

Good European Supervision

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At the EU Conference Enforcement in a Europe without borders

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Ladies and gentlemen,

I. Opening remarks

Thank you for the invitation to speak to you here today on Good European supervision at this well organised conference by the Inspectieraad regarding a very important topic: enforcement in a European context. A theme that has already known an incredible history in Europe. But it is also a theme which has only gained importance over the years.

And it all started in this room [show picture]. So, what do we see here? It is a room filled with men. I guess we could say that back in 1957, supervision in Europe was mainly a man-thing. Luckily, times have changed! This picture was taken on 25 March 1957, at the Palazzo dei Conservatori in Rome. It is the signing ceremony of the Treaty of Rome, that established the European Economic Community.

In December 2007, I entered the very same room. At the time, I was a **board member of OPTA**, the Dutch Independent Post & Telecommunications Authority. And it was the first time that I attended a

plenary meeting of **BEREC, which was in the process of being established**. BEREC stands for the Body of European Regulators for Electronic Communications and formed the successor of the informal European network ERG. BEREC was established as a formal European body for cooperation between the national communications authorities.

I remember walking into the room feeling **overwhelmed by the historic feeling** of the place. Everything was still exactly the same as on this picture; still original, even the small lampshades were still there! And although BEREC was still in the process of creation, it was obvious that we were building on the same foundations put in place 50 years earlier, in that same room.

But there also were some **important differences** compared to this picture. Where as in 1957 only 6 countries were present, now we were with so many different nationalities present, even from outside the EU. Some authorities young, some 'old', but all with the same 'spirit of supervision'. Of course there were differences and plenty of discussions, but we were unanimous in our **willingness** to cooperate, to share our best practices and to learn from each other and with the clear goal to establish a European communications market.

It is all about connecting

This is what BEREC and so many other European cooperation agreements, networks and agencies are built upon. **It is all about connecting**. Connecting people, connecting policies and connecting national agencies. And, of course, connecting supervision. And with

success!!! In my years at BEREC, I saw time and time again how markets were integrated to create new markets, how new level playing fields developed, and how cross border trade intensified.

Now in 2016, new technologies and social media have enabled us to connect easier and quicker than ever before. In fact, whole industries have emerged based purely on connecting: look at Airbnb, Uber, and of course Tinder 😊.

To sum up you could say *connecting* is more important than ever; our economies and social lives are built on it. But what does this mean for us as supervisors? And how well are we doing as supervisory authorities when it comes to connecting? *That* is what I want to talk about today.

II. Developments towards more cooperation

We have arrived in an era where technology has created a real global economy. Truly 'national' cases that stop at the borders of our countries are becoming extinct.

But a connecting economy creates both opportunities and risks.

Perhaps the biggest risk of being connected is that **we all suffer** when something goes wrong. The financial crisis opened our eyes to the downside of how intertwined our economies and businesses are.

It was a huge wake up call for all governments, policy makers and authorities. Here, the lack of coordination and the lack of trust between

the national authorities before the crisis led to a serious crisis. It triggered different reforms to improve harmonization and cooperation between Member States and their supervisory authorities. The most dramatic regulatory reforms were introduced, creating new European regulatory bodies and giving a central European supervisory role to the ECB for the most important banks. The ECB is now **exclusively** competent for **directly** conducting the prudential supervision of the Euro-zone's most significant banks. Europeanisation of supervision in its purest form.

As in many instances – unfortunately – we need a crisis before it becomes clear that we need a more coordinated, European supervisory action plan and implementation. This was for example the case after the mad cow disease crisis, the salmonella crisis and the PIP breast implants crisis.

At the same time, and I want to stress this, in most of the cases of supervision, it is business as usual and is the job done! What we learn and see from the media reports, are to my knowledge only the exceptional cases. From my own personal experience at OPTA, but also at the Authority Consumer and Markets, ACM, here in The Netherlands and at the Competition and Markets Authority in the UK, I see how inspectors, supervisors and regulators work hard to ensure that the goals of regulation are met. So let's not forget this!

No connecting culture?

But despite these efforts, there have been some clear cases in recent years where there was too little coordination by supervisory authorities, which led to a lack of effective enforcement. What lessons can we learn when looking closer at some of these cases? So we need to examine the negative side, to arrive at a positive stand.

Of course there are many reasons in each single case, but one overriding problem is significant: the *culture*, within the area of supervision and inspection, has not developed in the same pace as the world around us. There is a gap between the reality of the connecting world, and the way we as supervisory authorities connect with each other.

III. Causes

Why is this? I can see three causes for this non-connecting problem.

