

Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation

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Abstract

This paper examines to what extent the background presence of state regulatory capacity – at times referred to as the “regulatory gorilla in the closet” – is a necessary precondition for the effective enforcement of transnational private regulation. By drawing on regulatory regimes in the areas of advertising and food safety, it identifies conditions under which (the potential of) public regulatory intervention can bolster the capacity of private actors to enforce transnational private regulation. These involve the overlap between norms, objectives, and interests of public and private regulation; the institutional design of regulatory enforcement; compliance with due process standards; and information management and data sharing. The paper argues that while public intervention remains important for the effective enforcement of transnational private regulation, governmental actors – both national and international – should create the necessary preconditions to strengthen private regulatory enforcement, as it can also enhance their own regulatory capacity, in particular, in transnational contexts.

Keywords: advertising, certification, enforcement, food safety, transnational private regulation.

1. Introduction

Transnational private regulation constitutes an important element in contemporary debates on regulatory governance. Across a variety of policy domains, private, non-state actors are increasingly deploying their regulatory capacities between and across jurisdictions, either in the absence of or in coordination with international governance arrangements involving states (Braithwaite & Drahos 2000; Büthe & Mattli 2011). This development, which is widely associated with processes of globalization, adds to an increasingly complicated picture of governance, one in which state and non-state actors interact in “complex, fluid and multi-dimensional” ways (Djelic & Sahlin-Andersson 2006, p. 386). Indeed, the capacity to guide and influence transnational business activities is widely dispersed among public and private actors, resulting in a transnational regulatory space that is occupied by states, firms, and non-governmental organizations (NGOs), as has been vividly illustrated by Abbott and Snidal’s (2009a,b) “governance triangle.”

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Transnational private regulation, it is suggested, poses challenges in terms of legitimacy and accountability (Bernstein & Cashore 2007; Black 2008; Scott *et al.* 2011). This paper addresses a thus far relatively overlooked aspect in the academic discourse on transnational regulatory governance, namely that of the enforcement of transnational private regulation.¹ This theme raises a number of distinct questions and problems regarding the relationship and interaction between public and private regulatory capacity. Specifically, it has been argued that the background presence of the states is a crucial element in enhancing the enforcement capacity of private regulatory regimes. The highly influential enforcement theories of responsive regulation (Ayres & Braithwaite 1992) and smart regulation (Gunningham & Grabosky 1998) are suggestive of a central role for state agencies and legal enforcement capacity in promoting regulatory compliance with either public or private norms. Similarly, Rees (1997) suggested 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” (p. 519) – was a precondition for the establishment of an effective private system. This finding aligns with the more general hypothesis that the potential of public intervention, often couched in terms of the “shadow of hierarchy,” is needed to prompt the emergence of private regulation and to enhance its effectiveness (Héritier & Eckert 2008).

However, the hypothesis that state capacity fulfills a crucial role in the enforcement of private regulation appears to be increasingly difficult to sustain when extended to the transnational regulatory context. Where transnational private regulation has emerged as a response to the lack, paucity or, outright failure of international state governance arrangements (Abbott & Snidal 2009b; Cafaggi 2011), state actors are unlikely to act as a backstop. States have delegated the necessary capacity and authority to directly regulate transnational business activities to very few international governmental organizations (IGOs) (Abbott & Snidal 2012).

There are also strictly legal arguments to be considered. First, where transnational private regulation is adopted voluntarily, the degree of enforceability of these norms is unclear and typically rather limited. This depends, among other things, on the substance, wording, and legal status of the norms concerned (Black 1995). Second, there are jurisdictional obstacles. Courts and public administrative authorities have enforcement powers that are geographically limited 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 (Abbott & Snidal 2009a, p. 83). In a similar vein, it is claimed that domestic courts cannot easily intervene in the case of a violation of transnational private regulation (Black & Rouch 2008) unless a link under private international law grants jurisdiction to them (Wai 2008). This suggests that enforcement understood in terms of judicial or administrative actions that ensure compliance with legally binding norms does not find easy application in the context of transnational private regulation. Enforcement may, thus, not exist only in the conventional legal sense, but should be conceived of more broadly so as to also encompass various private ordering mechanisms, such as market mechanisms (e.g. third-party certification schemes) and associational structures (e.g. industry self-regulation).

This paper enquires into the nature of the enforcement of transnational private regulation and examines the interplay between public and private mechanisms for enforcement. It considers which private means are used to enforce transnational private regulation, how they relate to public mechanisms of enforcement, and under what

conditions such public mechanisms may bolster the enforcement capacity of private means. To answer these questions, the paper draws on two distinct regimes of transnational private regulation, namely those in the fields of advertising and food safety. The comparative analysis of these two case studies identifies four conditions that enable public regulatory enforcement to strengthen the effectiveness of private enforcement mechanisms. These concern: (i) the overlap of norms, objectives, and interests of transnational private regulation with public regulatory frameworks; (ii) the institutional design of regulatory enforcement; (iii) due process standards in private enforcement mechanisms; and (iv) information management and data sharing between public and private mechanisms. Under these circumstances, state regulatory capacity may play a key role in strengthening the enforcement capacity of regimes of transnational private regulation. Such complementarity not only enhances the effectiveness of transnational private regulation, but may also serve governments and IGOs to better achieve regulatory objectives, in particular, in a transnational context. The paper argues that state actors should aim to create the necessary preconditions to strengthen private enforcement capacity and engage with private regulatory regimes to coordinate their activities with them.

