observations can be made. First, it would seem the link is enhanced by the fact that the abuse is aimed at or has the effect of strengthening the position of the TPR'or. Secondly, it would seem that the extent to which the TPR'or has influence on the regulated market will decide much of the inquiry into the specific link. It is submitted that the

\begin{itemize}
\item Ibid. paras. 28-31.
\item De Londras & Senden 2013, p. 68.
\item Like is the case with IATA, see: De Londras & Senden 2013, p.68
\item It is admitted that such conduct may also lead to anticompetitive effects on the regulated market, but it is submitted that it need not do so: consumers may actually benefit from such clarification.
\end{itemize}
TPR'or's dominant position on the regulatory market will often imply a very strong influence on the structure of the regulated market too. Thirdly, however, it would seem that the two markets are not similar in the sense that they share customers or deal with similar products. Indeed they are not even horizontally related. Though the first two points are compelling and the third point not necessarily conclusive, the conclusion can and may not be that altering the content of regulation of TPR'ors is definitely liable to be objectionable under article 102 TFEU. After all, this entire reasoning has been by analogy and the third point remains unsatisfied. The conclusion must simply be that at least the possibility of qualifying a TPR'or’s conduct as objectionable behaviour in the third situation must not be discarded too easily.

As for the fourth situation specifically it must be emphasised, again, that the abusive behaviour on the regulated market can only consist in the alteration of the content of the regulation. The question then becomes whether any such alteration can have negative effects on the competition in the regulated market. It is submitted that it can. The TPR'or may reach this effect by making its grip on the regulated market more firm. In this case too, an example may clarify this:

IATA engages in, amongst other things, the accreditation of airlines and is quite dominant in that position. Between 2001 and 2003 IATA developed the IATA Operational Safety Audit (IOSA) programme, which was made mandatory for all members. This a clear activity on the regulated market as it changes the market conditions there. In addition it could clearly have anticompetitive effects on that market, as compliance may not be as easy for smaller airlines.

Again it is emphasised that making in abstracto judgments about the admissibility of such conduct under article 102 TFEU is hard. Nevertheless, the following can be noted. First, it must be admitted that the abuse is not aimed at furthering the dominant position. Secondly, however, it must be submitted again that the link between dominance and abuse may be strengthened by the fact that a dominant TPR'or will presumably have a very strong influence on the regulated market too. Thirdly, again, it must also be admitted that the two markets are not similar in the sense that they share customers or deal with similar products. Indeed they are not even horizontally related. As should be apparent, there are far less compelling reasons of relation to hold that the TPR'or's conduct may be abusive in the fourth situation than was the case in the third. Nevertheless, there would appear to be one direct policy argument in favour of such a conclusion. That argument is that this particular conduct may directly harm consumer welfare by distorting competition on the regulated market. As it is mainly for consumer welfare that competition law is created, it must be

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80 De Londras & Senden 2013, p. 68.
81 Ibid., p.82-83.
82 Note that this particular conduct may very well be objectively justified.
suggested this may tip the scales. Although the latter policy argument and the degree of influence a TPR’or may have on the regulated market are attractive, they are far from compelling. The conclusion must therefore be that it is quite unlikely but not impossible for a TPR’or’s conduct to qualify as objectionable behaviour in the fourth situation.

D THE PUBLIC INTEREST?

When considering the application of competition law to TPR’ors, one urgent question may come to mind: what if a dominant TPR’or truly acts in the public interest? It is quite likely that TPR’ors would claim that they do\(^84\) and it is submitted that sometimes their regulation may actually be in the public interest. In taking into account the public interest, two doctrines must be discussed: the doctrine of objective justification and the doctrine of state delegation.

i) Objective Justification

It has long been established in case law that in certain special circumstances the abusive behaviour of a dominant undertaking may be justified by reference to an objective justification.\(^85\) It has been suggested both in literature and by litigants that public policy considerations could provide such a justification.\(^86\) The argument there is that if proportionate public policy considerations can override the free movement of goods and can serve as justifications for breaches of article 102 TFEU, it should also be possible to override article 102 TFEU.\(^87\) It must be noted that in both Tetra Pak II and Hilti, this defence was rejected. In Tetra Pak II the rejection was based on the fact that less invasive measures were possible.\(^88\) In Hilti explicit reference was made to the fact that domestic legislation could and did achieve the goal that was put forward as to justify the abusive conduct.\(^89\) Thus, it would seem that public policy considerations may justify abusive behaviour, as long as it is the only way to achieve that goal.