Cause 1: Too much national focus (FYRA)

First of all, we have seen clear cases where supervisory authorities failed to connect, because there was too much of a national focus. **The Dutch Fyra** case is a clear example of this.

In this case, the *Dutch Inspectie Leefomgeving en Transport (ILT)* gave the final approval to use the Fyra train in the Netherlands. It gave this approval on the basis of the certificates it received from a certified private party that made the actual inspections. On the basis of the certificates, the train was found safe and in accordance

with all the technical requirements. However, as soon as they were tested on the actual tracks, the opposite conclusion was reached.

In the aftermath that followed, the ILT was criticized for **not having 'any teeth'**. Although the role of the private party that approved the design of the trains was also questioned, most problems in this case have been linked to the **complicated relation** between the partners involved: the Dutch State, the Dutch Railways and ILT. The Dutch parliamentary enquiry wondered why the Dutch inspectors of ILT did not **pick up the phone**, even when signals arose from Belgium and Denmark that something might be wrong. Cooperation with their colleagues from Belgian and Denmark could have made a difference.

Cause 2: authorities rely heavy on home state control rule in absence of clear rules on coordination (Volkswagen)

Another reason for lack of effective enforcement can be found in the fact that in some areas, there are **no clear rules for cooperation** between supervisory authorities. Because of this, the authorities and other stakeholders **rely heavily on the home state control rule**, or the principle of mutual recognition. A clear example can be found in the way the automobile industry is regulated. The system works in such a way that if a car is tested and certified in one Member State, this certification must be accepted **throughout the EU without the need for further testing**. **This is a result from** the mutual recognition rule. As such, this rule has been of great importance to the increase of trade and economic growth within the EU. At the same time, there are some **clear downsides** to this

principle, as we have seen in the Volkswagen case last year and during the financial crisis.

The *paradox* is that the home state control principle stimulates to a large extent trade between Member States, at the same time it forms a threat to the European Union, unless there are sufficient coordination mechanisms in place.

Cause 3: Box ticking mentality (PIP breast implants)

Related to the downside of home state control, is what I would call a '**box ticking mentality**' among some supervisory authorities – and I am sure none of them is today here present-. This is a phenomenon which cannot only be found *between* Member States, but also *within* Member States. And it can be best described as a situation where regulators perform their supervisory tasks, only on the basis on the data presented by other official bodies, or by the industry and staying strictly within the boundaries of their legal mandate.

Ladies and gentlemen, let me illustrate this by the case of the PIP breast implants scandal.

The French company PIP sold breast implants with industrial grade silicone. Thousands of these implants were later recalled and about 30,000 women were advised to have the implants removed. In this case, it was concluded that the national health authorities were not to blame, since they relied on **the assurances of the private notified body** that authorized the breast implants for the

market. So the public health authorities were not even expected to raise any questions. Despite the fact that in this case the UK public authority apparently already received reports on potential problems with the PIP breast implants since 2002. This was inherent to the European regulatory home state control system, and at the time presented as a 'weakness in the system' that we would have to live with. Luckily, in the aftermath of this scandal, the European Commission has proposed a **new Regulation on medical devices**, which seeks to replace the current system.

So the lack of coordination between the national authorities, triggered - also in this case - further Europeanisation and centralisation! The lesson we need to learn here is that:

by not coordinating and a pure national focus, national supervisors and authorities may lose their national autonomy.

This is something we need to realize: the more we try to protect our national interest or national territory, the more territory we might lose!

IV. Solutions

So what can we do better?

If we want to prevent disasters like this from happening, there is one main thing we need to do: We need a more *proactive approach* when it comes to *European enforcement and coordination* between national

supervisory authorities. And this proactive approach should be adopted by **both policy makers and national supervisory** authorities. Within the EU, but also within the Member States.

So how can we achieve this, what are the necessary ingredients for this proactive approach?

In my recent book I have identified the core principles of good supervision. I have called these principles, the LITER-principles. **LITER is the acronym for:** Legality, Independence, Transparency, Effectiveness and Responsibility.

I believe that these principles are essential for striking the right balance and achieving effective enforcement. I will highlight some of the relevant principles today, in the context of effective enforcement.

Ingredient 1: Independence

Perhaps the most important ingredient for proactive coordination, in my opinion, is the principle of independence.

I have defined independence as consisting of four key elements:

a) Impartiality, b) integrity, c) objectivity and d) expertise.

