2

'Smart' Public-Private Complementarities in the Transnational Regulatory and Enforcement Space

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2.1 INTRODUCTION

Chapter 1 determines that the main focus of this volume is geared towards establishing whether existing mixes of forms of regulation and instruments have been 'smart' in addressing the causes of environmental pollution and drivers for its prevention in different contexts. 'Smart' has primarily been taken to mean whether a mix of instruments has effectively contributed to the reversal or alleviation of environmental pollution. Underlying this smart mixes notion is the presumption that the *combination* of regulatory instruments and actors is often more effective than a single instrument and that instruments are thus *complementary*. As Gunningham and Sinclair have argued, most instruments and actors have strengths and weaknesses in specific circumstances. Combining regulatory instruments and actors into a mix, then, allows us to take advantage of their strengths while compensating for their weaknesses.[1] The challenge for regulators and policy makers has thus been said 'to select and combine those instruments that form a productive and compatible mix',[2] considering that this focus also brings a number of benefits in terms of considering the interaction rather than the choice of regulatory strategies; of concentrating on design aspects thereof; and of nuancing the role of nonstate entities within the framework of global (environmental) governance.

Given this presumption of complementarity underlying the smart mixes approach, an important question is not only when one can actually speak of complementarity, but also what factors are relevant in turning this into a 'smart' complementarity. This chapter will address these questions by first fleshing out the meaning of complementarity somewhat further from a regulation theory perspective (Section 2.2). It will then elaborate on this complementarity by zooming in more

[1] Gunningham & Sinclair (1999), as represented in Chapter 1.
[2] See Chapter 1, Section 1.1.

specifically on the regulatory role of private actors in relation to public regulators; what is the nature of this interaction and what forms does it take? In dealing with these questions, this contribution relies also on insights gathered from case studies that have been performed on transnational private regulatory regimes (TPR) in domains other than environmental policy, including, in particular, data protection, civil aviation and private security companies.[3] It will be argued that it is often the case that some form of public-private complementarity can indeed be identified, taking shape along the public-private axis, the private-public axis or a mixed form thereof, the latter often entailing some form of institutional cooperation between public and private actors (Section 2.3). The chapter will then proceed with considering what makes such a hybrid public-private regulatory regime 'smart' in terms of effectiveness and what other context-specific elements – beyond the regime in question – may be of relevance with a view to realising an effective smart mix. This also includes a consideration of the relevance that needs to be given to ensuring the legitimacy of such regimes. In connection with this, it will be seen that it is vital to also take account of the role of the law and the ways in which it may impact – and also impose limits on – the shaping of a smart mix. In most smart, instrumental and optimal choice approaches, however, the law still appears to be a rather neglected dimension (Section 2.4). The chapter will end with some concluding remarks (Section 2.5).

2.2 PUBLIC-PRIVATE COMPLEMENTARITY AS A FUNCTIONAL GOAL

The terminology and conceptual framing of the scholarly debate on instrument selection varies quite a bit, ranging in particular from instrumental choice/selection[4] to optimal policy mix, optimal instrumental mix,[5] responsive regulation[6] and smart regulation.[7] This framing can be seen as indicative of the underlying nature or goal of the various approaches; some of these are merely explanatory, offering underlying reasons for why certain choices occur or identifying aspects that have a bearing on instrumental choice, while others are clearly normatively tainted, offering a perspective on what would be the ideal or optimal instrumental choice and mix.

[3] HiiL-project on Transnational Private Regulatory Regimes. Constitutional Foundations and Governance Design (http://www.hiil.org/project/corporate-laissez-faire-or-public-interference-effective-regulation-of-cross-border-activities), its overall main findings represented in: Cafaggi (2014). This project included eleven case studies in the domains of consumer protection, financial services and fundamental rights. This contribution builds mostly upon the findings of the fundamental rights case studies, which included a consideration of transnational private regulatory regimes in the domains of data protection, civil aviation and private security companies. See Senden (2013).

[4] See for example Linder & Peters (1989). For a more general discussion of such theories, see Howlett (2004).

[5] For an account of various optimal mix approaches, see for example Wiener & Richman (2010).

[6] Ayres & Braithwaite (1994); Baldwin & Black (2008).

