1. Introduction: transnational private regulation and the challenge of enforcement

1.1 SETTING THE SCENE

Transnational private regulation has increasingly been recognised as a significant aspect of regulatory governance. Across a multitude of policy domains private, non-state actors have deployed their capacities to regulate business activities between and across jurisdictions. They have done so either in the absence of or in coordination with international governance arrangements involving states. This development, which is widely associated with processes of globalisation, adds to an ever more complicated picture of governance, one in which state and non-state actors interact in ‘complex, fluid and multi-dimensional’ ways. Indeed, the capacity to steer and influence transnational business is dispersed among public and private actors, resulting in a transnational regulatory space that is occupied by states, firms and non-governmental organisations (NGOs).

Transnational private regulation is an analytical construct that emerged to capture the idea of regimes that have regulatory effects across territorial borders, while driven by private, non-state constituents such as firms


and civil society representatives. As these regimes, which are here understood as ‘the full set of actors, institutions, norms and rules that are of importance for the process and the outcome of (…) regulation in a given sector’, are not based on treaties – conventionally the domain of international law – the connotation ‘transnational’, as opposed to ‘international’, is the preferred label in the discourse. However, ‘transnational’ does not necessarily imply ‘global’ since its effects may not extend across the entire world and may be limited to regions and continents.

A steadily growing body of literature addresses the conceptual and practical challenges thrown up by regimes of transnational private regulation. Many scholars have framed these challenges in terms of legitimacy and accountability, some suggesting that these concepts should themselves be revisited in the light of transnational private regulatory activity. If a comparison is drawn with the way in which the legitimacy of treaty-based intergovernmental organisations is secured, legitimacy deficits emerge in the face of the apparent lack of participation by or delegation of powers from national governments to transnational private regulatory regimes. These deficits are accentuated by the fact that traditional accountability mechanisms, including parliamentary committees, auditors, courts or ombudsman schemes, do not readily apply to them.

This book is concerned with a related, but relatively overlooked, element in the academic discourse of transnational regulatory govern-

7 Scott, Cafaggi and Senden (n 6).
10 Scott, Cafaggi and Senden (n 6).
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ance, namely the enforcement of transnational private regulatory norms. Enforcement is often seen as the Achilles’ heel of regulation: if enforcement is absent or weak, the regulatory norm in question may turn into a mere paper exercise, thus compromising the effectiveness of the entire regulatory regime. Clearly, robust and astute enforcement is a necessary ingredient for successful regulation, but lawyers have claimed that private regulatory regimes have a bad record of ensuring rule compliance.  

The theme of enforcement raises a number of distinct questions about the relationship and interaction between public and private regulatory capacity. More specifically, it has been argued that the background presence of the state is a crucial element in enhancing the capacity of private regulatory regimes to steer and modify behaviour. The seminal theory of ‘responsive regulation’ of Ayres and Braithwaite suggests a central role for state agencies and legal enforcement capacity in promoting regulatory compliance with either public or private norms. Similarly, Rees has argued in his study on the development of private regulation in the US nuclear industry that the background presence of state capacity – in his words the ‘regulatory gorilla in the closet’ – is significant for the establishment of an effective private system that is able to restrain and control its membership. This finding appears to be in line with the more general hypothesis that the potential for legislative action, executive intervention or a court ruling – often couched in terms of a ‘shadow of hierarchy’ – is needed to prompt the emergence of private regulatory regimes and enhance their effectiveness in attaining rule compliance.

The question emerges, however, whether this hypothesis also holds true for transnational private regulation. The capacity of public actors to intervene in transnational contexts is rather restricted. For one, transnational private regulation has often emerged as a response to the lack, paucity or failure of traditional international state governance arrangements. In these cases, public actors are unlikely to act as a backstop to private

14 I Ayres and J Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (OUP 1992).
enforcement activities, for they may simply be absent or incapable to act at this governance level. Furthermore, states have delegated to only very few international governmental organisations (IGOs) the necessary capacity and authority to directly regulate transnational business activities.18

Also, purely legal arguments can be advanced. First, if transnational private regulatory norms are adopted voluntarily and not included in any formal contractual arrangements, their legal status and degree of enforceability is limited, despite the de facto compulsory character they may assume in the market. Second, there are jurisdictional obstacles. Courts and administrative authorities have at their disposal enforcement powers that are geographically bounded and do not fit neatly with the cross-border nature of transnational private regulation. Indeed, the state’s domestic regulatory competencies do not extend readily into the transnational realm.19

In a similar vein, it has been claimed that courts cannot be addressed easily in the case of transnational private regulation,20 unless a link under the rules of private international law grants jurisdiction to them.21

This suggests that the potential for public enforcement action may play a less significant role in bolstering the capacity of transnational private regulatory regimes to effectively attain rule compliance.22 Put differently, a notion of enforcement that is limited to just the administrative or judicial activities that are undertaken to ensure compliance with legally binding norms does not find easy application in the context of transnational private regulation. Arguably, enforcement mechanisms may thus not exist only in the conventional public sense equipped with deterrent means of sanctioning, but should be conceived of more broadly, including also private ordering systems, such as internal compliance mechanisms, associational structures and market mechanisms. These systems may harbour various formal and informal means and techniques to promote and achieve compliance, and may involve a wider set of third-party enforcers such as consumers, NGOs and other civil society representatives to gain rule compliance.