This paper will first define the concepts of “transnational private regulation” and “enforcement,” followed by a presentation of the cases of advertising and food safety. The comparative analysis defines the relationship between public and private regulatory enforcement in these issue areas and discusses that relationship in light of established conceptualizations of regulatory enforcement and its relationship with private regulation. Finally, the paper identifies four general preconditions under which public enforcement can enhance the capacity of private mechanisms to ensure regulatory compliance with transnational private norms.

2. Enforcing transnational private regulation

“Transnational private regulation” and “enforcement” are concepts that require further consideration. Transnational private regulation is an analytical construct that emerged to capture the notion that regulation can have behavioral effects across territorial borders, while being driven by private constituents (Bartley 2007; Cafaggi 2011). Commentators have recognized that across a wide range of domains – from financial reporting to sustainable development, and from Internet governance to human rights protection – private regimes regulate transnational business activities. These “non-state, market driven” regimes (Cashore 2002) are not based on treaties, which fall within the domain of international law. The term “transnational,” as opposed to “international,” has, therefore, been the preferred label to describe these private regimes (Scott *et al.* 2011). However, transnational regulation does not necessarily imply that it is global in scope, given that its effects do not necessarily extend across the entire world and can be limited to specific regions and continents (Djelic & Sahlin-Andersson 2006, pp. 4–5). Transnational private regulation, in fact, often constitutes a multi-level affair, in which transnational standards operate in and are subject to domestic legal orders. It must, therefore, interact with national rules and institutions in order to have an effect. This implementation process, it is claimed, is obscured by a focus on “the global” in debates on transnational governance (Bartley 2011).

Transnational private regulation can be effective only if compliance therewith can be enforced vis-à-vis those to which such regulation applies. Scholars of regulation have

conceptualized enforcement as a necessary and constitutive element of a regulatory regime that must be distinguished from other elements of that regime, such as standard-setting and monitoring (Hood *et al.* 2001). Enforcement then concerns the process of ensuring compliance with regulatory norms, as opposed to the setting and monitoring thereof. Enforcement should, in this sense, be distinguished from compliance. While the latter concerns the act of conforming to norms, for example, because of intrinsic motivations of the regulated firm, enforcement comprises those activities undertaken by third parties – such as state actors, market participants and their associations, and NGOs – to achieve and compel compliance with rules. For purposes of this paper, enforcement is, therefore, considered to involve all those activities pursued by third parties that are aimed at securing compliance with a set of regulatory norms (cf. Yeung 2004, p. 12).

3. Case studies in advertising and food safety

How is transnational private regulation enforced? What mechanisms are deployed in practice? Are these public or private in nature? How do they operate and how do they relate to each other? The focus of this paper is on the interplay between public and private enforcement mechanisms, and in exploring this link it examines the practices developed by two distinct transnational private regulatory regimes, namely those of advertising and food safety. These two fields are juxtaposed, as enforcement occurs in rather different institutional settings, potentially affecting the relationship between public and private enforcement. The case study analysis will identify the conditions under which public enforcement can bolster the enforcement capacity of transnational private regulatory regimes. For each case it will be determined how the regime is organized and governed, which private means of enforcement are typically used, and how these means relate to public enforcement.

4. Advertising

4.1. The regime

Advertising is an industry that has a significant transnational reach, as advertising is financed and created by multinational companies, and Internet-based technologies allow advertising to target potential buyers around the globe. While the phenomenon of cross-border advertising is on the rise, advertising is still very often nationally distinctive, using the local language, characters, and humor familiar to the target audience. Private regulation in the advertising industry reflects this balance between the potential transnational scope and national impact of advertising, as it operates across multiple levels of governance (Ginosar 2011; Verbruggen 2011). At the national level, private regulation typically comprises two elements: a code of conduct or set of guiding principles governing advertising, and a system for the adoption, review, and enforcement of this code (Boddewyn 1992, p. 9; EASA 2010, p. 19). The aim of these codes is to ensure that advertising is legal, fair, not misleading, in good taste, and socially responsible. Trade associations representing the segments of the industry (advertisers, advertising agencies, and the media) set these codes, but often establish separate self-regulatory organizations (SROs) to oversee the application of such codes.

The codes applied by national SROs frequently have their origins in codes of international trade organizations or business consortia that aim to create a level playing field

for transnational advertising. The principal institutional actor in this respect is the International Chamber of Commerce (ICC), which has promulgated codes of advertising practice since the mid-1930s, that is, long before many of the national regulatory regimes, both public and private, were put in place. Also, the most recent version of the ICC code continues to serve as a general reference point for SROs in the adoption, review, and enforcement of codes of conduct (ICC 2011), in particular, in continental Europe. The SROs in France, Belgium, Sweden, Finland, and Turkey, for example, still apply the ICC code in full to evaluate advertising reaching consumers in their countries (EASA 2010).

A second institutional actor in this multi-level regime is the European Advertising Standards Alliance (EASA), which is a network of European trade associations and SROs. EASA was established in the early 1990s following pressures by the European Commission to overcome the fragmented structure of private regulation in Europe (Cunningham 2000). It originally set out to field complaints about cross-border advertising in Europe, as a result of which SROs would accept complaints about advertising diffused in other countries. In 2002, the mission of EASA was broadened to include the adoption of best practice recommendations to guide SROs in their respective operational activities and enhance their regulatory capacity. EASA, thus, became a vehicle for the European advertising industry to converge on a single model of private regulation (Verbruggen 2011).