All of these ingredients are needed to achieve true independence in supervision, no matter if the authority is also a formal independent body, or residing under the State. The other side of the coin from independence is **accountability**. And by this I do not mean *accountability*

as a mechanism. But being accountable as a virtue. We have to adopt a willingness to act in a transparent, fair, and equitable way.

Also in the European context, these virtues must be exercised to become a true **Good European Supervisor**. Acting independently, is a necessary ingredient for effective enforcement.

Ingredient 2: Mindset of professionalism

An independent mindset also implies having a mindset of professionalism. We also need to have a closer look at our *mindset*: pro active enforcement and pro active coordination **requires a mindset of professionalism**. Professionalism meaning that we cannot rely merely on rules, procedures and the regulatory system. We cannot hide behind the fact that things seem 'o.k.' on paper, when there are clear indications that something might be wrong. That is not the moment to lean back, but a moment for action. Starting by simply **picking up the phone** and calling our partner authorities to check what is going on. Not only in cases that involve several Member States, but also within a single Member State. The **Fyra** case is a very clear example where that phone was not picked up, where it could have made all the difference.

Professionalism also means that delegation to private bodies never relieves us from our own **responsibility** as public supervisory authorities. Sometimes, scandals can be the wake up calls we needed. After the **Volkswagen** scandal, the French **public** authorities started to act more proactively. In October 2015, the French government set up a Commission to inquire into possible emission cheats by other car

manufacturers. Although the investigation is still pending, it is a clear example of how big shocks may bring about certain positive outcomes. In other words, even within a public-private regulatory regime, professionalism implies that public authorities always stay responsible to conduct independent research. And to cross-check the data provided by the notified bodies.

Ingredient 3: The right architecture

Finally, we have to be more proactive in putting **the right architecture** in place. In my opinion, the importance of ‘institutional design’, and the direct relation it has with effective enforcement is often underestimated. The right architecture means more networks between supervisory authorities, and sometimes more formal policy and rules. Some say more rules and procedures will work **counterproductively**, as stated in the paper of Versluis & Polak, which will be discussed this afternoon. But I don’t fully agree with this observation. As long as you prioritise clearly which areas need more formal rules and which don’t.

There are good examples of what I call ‘institutionalised coordination’, that gives a clear framework for coordination and cooperation between supervisory authorities.

An example of this can be found in the competition world, where as you may know, the European competition rules are enforced by the national competition authorities. So this is a decentralized model. To ensure that there is consistency in the enforcement by the national authorities, the European Competition Network (ECN)

was created. It consists of the 28 national competition authorities and the European Commission as *primus inter pares*. The ECN has a clear cooperation mechanism, and I can tell from personal experience that it has proven to be a success story.

Of course there is no one size fits all model. In other cases we only need softer forms of coordination, which is only based on **data-sharing** and technology intelligence, as is for example the case with the new to be established Food Fraud Network. Instead, we have to look for the right level of coordination that is sufficient for supervisors and inspections to perform their tasks in the specific circumstances of the market. And even with the right architecture in place, there is more we need to do to achieve more proactive coordination and enforcement.

V. Conclusion

Ladies and gentlemen,

I come to a conclusion.

In the end it is about doing a better job tomorrow than we did yesterday. And in a connecting world, we – as supervisors, inspections, and policy makers - need to adopt a connecting culture. Although I am convinced that we need an institutional framework to facilitate coordination, in the end culture is even more important than institutionalism, rules and procedures. Personal contact is indispensable, and happens through networks. Let's face it: Picking up the phone is easier if you know people. It is about coming out of our comfort zone. At the same time, forming

institutionalised networks can create this comfort zone.

VI. Closing

[show picture]

This became apparent to me when I gave a lecture on supervision a couple of weeks ago at Utrecht University College. Here you see my students sitting in a circle and discussing the Volkswagen case. The room is less fancy than the Palazzo dei Conservatory , but what happened in it was not less meaningful. Here, 20 students from 10 different nationalities and different backgrounds met to share their views. I remember how I was sitting there and thinking: for this generation, connecting is in their genes. And they are our future, and the future of Europe. That is why I am still very optimistic about the future of Europe. As I said before; it all starts with connecting, and it can start in any room. Also in this room. Thank you.

Annetje Ottow is Dean of the Faculty of Law, Economics and Governance of Utrecht University and Professor of Public Economic Law at this faculty. In 2015 she published the book 'Market and Competition Authorities. Good Agency Principles' with Oxford University Press. She was a non-executive board member of the former Dutch telecommunications authority (OPTA) from 2006-2013. In October 2013 she was appointed a non-executive director of the Competition & Markets Authority (CMA), the UK's newly created competition authority.