When applying this to the special case of the TPR’or it should be noted that the public policy considerations must serve to justify the abuse, not the regulation itself. It must be

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\(^84\) e.g. the Forest Stewardship Council [https://ic.fsc.org/importance-of-forest-stewardship.349.htm]; the International Air Travel Association [http://www.iata.org/about/Pages/mission.aspx]; the Fair Trade Foundation [http://www.fairtrade.org.uk/what_is_fairtrade/fairtrade_foundation.aspx].


\(^87\) Rousseva 2002, p. 34.

\(^88\) Decision IV/31043 Tetra Pak II OJ [1999] L72/1, para 119: “The proportionality rule excludes the use of restrictive practices where these are not indispensable.”

emphasised that not much abusive behaviour would be driven by public policy considerations. It would appear that only abusively increasing compliance checks may be justified because it has the effect of increasing effectiveness of the regime - which could be considered desirable. An example of this could be IATA which made the IOSA mandatory to increase safety on air travel. It is suggested that such an anti-competitive action could very well be objectively justified. Nevertheless, keeping in mind the fact that no one has ever succeeded in justifying abuse by reference to objective justifications, it must be submitted that it is not very likely that TPR’ors will.

\[\text{iii) State Delegation}\]

It is generally accepted that self-regulatory arrangements need not necessarily be objectionable under competition law if there is a sufficient degree of public interest involved. This is normally relevant where there is state delegation involved. Although this essay is concerned with fully private TPR’ors - i.e. TPR’ors that are in no way connected to the nation state -, one interesting reading of the doctrine of state delegation must nevertheless be taken into account.

Harm Schepel suggests that the test the European Courts have used to determine whether an undertaking has indeed put public interests over private interests, is a procedural one. His argument is that the delegation doctrine essentially asks whether it can truly be said that the interests of the public are reflected in the decision-making process. He adds that essentially the ECJ has held that no formal or substantive rule can prove this, but that a procedural rule can. If this suggestion is correct, it could in turn be suggested that the question of whether TPR’ors may be examined under competition law could whether the TPR’or is sufficiently accountable.

Accountability in Bovens’ view, strongly resembles Schepel’s account of procedural inclusion of the public interest. In a constitutionalist view of public power this might of course still require some connection with the state by means of proper delegation. Nevertheless, drawing on theories of constitutional pluralism and global administrative law, it could perhaps also be suggested that on rare occasions a fully private TPR’or could serve the public interest. In Schepel’s reading, this would require the TPR’or to have sufficient procedural safeguards in place to ensure it is indeed the

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90 e.g. Cafaggi 2013, p.5; Cafaggi 2010, p.9
92 Cf. Services in the general economic interest, excluded in article 106(2) TFEU, but see also: Case 267/86, Van Eycke v. ASPA, [1988] ECR 4769, para 16; Case C-185/91, Gebrüder Reiff, [1993] ECR I-5801, para 24; Cf. where a similar test was applied to the concept of an undertaking: Case C-309/99, Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten, [2002] ECR I-1577, para 57.
public interest that is being served. It is submitted, however, that this could only be possible if the TPR’or is fully accountable to all its constituencies, and that is precisely the problem that this essay: they are not.\footnote{Cafaggi 2013, pt.128.}

Whatever value this suggestion may have, it should be emphasised that it is a bold suggestion that does not necessarily represent the stance of the ECJ. It must furthermore be emphasised that even commentators are weary to accept this reading.\footnote{Chalmers e.a. 2010, p. 1019.} Although the possibility of this suggestion cannot be discarded immediately, it should not be accepted as the truth or the current state of the law. Rather, it must be seen as an interesting suggestion that is worth looking into for TPR’ors that claim to serve the public interest.