Systems of private regulation also exist in the two biggest advertising markets in the world, namely the United States and China. The US system comprises various private bodies, the procedures and policies of which are coordinated via the Advertising Self-Regulatory Council (ASRC). Private regulation in the US covers unfair and deceptive advertising, although it occasionally extends to issues of taste and decency (Boddewyn 1992, p. 132), and, most recently, to privacy in online advertising (Interactive Advertising Bureau *et al.* 2009). This issue addresses data protection concerns in relation to online behavioral advertising, a marketing technique that uses data collected across multiple websites to predict user preferences and serve advertisements most likely to interest individual consumers. In this area, the European industry mimicked the US approach to create a common transnational private regime for online behavioral advertising (EASA 2011a).

In China, private regulation of advertising is underdeveloped. Industry organizations find it difficult to compete with state authorities over regulatory matters in the absence of a hospitable climate of political freedom and democracy (Gao 2005, pp. 79–80). The Chinese Advertising Association (CAA), the central trade association for the advertising industry, adopts codes of conduct, but these do little more than publicize state laws and policies on advertising. The CAA is state-funded and its top staff is also employed at the State Administration of Industry and Commerce. However, in 2011, with the support and guidance of Western companies, the CAA and other major representative bodies of the Chinese advertising industry developed a new code of advertising practices. The code is based on national law, although it also extends to ethical standards and makes explicit reference to the content of the ICC code (World Federation of Advertisers 2011).

4.2. Private enforcement mechanisms

While national and transnational standard-setting activities are, thus, often conflated, monitoring and enforcement of private regulation is strongly decentralized and carried out primarily by national SROs. These bodies usually invite consumers, competitors, NGOs, and even public agencies to submit complaints about national and cross-border

advertising, after which they assess whether the advertising in point complies with the applicable codes (or national laws). Adjudication boards – also called complaints councils, juries, or review committees – are in charge of resolving these complaints. They often involve non-industry stakeholders in their activities to enhance their expertise and credibility (Boddewyn 1988, p. 349). The SRO adjudication boards operate on a country of origin basis, handling complaints about advertising with regard to which the editorial decision to publicize the campaign was made in their jurisdiction. As cross-border and online advertising gains importance, so does the bilateral and multilateral referencing among national SROs as facilitated by EASA's cross-border complaint handling mechanism (Harker 2008; Verbruggen 2011).

SROs have at their disposal a range of remedies and sanctions, typically including advice, persuasion, claim substantiation, adverse publicity, the denial of media access, referral to public authorities, and, ultimately, membership expulsion (Boddewyn 1992, pp. 9–10). These means are applied following a sanction escalation policy: SROs seek to achieve compliance by first applying consensual measures, before gradually resorting to more interventionist sanctions in exceptional cases of defiance (Verbruggen 2012). To effectively enforce sanctions, the participation of the media in the private regimes is decisive. A substantial part of the advertising produced today requires a medium to be placed in the public domain. Television, radio, newspapers, magazines, postal services, and Internet service providers form, as it were, a gate that advertisers must pass in order to reach potential customers. Because of this supply chain structure, media owners can potentially halt advertising that breaches the applicable codes of conduct. Media owners can, thus, act as gatekeepers; they add teeth to the private regulatory system and ensure that the regime is not solely dependent on the integrity and voluntary decision of the code offender to modify its behavior. The involvement of media in private regulatory regimes is, therefore, considered essential to the effective private enforcement of codes (Boddewyn 1988, p. 333). The denial of media access is often sufficient to halt non-compliant advertisements from (re)appearing; indeed some SROs report compliance rates of over 95 percent.²

In the US, by contrast, the press and broadcast media have not subscribed to the ASRC regime, in part because of antitrust concerns (Labarbera 1981). Instead of subscribing to the regime, media companies perform separate clearance practices. However, as they often lack the incentives or expertise to perform this task vigilantly, this form of private control remains imperfect (Rotfeld 1992; Galloway *et al.* 2005). It has, thus, been held that the absence of media participation undermines the effectiveness of the system (Miracle & Nevett 1987, p. 121; Harker 2008, p. 306). In China, private enforcement activities are virtually nonexistent, as the CAA did not monitor advertising until recently, nor did it process complaints about advertising (Gao 2008, p. 167).

4.3. Links with public enforcement

There are several important links with public enforcement that help to strengthen the private enforcement capacity of SROs. First, public authorities may require that media owners become members of SROs, code signatories, and/or abide by the decisions of the national SRO. In the United Kingdom, for example, the public authority regulating broadcast media has made compliance with codes of the local SRO for broadcast advertising a condition of obtaining a license under the Communications Act 2003. As under this act every broadcaster based in the UK is required to have a license, and as the public media regulator is in charge of granting, suspending, and revoking this license, media

broadcasters are under a *de facto* obligation to adhere to the code (Prosser 2008). In other countries, however, media laws facilitate the enrolment of media in the private systems. In the Netherlands, the applicable media laws simply require broadcasters to subscribe to the code overseen by an SRO, and, thus, promote compliance by media with private codes and decisions.³ In China, national law generally requires media to pre-screen the ads they disseminate (Gao 2008). In the US, by contrast, such an obligation would be likely to raise constitutional concerns regarding the freedom of (commercial) speech (Galloway *et al.* 2005).