19 Abbott and Snidal, ‘The Governance Triangle’ (n 4) 83.
22 In their study on the development of transnational private regulation in the European paper and PVC sector, Héritier and Eckert find that while the threat of legislative or executive action is an important driver for the establishment of transnational private regulation in these domains, they also note that this threat plays a less significant role in motivating compliance with this body of norms. Instead, economic incentives have a bigger impact on compliance performance. Héritier and Eckert (n 16) 128–31.
1.2 RESEARCH QUESTIONS AND METHODOLOGY

The interaction between public and private mechanisms in the enforcement of transnational private regulation is at the heart of this book. It considers the actors’ motives in engaging with each other, determines the kind of interaction that exists and identifies the circumstances that enable such interaction. In particular, three sets of research questions are answered: First, what mechanisms are employed to enforce transnational private regulation? What is their nature: are they public or private, judicial or non-judicial, formal or informal? What are the boundaries between them? Second, how do private enforcement mechanisms operate and why? Who operates them and what is their design? Which procedural standards apply to, for example, inspection, standing and proof? What sanctions are used, if any, and what is their function? And importantly, how does this institutional design differ from judicial or administrative enforcement? Third and finally, whether and to what extent do private mechanisms interact with public enforcement? Which forms of interplay can be observed between the two? Which circumstances or institutional settings enable that interaction? What role do courts play?

These research questions are answered by engaging in a comparative analysis of the issue areas of advertising and food safety. As will be shown in Chapters 3 and 6, the industry has developed elaborate regimes to regulate transnational business activities in both areas. In brief, advertising is an industry that has a significant transnational reach: it is financed and created by multinational corporations and increasingly used in Internet-based media, allowing advertisers to target potential buyers around the globe. Nevertheless, advertising is still very often nationally distinctive, using the language, characters and humour familiar to the audience targeted. Private regulation in the advertising industry reflects this balance between the potential transnational scope and national impact of advertising and marketing communications, and therefore operates across multiple levels of governance. At the national level, private regulation is typically based on a code of conduct developed by a trade association. The aim of these industry codes is to ensure that advertising is legal, fair, not misleading, in good taste, and socially responsible. However, the national advertising codes frequently have their origins in a code adopted by international trade organisations or business consortia. The International Code of Advertising Practices of the International Chamber of Commerce since the 1930s constitutes the principal example here and has served as a general reference to many of the national industry codes and systems developed in the twentieth century, specifically those in Western Europe and Scandinavia.
In the case of food safety, recurrent safety crises, global food sourcing, private labelling, food retail market concentration and changes in consumer perception and liability frameworks have spurred major food companies and retailers around the world to develop product and process standards for food safety. These private standards, which concern among others topics such as hygiene, pesticide residues and microbiological contaminants, often have transnational reach as powerful actors along global food supply chains impose them on suppliers in that chain. More specifically, private food safety standards find application as a result of their inclusion in commercial contracts.

The domains of advertising and food safety are juxtaposed, as enforcement occurs in different institutional settings, potentially affecting the interplay between public and private enforcement. It was noted above that in the case of advertising national and transnational standard-setting activities are often conflated. However, the monitoring and enforcement of private regulation is strongly decentralised and carried out primarily at the national level. Here, trade associations operating on a membership basis have established separate private bodies that handle complaints about advertising submitted to them by consumers, competitors or NGOs. These bodies, which in principle operate on a territorial basis, adjudicate on the complaints and determine whether the advertising complies with the applicable codes of conduct. However, for complaints on trans-border advertising activities, the private bodies have established a coordination mechanism as a result of which one such body can forward incoming complaints to another and leave the task of ensuring rule compliance to it. The rise of online advertising increases the need for such coordination mechanisms to be in place.

In the case of food safety, compliance with transnational private regulation is typically monitored and enforced via private third-party certification schemes. Firms employ these schemes to assess the compliance of sellers with private food safety standards before engaging in a commercial relationship and monitor it throughout the duration of that relationship. These schemes, like the standards they comprise, become legally binding upon the sellers – and at times upon its suppliers in the second and third tier of the supply chain – as buyers require compliance with them in their commercial contracts. Multinational auditing firms typically carry out the certification activities and the businesses they certify pay them to do so. Accordingly, the costs of monitoring and enforcement are directly borne by the entities that are required to adhere to the transnational private standards.

This brief exposé shows that the institutional design of enforcement of transnational private regulation in the areas of advertising and food
safety differs strongly. By selecting two such opposing cases, it is possible to identify whether and to what extent the design of private regulatory enforcement affects the interplay between public and private enforcement. The case studies will therefore carefully describe the design and operation of the private enforcement mechanisms in place in the domains of advertising and food safety, assess the interplay between these mechanisms and public enforcement, and identify the circumstances and institutional settings that enable this interplay. By limiting the number of domains to just two, a rich or ‘thick’ description of complex regulatory regimes can be given so as to account for the type of interplay between public and private enforcement mechanisms despite the strong differentiation in the design of enforcement across the domains.