V. THE ROLE OF COMPETITION LAW: A CONSTITUTIONAL PERSPECTIVE

Having identified the ways in which competition law might deal with TPR’ors, the question now arises whether these applications would be sufficient to eliminate or diminish the accountability deficit from a constitutional point of view. As will be shown below, the competition law solutions and the constitutional need may coincide in a broad range of situations, but competition law cannot solve all problems.

A. THE SOLID CORE

It should be recalled that the competitive process that is desirable from a constitutional perspective is the one taking place amongst TPR’ors.\footnote{See paragraph III of this essay.} It is, in other words, the competitive process that takes place on the regulatory market that must be ensured. It would appear, therefore, that from a constitutional perspective the application of competition law is mainly relevant where the abuse has the effect of limiting subscribers’ choice of private regulation. It is submitted that in that respect only the first and third situation addressed above are relevant from a constitutional point of view. After all, only in those case is competition on the regulatory market limited. If it is possible for competition law to govern these situations and abuse is sufficiently supervised and prevented, the TPR’ors’ accountability deficit would be rendered a lot less strong and its existence would be less problematic. In its core, therefore, competition law may prove to be a very helpful tool in addressing the accountability deficit as it is able to restore competition in a broad range of situations.
B WHERE COMPETITION LAW DOES TOO MUCH

However, in some cases, competition law does too much from a constitutional perspective. The first situation where that is the case is related to the second and fourth situations described above. Although the applicability of article 102 TFEU to those situations is inevitably relevant to ensure consumer welfare, it must be emphasised that this will do little or nothing to mitigate the accountability deficit or render it unproblematic. Of course, it does not increase the accountability deficit either, but it may deprive TPR'ors of the ability of adopting certain rules or engaging in certain practices. There is no general statement possible as to what is more desirable: the availability of those mechanisms or the persistence of competition. Either way, it would seem that in these two situations, competition law might “solve” more problems than is strictly necessary from a constitutional perspective. It should be emphasised, of course, that this problem will not arise if the suggestion that acts and effects on both the regulatory and regulated market fall under competition law is rejected.

The next situation in which competition law may do too much is more dangerous from a constitutional law perspective. If a TPR'or manages to, against all odds, be completely accountable to its entire forum, the question arises whether its conduct too should be subjected to competition law or whether competition law ought to take a step back. It could be argued that in that case the public interest ensures that competition law has no role to play, but it would appear that that line of reasoning is highly speculative. It is therefore very well possible, perhaps even more likely, that fully accountable TPR'ors are also subjected to the scrutiny of competition law. This might deprive TPR'ors from valuable tools that could enhance effectiveness and compliance (such as tying clauses), and it could preclude the adoption of certain rules that might otherwise be very desirable in creating public awareness.

C WHERE COMPETITION LAW DOES TOO LITTLE

Reading the above, it would seem competition law may be strong enough to ensure the competitive process is respected to the extent that the accountability deficit is both mitigated and rendered unproblematic exactly in those instances when it is needed. It is submitted that this is true for those cases where the TPR’or engages in abusive behaviour, but that this is not so easily stated for the case where the TPR’or is “just dominant.” After all, under article 102 TFEU, dominance per se is not objectionable. As long as there is sufficient room for a competitive process, it is not at all objectionable under competition law.