Second, public authorities may operate as a backstop to SRO enforcement. If SROs cannot obtain compliance with codes or their decisions, they may consider referring the case to the public authority enforcing advertising regulation, to ensure follow-up and compliance. However, the potential for referrals is not unlimited; a basic precondition for a successful follow-up by a public authority is that the code violation in point falls within the scope of the authority's competence and jurisdiction. In the EU, several directives regulating advertising leverage public authorities and courts to respond to non-compliance with codes and to act as a legal backstop to SRO enforcement. The Unfair Commercial Practices Directive (Directive 2005/29/EC), for example, defines non-compliance by a trader with a code of conduct by which it has undertaken to be bound as a breach of statutory law, provided that this commitment was not merely aspirational and the trader indicated in its advertising that it is bound by the code.⁴ Accordingly, it gives rise to the potential of public enforcement in the event of non-compliance with (trans)national codes of conduct.

A complementary role of public authorities in the enforcement of codes of conduct is further promoted in the context of EU advertising regulation, as Member States are enabled to require that prior recourse be taken by SROs before administrative or judicial enforcement may be taken against unlawful advertising.⁵ In a number of European countries, legislators have used this to position the local SRO as a mechanism of first resort that filters out most of the unfair advertising, leaving public authorities to take action in only a few and especially troublesome cases. In Ireland, the Netherlands, Romania, and Spain, the national SROs and competent authorities have formalized this division of labor through memoranda of understanding, covenants, and protocols, while in the UK, the media regulator formally delegated a share of its rulemaking and enforcement authority under national law to the broadcast division of the British SRO.⁶ These arrangements typically hold that the SRO will, in principle, resolve complaints concerning advertising, while public authorities retain backstop legal powers to act if SRO enforcement fails. In addition, the conditions under which the SRO can refer cases to the agency – and vice versa – may be spelled out, as well as how and when information related to monitoring and enforcement should be exchanged. Accordingly, the coordination of private and public regulatory enforcement is crystallized through these arrangements.

However, in many countries the engagement – if any – of public enforcers with private sector initiatives to control advertising is not formalized. In the US, the Federal Trade Commission (FTC) and Federal Communications Commission have conducted hearings, issued reports, and organized workshops to enhance the effectiveness of self-regulatory activities in the area of food marketing to children, albeit with little success (Kunkel *et al.* 2009). More generally, the FTC stimulates compliance under the private ASRC system by sensitizing and informing industry groups that if they do not comply, they risk FTC scrutiny. To that end, the FTC also identifies the private system as the

referring body in its decisions (FTC 2007). The ability of the US private system to refer cases to public enforcement agencies is crucial for its effectiveness, particularly so because it cannot rely on media support to stop violations. The FTC's reputation in controlling advertising, it has been argued, provides a powerful incentive for industry to comply with the decisions made under the private regime (Miracle & Nevett 1987, p. 122). In China, however, attempts at private regulation have, thus far, largely coincided with public advertising laws, given the quasi-governmental nature of the CAA.

Where private and public regimes regulating advertising coexist and coordinate, this may create win-win situations. Engagement with private regulatory regimes allows public authorities to refocus their limited enforcement budgets on specific cases, while for SROs the principal benefit lies in the fact that they can refer cases to the authorities that they cannot settle of their own accord. The collaboration may be considered significant for preventing a potential enforcement gap. Furthermore, the threat of being referred to the public authority by the SROs can be perceived by industry members as a strong deterrent that motivates compliance (Miracle & Nevett 1987, pp. 122–123). Referrals are, then, the metaphorical stick that SROs carry to force recalcitrant companies to comply under the private system. This threat gains credibility if an authority, such as in the Netherlands, uses compliance records of industry members with the SRO decisions as an element to determine the magnitude of the administrative fine they may impose for violations of consumer protection laws.⁷

However, the deterrent effect of referrals should not be overstated and requires some nuance. Referrals are infrequent and SROs often view them as a remedy of last resort. In 2008, the SRO in the UK, commonly seen as having the most developed private regime in the world, referred only one case out of a total of 15,000 unique ads handled that year to the national consumer protection agency, with the previous referral dating back to 2005 (ASA 2009, p. 3). Although the possible reluctance of SROs to report their own members to public authorities may explain this, the restrictive conditions that apply for referral can also play a role. As regards the latter point, which relates to regulatory competence, rather than to regulatory capture, the scope for referrals is rather limited. Referrals are appropriate only to the extent that the case falls within the powers of the public authority, most notably in the case of deceptive advertising. Issues of taste and decency usually fall outside that scope and will, thus, not be susceptible to referral. This is an important limitation on referral processes in Europe, and, therefore, also on the deterrent effect thereof for traders, given that some 60 percent of the complaints about advertising in Europe concern issues of taste and decency, social responsibility, and health and safety (EASA 2011b, p. 27). In the US, on the other hand, the private system enforces largely the same standards on truth and accuracy in advertising as the Federal Trade Commission (FTC) does. Therefore, the potential for referral is considerable. Referrals are indeed more common in the US: between 2004 and 2007, the FTC received over 60 referrals from private bodies coordinated by the Advertising Self-Regulatory Council (FTC 2007, p. 2).