[7] Gunningham, Grabosky & Sinclair (1998); and Gunningham, Grabosky & Sinclair (2017).

Howlett and Rayner have argued that 'smart regulation takes its place in a larger literature about the transition from a more hands-on, interventionist style of government to "governing at a distance", "governance" and the widely employed metaphor of governments achieving public purposes by "steering" complex networks of public and private actors rather than directing an expensive and possibly ineffective bureaucracy'.[8] The public and private levels of regulation are thus seen as complementary to one another, in the sense that they improve each other's qualities'. The smart regulation approach thus underscores the importance of designing policies that employ a mix of instruments, taking account of and responding to the specific context and features of the policy sector in question. So, it is not simply a choice between regulation and markets; smart regulation is about a policy mix that considers the fullest range of possible instruments. Another core element of smart regulation, however, which the previous quote reflects, is that, whenever possible, within this mix less interventionist instruments are favoured instruments. This includes motivational, informative and incentive-based instruments as well as various forms of co-regulation and self-regulation by industry. This leads us to a third core element, namely that this possibility depends very much on the effectiveness of the proposed [mix of] instruments; or, governance is deemed smart 'when it is conducive to timely and effective collective problem-solving under conditions of high problem complexity and contextual uncertainty and volatility'.[9] This effective problem-solving capacity may thus require the choice of more interventionist instruments in a particular context or situation.

Another scholarly line of thought on instrument choice puts more emphasis on responsiveness, rather than on effectiveness. Most prominently, Ayres and Braithwaite developed the theory of responsive regulation in the early 1990s.[10] Central to this theory is that regulators should not immediately turn to law enforcement solutions to solve certain problems, but that they should first focus on considering a range of approaches that support capacity-building. Problems of concern to regulators should thus first be addressed through developing or reinforcing a pyramid of support that is capable of expanding strengths to deal with a certain problem. Only when this fails to realize the desired results should the regulator then move up a pyramid of sanctions. The presumption is that regulation should always start at the base of the pyramid and that sanctions only come into play when dialogue fails. This presumption applies regardless of the seriousness of the problem and the risks at stake, meaning that dialogue and the lowest form of intervention should be tried first and only when there are compelling reasons, when there is failure, should one move up the ladder. Baldwin, Cave and Lodge have since built upon this pyramid idea by connecting regulation and enforcement strategies more directly. Their approach

[8] Howlett & Rayner (2004), at 173.
[9] NWO (2013), at 10.
[10] Ayres & Braithwaite (1992).

thus reflects a preference for the use of self-regulation and then moving towards enforced self-regulation before following that with forms of command-and-control regulation coupled with limited or more stringent sanctioning.

While the responsive regulation and enforcement approaches are thus very strongly focused on the lowest form of intervention, seemingly as a goal in itself, smart regulation puts effective problem-solving centre stage, as well as the mix of instruments this may require. Smart-regulation and responsive-regulation approaches thus differ from one another as regards the preference to be given to less interventionist forms of regulation and enforcement; whereas in the responsive-regulation approach this preference is at its very heart, in the smart-regulation approach the idea of the mix of instruments and its effectiveness to realise the set policy goal is put centre stage, and the choice of the less interventionist instrument is functional to this aim. Smart regulation also underscores the need to search for 'next generation' instruments to meet this challenge, so it is also more about regulatory innovation. As Van Gossum et al. have stated, smart regulation is about ascending a 'dynamic instrumental pyramid' to the extent necessary to achieve policy goals and to maximize opportunities for win-win outcomes.[11] As such, this underscores an understanding of smart regulation in a rather technical, nonideological sense by seeking, first and foremost, efficiency in the delivery of public policies. This connects with economic and political science approaches that emphasise regulatory quality as a means of expressing the extent to which regulation is successful in realizing certain policies, e.g. stable institutions, the development of the private sector, fair market conditions etc.[12]