100 Recall: from a competition law perspective.
101 It might add to output legitimacy, but that suggestion is not very well-supported.
102 Schepel 2002, pp. 33, 50
103 Chalmers e.a. 2010, p. 1019.
104 Whish 2009, p. 188; See also the wording of article 102 TFEU.
When the situation is viewed from a constitutional perspective, however, it must be submitted that this situation, too, is quite undesirable. Although in theory other TPR’ors may join the regulatory market if the competitive process is healthy, until they do, consumers are left with only one option. As was argued above, this might lead to a *de facto* obligation for private parties to subscribe to the rules. It should therefore be noted that although competition law goes a long way to solving the problematic nature of the accountability deficit, it cannot force new TPR’ors to emerge, whereas from a constitutional perspective that would be ideal.
VI. Conclusion

In academic literature, many commentators have noticed that fully private TPR’ors often show weak legitimacy due to their lacking accountability to those they affect. The accountability deficit in TPR’ors is a result of (i) a multiplicity of accountability relationships - witnessed by the fact that it is often unclear who the TPR’or should be accountable to, and the fact that it is unclear who should be accountable within the TPR’or - and (ii) a lack of a formal obligation to comply with demands and give account for actions.

If TPR’ors compete with one another, the accountability deficit may not be as strong as often perceived. First and most importantly, a healthy competitive process between TPR’ors may offer regulated parties and consumers a choice between regimes. If this is the case, subscription will be truly voluntary. Truly voluntary subscription guarantees, it has been submitted, that no party will be bound against their will. This renders the accountability deficit unproblematic.

Secondly, even if it would be argued that accountability deficit remains problematic, the sharp edges of the deficit may be filed off. This would happen by substantive inclusion of all those constituents that can exercise some demand through market demand. Of course this will never fully remove the accountability deficit, but it may be of help in addressing it.

Although the competitive process may ensure that the accountability deficit is (i) mitigated and (ii) rendered unproblematic altogether, in reality such competition is often lacking. Indeed, subscription often becomes de facto obligatory. It requires no explanation that this is undesirable. The question that arises is how competition could be restored.

Restoration of competition is normally done by competition law. The question is how that could be the case. Assessing the role competition law could play in ensuring a competitive process amongst TPR’ors first requires an assessment from a competition law perspective. Due to the relatively novel nature of TPR’ors, this account has been interpretative. Note, however, that the interpretation has been done with the goals of competition law – rather than the goals of constitutional law – in mind.

TPR’ors can be the addressees of competition law: their activity may be complex, in the end it is economic in nature and can be conducted by private actors. Their activity is however special. It is dual in nature. On the one hand, the TPR’or “sells” his “product” or “service” regulation on its own small market. In this essay, this market has been dubbed the regulatory market. On the other hand, however, the TPR’or strongly influences the market it seeks to regulate. This market has been dubbed the regulated market. On this market the TPR’or is not an actor, but its conduct may affect the structure of the market. Dominance can only be established on the regulatory market. It is submitted that it often will. As for abusive behaviour and the negative effects on competition that behaviour might have, it can be noted that in any case abuse on the regulatory market with negative effects on that market will fall within the realm or competition law. Due to the dual nature of a TPR’or’s activity and the special link between this
activity and the regulated market, however, it has been submitted that abuse and/or negative effects on competition could also occur on the regulated market. This suggests a potentially very broad range of situations in which competition law might interfere with the behaviour of TPR’ors.

The broad application of competition law to TPR’ors may seem appealing, keeping in mind the fact that any restoration of the competitive process between TPR’ors is beneficial to enhancing accountability and rendering its deficit unproblematic. Nevertheless, from a constitutional perspective, competition law may sometimes do too much and may sometimes do too little. First, competition law may do too much where it opposes abusive behaviour that affects the regulated market. From a constitutional perspective that is unnecessary and may actually deprive the TPR’or of certain valuable tools. Secondly, it is quite likely that competition law will do too much where it objects to abusive behaviour of fully accountable TPR’ors. Although this is perfectly understandable from a competition law perspective, from a constitutional point of view, such abuse may actually be both justified and desirable. It may for example increase effectiveness and thus enhance output legitimacy. Thirdly, competition law does too little where it does not object to a completely dominant TPR’or that does not abuse its position. Although the competitive process will, in theory, be healthy in that particular situation, the regulated parties and consumers will still have no choice. Competition law cannot force new regulators to emerge, whereas in certain circumstances that would be desirable from a constitutional point of view.
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