5. Food safety

5.1. The regime

Over the past two decades transnational private regulation has become a significant element in the governance of food safety. Recurrent food safety scandals, global food

sourcing, private labeling, food retail market concentration, and changes in consumer perceptions and liability frameworks have spurred major food companies and retailers to collaborate and establish international coalitions for the adoption of food safety standards (Fulponi 2006; Henson & Humphrey 2009). National and transnational private bodies, such as the British Retail Consortium (BRC), International Featured Standards (IFS), GlobalGAP, and the Safe Quality Food Institute (SQFI), have all developed extensive industry-driven programs regulating food safety. The latest phase in the development of transnational private food safety regulation is the creation of a global coalition of standard-setters, namely the Global Food Safety Initiative (GFSI). The GFSI, established in 2000 by eight of the world's biggest food retailers, constitutes an effort to coordinate various national and regional regimes adopted in the past two decades, such as those administered by the BRC, IFS, GlobalGAP, and SQFI. By benchmarking the regimes, the initiative aims to achieve cost efficiencies in the supply chain and reduce duplications of audits under the adage "once certified, accepted everywhere" (GFSI 2008). The impact of GFSI on the regulation of food is significant. Indeed, major supermarket chains estimate that 75 percent to 99 percent of their food supplies are certified under GFSI benchmarked schemes (Fulponi 2006, p. 6).

This rise of private food regulation has precipitated a shift in the governance of food safety regulation. Today, public and private bodies regulate food safety concurrently, at both the national and transnational levels, giving rise to an increasingly complex regime that comprises a vast array of standards, and monitoring and enforcement activities applying to food products (Iizuka & Borbon-Galvez 2009). These standards and activities often have a transnational reach. Food standards in one country may effectively be set by another country to which companies in the first country wish to export (Gale & Buzby 2009). Private standards, however, assume transnational application as powerful actors along the supply chain impose such standards on upstream companies (Vandenbergh 2007). In these circumstances, a country may find itself competing for authority with private regimes, which, in part, emerged in response to government failures over food safety emergencies (Meidinger 2009, p. 242).

Intimate linkages, thus, exist between public and private food safety regulation. In fact, a key objective of private food safety norms is to achieve compliance with the public regulatory framework applicable to food safety (Henson & Humphrey 2009, p. 13). A key element here is that modern food laws require companies along the food supply chain to have in place a private control system based on the so-called Hazard Analysis Critical Control Point (HACCP) principles, which provide a systematic method to identify and control hazards associated with food handling processes. Under the HACCP principles, a food business operator must identify the potential hazards at all stages of the food production process, assess the risk of occurrence of those hazards, identify the best methods for addressing those hazards, suggest possible action to correct its operating procedures if a critical control point is not met, and ensure that it complies with that methodology. Food businesses must further provide authorities with documentary evidence demonstrating their compliance with HACCP principles. Companies that fail to comply run the risk of warnings, fines, license revocation, and even the imprisonment of directors. Private regulatory regimes, such as those developed by the BRC, IFS, GlobalGAP, and SQFI, are based on the HACCP principles and help companies to live up to those principles, and, thus, to achieve legal compliance.

5.2. Private enforcement mechanisms

Enforcement of transnational private food safety regulation occurs through a series of private mechanisms. Private regulation finds application as a result of its incorporation in commercial contracts concluded between a buyer – often, but not exclusively, food retailers and importers – and a seller, namely a producer or supplier (Vandenberg 2007). Buyers use certification systems to monitor compliance with these standards, which have become legally binding upon the seller – and at times upon its suppliers in the second and third tiers of the supply chain – as they are included in the underlying commercial contracts. Firms selling food products under their own brand name often assess the seller's HACCP compliance themselves (first-party certification), but also rely on second- or third-party certification schemes to monitor compliance throughout the commercial relationship (Henson & Northen 1998). Third-party certification has gained particular relevance in the last decade, as it allows retailers to shift the costs of certification to those companies applying for it. Moreover, it offers the pretense of being more independent, credible, and transparent than first- and second-party certification (Hatanaka *et al.* 2005).

The key function of these second- and third-party certification schemes is to signal compliance of food businesses and their products with private and public norms to other actors in the supply chain. For this purpose, certification bodies have a range of monitoring powers at their disposal, such as inspection, sampling, and reporting, as well as sanctions. These typically concern warnings, demands to take corrective action, and the suspension or revocation of certification, which implies the loss of the right to use certificates, trademarks, or logos owned by the standard-owner. Buyers that have imposed private standards through their commercial contracts, along with other actors in the supply chain, use these sanctions to determine their own response to non-compliance. As such, the certification bodies act as agents for both contracting parties and market participants to deploy their own means to secure compliance with rules. Business partners may withhold contractual performance, levy contractual penalties, or terminate the contract, while market participants may refuse to contract with non-certified suppliers. Given that food retail markets are strongly concentrated today, particularly in Europe (CIAA 2010), the refusal of a retailer to contract with a non-certified supplier can signify the end of the supplier's business. Accordingly, the supply chain constitutes an important source of authority for giving effect to these private standards (Cashore 2002; Bütte 2010, p. 16).

5.3. Links with public enforcement

How does private certification link up with public enforcement? First, the fact that transnational private food safety standards are incorporated into commercial contracts gives rise to the potential for judicial enforcement. Contracting parties may address violations of these standards, as signaled by certifiers, to courts based on the concept of breach of contract or express warranty. In such cases, courts may interpret and determine the validity of transnational private regulation (Cafaggi 2012, pp. 88–89). It should be recalled, however, that disputes between companies – in particular small and medium-sized enterprises – are most often resolved through agreement and are, therefore, unlikely to involve litigation (Macaulay 1963; Croes & Maas 2009). In contractual relations, remedies are more likely to concern suspension of contractual performance, refusal to accept non-compliant products, or corrective actions to restore compliance and subsequently ensure continued compliance (Scott 2012, p. 154).