Yet, within such a smart-mixes approach, due account should be given to a range of elements that will have a bearing on the problem-solving capacity of an instrumental mix. These include its capability to deal with unexpected events, developments taking place over time in domestic society as well as globally, the presence of other actors who adjust their behaviour in response to policies and each other's actions, and progressive information.[13] Moreover, policies have to be devised while there are profound uncertainties about the future – whether these uncertainties are due to unknown, or unforeseen, vulnerabilities or due to assumptions that fail to hold – for actors taking actions that undermine the utility of the set policy, or there being exogenous events that fundamentally change the conditions under which the policy must operate.[14] So, importantly, as Walker, Rahman and Cave have held, 'policies should be adaptive; devised not to be optimal for a best estimate future, but robust across a range of plausible futures'.[15] This can be said to also hold true for the instruments relied upon to shape such policies. Smart regulation thus requires

[11] Van Gossum, Arts & Verheyen (2009).
[12] Cf. Voermans (2017).
[13] Walker, Rahman & Cave (2001).
[14] Ibid., at 283.
[15] Ibid.

the instrumental mix to be effective not just here and now, but also to be robust in the sense of having future-proof capacity, and to demonstrate, where needed, adaptability and flexibility to deal with changing circumstances with a view to realising its overarching problem-solving goal. In addition, however, regulation will be truly smart only when those affected by it consider it to be legitimate and follow up on it. As will be seen, public-private complementarity in regulation and enforcement regimes may contribute to these various elements.

2.3 THE NATURE OF PUBLIC-PRIVATE INTERACTION

Shifting the focus from the state as the main and exclusive public regulator to a smart-mixes approach implies taking a much wider and open stance towards the question of how certain socioeconomic or societal problems need to be dealt with, as well as by whom and by what measures, instruments and procedures. How may the regulatory and enforcement space be used and filled in particular areas – not only by public regulators and enforcers but also by private ones – at the international, regional and national levels? What interaction is taking place and how can we explain it in terms of complementarity? This, then, will be the focus of this section: in it we will consider how transnational private regulation (TPR) (Section 2.3.1) interacts with public regulation (Section 2.3.2) and other private regimes (Section 2.3.3) before concluding with some observations on how public-private interaction impacts on or transforms the public-private distinction (Section 2.3.4).

2.3.1 *Transnational Private Regulation*

In earlier work, the concept of transnational private regulation has been said to capture 'the idea of governance regimes which take the form of "coalitions of non-state actors which codify, monitor, and in some cases certify firms' compliance with labor, environmental, human rights or other standards of accountability". They are transnational, rather than international, in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties. They are non-state (or private, as we prefer) in the sense that key actors in such regimes include both civil society or nongovernmental organisations (NGOs) and firms (both individually and in associations)'.[16] TPR is cast in private law forms and instruments such as regulatory contracts, codes of conduct, guidelines and internal regulations, all of which are characterised by voluntariness; in addition, TPR has its own governance, regulatory and enforcement processes, which are subject to only limited judicial review.

[16] Scott, Cafaggi & Senden (2011).

It must be stressed, though, that TPR is a heterogeneous phenomenon that is very context-dependent. It may thus emerge within the framework of a multilevel, multiactor regulatory and enforcement system featuring numerous international, regional and national – both public and private – regimes, such as in the area of civil aviation. In other areas such as data protection, public international law regimes may still be absent while there are various regional (including EU) and national public law regimes as well as private corporate rule systems. One can also identify different drivers behind TPR, such as the harmonization of (technical) standards, the need for regulating market entry, cost reduction, risk management, safeguarding fundamental rights and the monitoring of compliance.[17] As such, TPR may also occur at different stages of the policy cycle; rule-making, implementation, monitoring and enforcement. So, when using the concept of a transnational private regulatory regime, it must be understood that the meaning of 'regulatory' goes beyond rule-making, and may refer to any of these stages. Very importantly also, while 'private' in this concept denotes the fact that the role of private actors is key in such regimes, it must be understood at the same time that most TPR regimes are of a hybrid public-private nature and therefore interact with public regulation and regulators in one way or another.