In terms of data collection, the analysis in the case studies draws on documents of private regulation, including codes of conduct, rules of procedure, statutes and standardised contracts. Desk-study of relevant legislative acts, administrative regulations and policies and case law supplements this body of documentation. Where academic research – varying from legal to political-economic writings and from socio-legal to regulatory scholarship – has expanded on the private regulation of advertising and food safety, and in particular its relationship with public regulation, the analysis will build on this. In addition, data has been collected through open-ended elite interviews held with key constituents of private regulation in the advertising and food industries. These interviews helped to develop a better understanding of the regulatory regimes in place, the institutional design of enforcement mechanisms and the challenges confronting them. A full list of interviewed organisations is provided in the Annex.

1.3 AIMS AND RELEVANCE

Enforcement of transnational private regulation is a new field of study. So far, few in-depth studies have been conducted on the enforcement of transnational private regulation and the various actors, mechanisms and strategies involved therein. The studies that have emerged in recent years often did not go beyond the dynamics of enforcement in single regimes,
This book seeks to fill this current gap in the literature by conducting a cross-sector comparative analysis of enforcement mechanisms for transnational private regulation. In doing so, it focuses on the institutional design of these mechanisms (organisational structures, procedural norms and actors involved in their governance) and their relationship with public enforcement capacity.

The case studies and the comparative analysis thereof provide clear insights on the ways in which enforcement takes place within transnational private regulatory regimes and how this interacts with public enforcement, both judicial and administrative law mechanisms. The findings will be used to inform current theoretical understandings on the functions of public enforcement in transnational private regulation, inductively identify the circumstances under which public administrative enforcement may strengthen private enforcement mechanisms and discuss the role of courts in enforcing transnational private regulation. As noted, much of the contemporary scholarship on enforcement claims that public enforcement capacity retains a fundamental role in ensuring compliance with private standards. Considering to what extent this is true for transnational private regulation and exploring the actual interplay between public and private regulatory capacity in this context, constitutes an important contribution to the current state of the art.

In a nutshell, this book argues that in enforcement of transnational private regulation, public and private enforcement mechanisms principally operate as complementary means. The concept of complementarity denotes the combination of different mechanisms and activities with the purpose of enhancing regulatory outcomes. This can be achieved either by reinforcing the operation and effects of other mechanisms and activities or by compensating for their deficiencies. As the comparative analysis of the case studies will demonstrate, public enforcement, or the latent threat thereof, can effectively bolster the capacity of private mechanisms to secure compliance with transnational private regulation. Conversely, private mechanisms may also enable a more efficient deployment of (scarce) enforcement resources and provide access to information and evidence that fosters public enforcement.

Understanding the practices and rationales of private enforcement mechanisms, as well as their interplay with public regulation and enforcement, is of great relevance to policy and lawmakers. National governments and IGOs grapple with the question of how to design effective regimes to regulate transnational business activities. Private actors have

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25 Chapter 2 offers a comprehensive overview of the scope of the studies that have been concerned with the enforcement of transnational private regulation.
been shown to possess capacities, including expertise, organisational capacity, financial resources, authority and strategic position, that public actors frequently lack when addressing such activities. Keying into the regulatory capacity of private actors while at the same time controlling for resulting dependencies or vulnerabilities constitutes a principal challenge for state actors in enhancing their own regulatory capacities in the transnational context. This book aims to facilitate that process by offering insights in the practical operation of transnational private regulation in the fields of advertising and food safety and offers detailed recommendations on how to best engage with these regimes to further the protection of public interests.

1.4 STRUCTURE

The book is divided into four parts. This introductory chapter and Chapter 2 make up the first part and lay out the conceptual framework for the analysis in the case studies. Chapter 2 offers an outline of the research that has been undertaken on transnational private regulation and its enforcement. This overview is conducive, first, to defining the notions of ‘transnational private regulation’ and ‘enforcement’ and, second, to positioning the analysis conducted in the case studies in the current academic discourse. Parts II and III of the book present the case studies of advertising and food safety. Each part comprises three chapters which discuss the architecture of transnational private regulation in both fields (Chapters 3 and 6), the private enforcement mechanisms in place (Chapters 4 and 7), and the relationship of these mechanisms with public enforcement (Chapters 5 and 8). Part IV constitutes the synthesis of the book. Chapter 9 comprises the comparative analysis of the case studies. It highlights and explains commonalities and differences of the institutional design and practices of the private mechanisms concerned with the enforcement of transnational private regulation and relates these findings to socio-legal theoretical debates on regulatory enforcement and the role of the state in private regulatory regimes. Chapter 10 sums up the findings of the comparative analysis and discusses the theoretical contribution they make in relation to the current literature on transnational private regulation and its enforcement.