Judicial enforcement based on tort litigation also provides a way for third parties, such as consumers, to address breaches of transnational private food regulation. Product liability regimes like those in the UK have been regarded as influential in motivating the food industry to adopt certification programs and implement them along the entire supply chain (Fulponi 2006, pp. 9–10). However, again, the enforcement capacity of third parties to sanction breaches of private regulation via judicial action is unlikely to be used. Buzby and Frenzen (1999) estimate that in the US, where civil litigation over product liability is relatively well developed, fewer than 0.01 percent of cases of food-borne diseases are litigated, and even fewer lead to the establishment of liability on the part of the producer. Empirical work by Hutter and Jones (2007) confirms that businesses in the UK are only to a very limited extent concerned with liability claims when managing food safety risks, implying that tort claims are not guiding their risk management activities as much as perhaps previously thought.

The link between public and private enforcement mechanisms may also manifest itself via enforcement policies of food safety authorities. These public bodies increasingly incorporate and build on private regulatory systems in the management of their own policies to enforce food safety laws and regulations, including HACCP (Coglianese & Lazer 2003; Garcia Martinez *et al.* 2013). Contemporary food safety laws prescribe risk-based frameworks of supervision, requiring public bodies to organize their inspection and enforcement resources around an assessment of the risk that a company in the supply chain poses to food safety. Spurred by government cutbacks and pressures to reduce administrative burdens on companies, food safety authorities now seek to include the status a company has under the private certification scheme in this assessment as one of several elements to determine the frequency, scope, and intensity of their monitoring and enforcement activities vis-à-vis a particular company. Other elements may include the particular sector in which the company is involved, the size of the company, and its track record of compliance at the authority. The result is that certificate holders of a particular private scheme may be seen as low-risk companies in relation to which state monitoring and enforcement are relaxed.

The enforcement policy of the Dutch Food Safety Authority (*nieuwe Voedsel en Warenauthoriteit*, nVWA) may serve to illustrate this matter (nVWA 2006, 2007). To administer its enforcement budget efficiently and comply with its obligations under EU Regulation (882/2004/EC) concerning official food and feed controls, the nVWA developed a policy of grouping companies concerned with the handling and processing of food into categories of high- (red), medium- (orange), and low-risk (green). Red companies are subject to a stricter enforcement regime than green companies. The status of a firm is determined by factors, such as whether it is certified under a private certification scheme that the nVWA has recognized as complying with, at a minimum, the legal food safety requirements, including HACCP principles. Dutch HACCP, a GFSI benchmarked regime that is seen as an equivalent to the food safety regimes developed by BRC, IFS, and SQFI, is one such recognized scheme. Certification under the Dutch HACCP standard, thus, offers food companies the advantage of having to cope with fewer official inspections by the nVWA. Driven by further cuts to its enforcement budget, the nVWA is now investigating whether and how to extend its policy in relation to Dutch HACCP to other GFSI benchmarked regimes that are based on HACCP principles, such as those developed by the BRC, IFS, and SQFI (Beuger 2012).

However, the question is what implications such recognition of – if not reliance on – transnational private regimes by local food safety authorities has for the enforceability of those regimes. While the prospect of being subject to fewer official inspections may incentivize regulated suppliers to better comply with the applicable norms so as to earn certification, such an incentive will not outweigh prevailing market pressures to gain certification. The risk of losing one's business if no certification is obtained should be considered a much stronger incentive for suppliers to comply, given that the alternative may put the company straight out of business. Thus, the recognition of private regimes by national food safety authorities in their enforcement policies does not itself appear a sufficient condition to ensure compliance with transnational private regulation, although that recognition may, at most, offer additional motivations for such compliance.

6. Discussion

6.1. Qualifying the public–private interplay

What kinds of interplay between public and private enforcement mechanisms do the cases of advertising and food safety display? These two cases do not provide evidence that such mechanisms function as alternatives, in the sense that one excludes the effects and activities of the other. Nor do they suggest that public and private mechanisms compete over regulatory turf or authority (Black 2009). Instead, they are suggestive of a relationship of *complementarity*, that is, a relationship in which one mechanism reinforces the functionality of the other, or compensates for its weaknesses (Höpner 2005; Campbell 2011). The case of advertising demonstrates that the private, SRO-led regimes benefit from collaboration with public enforcement authorities. It not only lends them a degree of legitimacy, but also signals to recalcitrant parties that they will have to face the public watchdog if they fail to comply with the private system. The recognition of codes in legal texts or policy documents will also aid SROs in securing compliance with their codes and decisions. Also in the case of food safety, public authorities may leverage the capacity of private regimes to establish compliance by recognizing those regimes in their policies. Such recognition is likely to spur adherence with those schemes, provided that such schemes offer certified companies the benefit of being subject to a more lenient inspection regime. While recognition is in itself not a sufficient condition to warrant compliance with private food safety standards, it indirectly facilitates the task of certification bodies to achieve compliance.

Importantly, the cases of advertising and food safety also demonstrate that private enforcement means may benefit public mechanisms, thereby suggesting that complementarity implies a degree of reciprocity. Private regimes can compensate for some of the weaknesses of public enforcement by offering faster, more flexible, and cost-efficient means of enforcement, specifically in cross-border situations. In the case of advertising, this is exemplified by well-established and funded SROs, such as in those in the Netherlands, the UK, and the US, which process (cross-border) complaints of consumers and competitors at a pace, frequency, and cost that public authorities or courts simply could not match, given the procedural framework and costs involved. In the case of food safety, private certifiers may partially compensate for the inspection gap that public agencies are faced with because of continuing budget cuts and increasingly globalized food supply chains. Crucially, private mechanisms also reinforce public enforcement by providing data about non-compliance in fast and cost-efficient ways. Private schemes can generate

valuable additional information on violations, as well as the severity and frequency thereof. By sharing this with public authorities, private schemes allow the public authorities to economize on the deployment of public resources for monitoring and enforcement. Compliance data gathered by private mechanisms may also enable judicial enforcement, as claimants can use this information to bring civil proceedings for contractual or extra-contractual liability.

6.2. Theorizing complementarity

Various commentators have theorized about the ways in which different resources and instruments of enforcement can best be combined to mutually enhance their performance. Of particular influence has been the notion of “responsive regulation” as developed by Ayres and Braithwaite (1992). In a time when deregulation was high on the political agenda in the UK and the US, these scholars argued the need for a “symbiosis between state regulation and self-regulation” (Ayres & Braithwaite 1992, p. 3). To illustrate how to combine these strategies, they suggested that states and public regulators develop their respective enforcement and regulatory activities around two pyramidal models: “a hierarchy of sanctions and a hierarchy of regulatory strategies of varying degree of interventionism” (Ayres & Braithwaite 1992, p. 6). At the base of these pyramids, the less intrusive sanctions (persuasion and education) and regulatory strategies (forms of self-regulation) are positioned, while the apex represents the most intrusive sanctions and strategies. The central contention of the models is that by escalating up and down the tiers of the pyramid, depending on the attitude of regulated firms toward the distinctive sanction or regulatory strategy, states can more effectively and efficiently achieve regulatory compliance, and, by extension, their policy objectives.

Responsive regulation, in particular its enforcement pyramid, has been highly influential in motivating both practitioners and scholars to rethink their approaches to regulation, despite the fact that it has proven to be rather difficult to implement in practice (Mascini 2012). One fundamental critique of responsive regulation has been that it falls short of recognizing the expanding role of private actors in the regulatory process (Gunningham & Grabosky 1998; Baldwin & Black 2008; Grabosky 2012). Regulation is not the prerogative of the state, and the capacity to guide and influence business is shared with private non-state actors, both firms and public interest groups. This is particularly true in the context of transnational regulation, as states and IGOs typically lack the capacity and jurisdiction to take action. Responsive regulation was written for state authorities having full legitimacy and authority over domestic issues, and will require adaptation if it is to be applied in relation to transnational business activities (Drahos 2004; Abbott & Snidal 2012).

A central strategy to enhance the capacity of state actors to regulate transnational business activities is to engage with private actors. This has been discussed in the literature as efforts of regulatory “enrolment” (Black 2003). Enrolment occurs when a regulator chooses to engage with actors that possess resources relevant for regulation and enforcement, such as information, expertise, financial means, authority, or organizational capacity that the regulator itself might lack. The cases of advertising and food safety provide examples of how private regimes have enrolled public regulators to enhance their own capacities and vice versa, thus effectively linking and integrating both regimes. As the case of advertising shows, some SROs have reached collaborative understanding with public authorities to refer cases to them if the public authorities fail to achieve

compliance. At the same time, however, public regulators have enlisted SROs in enforcement policies in order to allow the public regulators to more efficiently utilize their enforcement budget. Similarly, public food safety authorities, such as those in the Netherlands, have recognized private certification schemes so that they can benefit from the information that such schemes generate about HACCP compliance by companies in the sector. It, therefore, appears that private regulators may wish to enroll public regulators to gain authority to secure compliance, while public regulators principally involve private actors for informational gains and organizational capacity in order to more efficiently utilize their monitoring and enforcement resources.

Regulatory enrolment offers important advantages to public and private regulators. By being able to work with a wider set of resources for enforcement, they can more accurately determine what type of enforcement action is required and better refine their approach to secure compliance (Braithwaite 2008, p. 96). Secondly, the ability to use or rely on additional resources may also enhance the transnational reach of regulatory enforcement (Drahos 2004, pp. 418–419). This appears particularly important in the case of food safety regulation, in which public regulators seek to monitor and obtain compliance with local safety standards, despite the fact that food products are often produced, processed, and packaged in foreign and remote countries. By enrolling private certification schemes in their own enforcement policies, public authorities can reach more food business operators in a greater number of countries and, therefore, extend beyond their own jurisdiction.

6.3. Designing complementarity

A mutual reinforcement of enforcement activities of public and private actors requires a careful design of the regulatory regimes and mechanisms of enforcement. The case studies concerning advertising and food safety suggest that four institutional preconditions affect the potential for complementarity between public and private enforcement mechanisms. The first of these conditions relates to the *overlap in the norms, objectives, and interests* of public and private regulation. In both cases, it was observed that this overlap creates the leverage and scope for public authorities exercising enforcement powers to coordinate their activities with those of private regulatory regimes, principally at the national level. In the case of advertising, collaborative arrangements ranging from informal coordination to delegation of public regulatory powers emerge only where the advertising codes concern the same type of behavior addressed by legal norms. Also, the Dutch food safety authority engaged with private certification schemes only after it had assessed the degree to which such schemes comply with the legal food safety requirements and serve public interest goals. If a substantive overlap is lacking, there is little basis for collaboration.

A second precondition enabling complementarity between public and private enforcement involves the *institutional design of regulatory enforcement*. Discretionary competences for enforcement offer public and private mechanisms the possibility to coordinate and integrate their enforcement activities. The cases of both advertising and food safety show that public authorities use their discretionary competences to build on the monitoring and enforcement activities of privately established regimes to inform their own course of action. The legislative frameworks for the control of advertising and food safety issues have encouraged such a co-regulatory approach and have leveraged the role of private regimes in achieving public policy goals. This role is typically concerned

with the monitoring of compliance and the settlement of obvious, low-impact, and easy-to-resolve violations. Private enforcement then operates as a mechanism of first instance, clearing the market of advertisements and food products that do not call for immediate public intervention, while leaving those complex, fraud-related, and high-impact cases that do call for immediate public intervention to public authorities.

A third condition concerns the compliance of private regulatory enforcement with *due process* standards. Public authorities will be likely to coordinate enforcement activities with private enforcement mechanisms only when such mechanisms follow due process standards. In the case of food safety, the Dutch food safety authority collaborates only with schemes that are administered by a well-established, expert, and representative industry body in which third-party certification bodies are accredited by independent accreditation bodies. In the case of advertising, the policy of collaborating with only those private mechanisms that meet standards of due process can be observed for example in relation to the UK system. Here, independence, expertise, and fairness in SRO adjudication procedures constitute a firm requirement under the authorization contracting out public powers to the SRO.⁸ Compliance with such standards in SRO enforcement is also encouraged by the European Commission (2006, p. 26).

A final institutional precondition for complementarity relates to *data sharing and information management*. Coordination of enforcement requires information and the proper management thereof. Knowledge of the procedures, practices, and results of private enforcement mechanisms should be available to the public authorities and vice versa. Without a proper understanding of what action has been or is taken under one regime, the other regime cannot adequately respond. Information gaps between enforcement bodies, such as the failure of a recognized food safety certification scheme to communicate changes in the certification status of regulated companies to the relevant public authorities, is a potentially disruptive risk that undermines the effectiveness of any collaborative arrangement. The inability to secure sufficient and reliable information has so far prevented the Dutch food safety authority from extending its policy in relation to Dutch HACCP to other GFSI-benchmarked regimes (Beuger 2012). Mechanisms of data exchange and management should be in place to enable the regimes to effectively coordinate their enforcement activities.

7. Conclusions

This paper set out to study the interplay between public and private mechanisms used to enforce transnational private regulation. The cases of advertising and food safety regulation support the argument that the potential for public enforcement retains a key role in strengthening the enforcement capacity of private regulatory regimes. These cases also suggest that by engaging with private regulatory regimes public regulators can simultaneously boost their own regulatory capacity, in particular in a transnational context. Such complementarity between public and private regulatory enforcement is, however, conditional upon the overlap between the norms, objectives, and interests of public and private regulation; the institutional design of regulatory enforcement; compliance with due process standards; and the proper exchange of information on regulatory compliance.

The question remains, as Rees (1997) noted, to what extent does this argument hold true in contexts other than those discussed here? While the domains of advertising and

food safety provide a wealth of information, sector-specificity clearly plays a role. One caveat to be noted is that transnational private regulation in the domains studied here does not specifically address production externalities in the country of origin apparent in sectors such as apparel, coffee, fisheries, forestry, and mining of natural resources. Thus, further empirical research is needed to unravel the particular modes of interplay between public and private enforcement mechanisms; specify the conditions under which these modes emerge and endure; and map the actual impact they have on levels of compliance.

Future research should, at the same time, address the risks associated with the increased integration of public and private regulation and enforcement. While an optimistic view would suggest that the kind of public–private complementarity highlighted in this paper has capacity-building effects, a more pessimistic reading would see the integration of public and private enforcement activities as a potential regulatory minefield. Scandals such as those involving the mislabeling of horsemeat, in which private certification regimes failed to adequately report on the authenticity of food, continue to raise concerns about the integrity, accountability, and transparency of regulatory enforcement by private (commercial) actors. If a mix of public and private regulatory enforcement is to become the way forward, these concerns also must be addressed.

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Notes

- 1 Positive exceptions are the contributions to the edited volume by Cafaggi (2012).
- 2 The Dutch SRO, *Stichting Reclame Code* (SRC), reports compliance rates up to 98 percent in 2009, 97 percent in 2010, and 98 percent in 2011 (SRC 2011, p. 27).
- 3 Articles 2.92 and 3.6 Media Act.
- 4 Article 6(2)(b) Unfair Commercial Practices Directive.
- 5 Articles 10 and 11 Unfair Commercial Practices Directive and Articles 5 and 6 of the Misleading and Comparative Advertising Directive (Directive 2006/114/EC).
- 6 Authorization of the Contracting Out (Functions relating to Broadcasting Advertising) and Specification of Relevant Functions Order, SI 1975/2004.
- 7 See e.g. *Consumer Authority v. Holdvest Investments B.V. and Wizz Mobile Interactive B.V.* (2008).
- 8 Paragraph 17 Memorandum of Understanding between Office of Communications (Ofcom) and The Advertising Standards Authority (Broadcast) Limited (ASA(B)) and The broadcast committee of advertising practice limited (BCAP) and The Broadcast Advertising Standards Board of Finance Limited (BASBOF) (2004), http://www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/mou.pdf.

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