The question that interests us here is: Can these different forms of interaction be explained in terms of a mutually reinforcing interaction that contributes to achieving the set policy goals and the solution of identified problems, or are they functioning rather as an alternative to public regulation or in a competitive way? Or, what may this combination of regulatory instruments and actors that is advocated by a smart-mixes approach actually entail; what forms can 'complementarity' take? This enquiry could start from different interaction mechanisms: comparison (and benchmarking); collaboration; coercion; conceptual interaction; cognitive interaction; and also competition.[18] Here, however, we will not look through these specific lenses, but rather start from the different levels at which interactions occur: the vertical interaction level (between public and private actors/regulation) and the horizontal interaction level (between private actors/regulation). In doing so, our main focus will be on vertical complementarity, identifying the formal and informal connections that may exist between public and private actors and regulation at the various stages of the policy cycle, so we are considering not only rule-making, but also its implementation, monitoring and enforcement. In doing so, manifestations of the aforementioned mechanisms will come to the fore as well. The case studies on TPR that I will be drawing on concern primarily 1) Binding Corporate Rules (BCR) in the area of data protection, 2) a number of private regulatory regimes that have been established to secure the compliance of private security companies with fundamental rights, 3) several private regulatory regimes to secure the safety of civil

[17] Cafaggi (2014).
[18] On such mechanisms, see e.g. Eberlein et al. (2012) and Gulbrandsen (2014).

aviation[19] and 4) the technical standardization regime within the context of EU internal market legislation. The analysis of these case studies has revealed that public and private regulators complement each other in many ways on the vertical and horizontal levels and that this complementarity can take different forms, depending on the prevailing institutional, market and legal landscapes in a certain domain or policy area.[20]

2.3.2 *Vertical Complementarity*

The analysis of these case studies reveals that there are different dynamics at play in the regulatory space between private and public organisations and that we can distinguish between three different situations of vertical complementarity, depending on who takes the lead in the initiation or development of a regulatory regime. These are: the public regulator bringing in the private regulator; the private regulator bringing in the public regulator; or the case of a mixed public-private initiative in which neither of them is clearly in the driver's seat.

Looking first more closely at the *public-to-private axis*, this refers in particular to cases where complementarity comes about by way of public regulators involving private actors or regulation in public regulatory processes or by setting rules for private regulation through co-regulation or conditioned self-regulation mechanisms. Co-regulation is a term that is used to refer to a 'whole spectrum of regulatory set-ups between the two extremes of pure self-regulation and pure state regulation'.[21] Again, this involvement may occur at the various stages of the policy cycle. The nature of the public involvement may also differ, from being formally mandated to being merely informally supported. The intensity of public involvement may also vary, from setting out a detailed legal or sanctioning framework to (much) lighter forms of public involvement.[22]

The corporate rules that may be adopted in the area of EU data protection provide an interesting example of conditioned self-regulation. The newly adopted General Data Protection Regulation[23] does not so much mandate the adoption of such rules as it allows for their lawful establishment and even for their binding nature. It thus defines 'binding corporate rules' (BCR) as 'personal data protection

[19] As ensued from the HiiL project that was mentioned in Footnote 3 in this chapter. Furthermore, account will be taken of recent research in the area of technical standardisation in EU internal market law.

[20] Cf. also Cafaggi (2014).

[21] Heremans (2012), at 81–82. See also: Maxwell (2014), at 67.

[22] See in more detail, Senden et al. (2015), at 35–36, available at: https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/dae-library/mapping_self-and_co-regulation_in_the_eu_context_0.pdf.

[23] Regulation EU 2016/679 of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016, L 119/1 which will apply as from 25 May 2018.

policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity'.[24] In particular, the Regulation makes it legally possible for a controller or processor to transfer personal data to a third country or an international organisation on the basis of BCR, as it considers that BCR may provide appropriate safeguards and effective legal remedies for data subjects as long as these comply with the conditions set out for this in the Regulation. The Regulation's Article 47 thus prescribes the binding nature of BCR, the substantive and legal protection requirements they need to fulfil, the procedures for their approval by national data protection authorities and mechanisms for securing compliance and enforcement. So, while the adoption of BCR is voluntary in itself, the process of their adoption, their compliance and effects is regulated top-down by EU law, in effect transforming them into legally binding rules.

Yet, public regulators may also formally delegate regulatory powers to private bodies or confer a regulatory mandate upon them. This occurs, for instance, in the area of technical standard-setting – private regulators being made responsible for providing technical standards that specify the principles defined by the public organisation. Exemplary in this respect is the case of the 'New Approach' to technical harmonisation and standards within the framework of EU internal market legislation.[25] As a result of its introduction, harmonisation in EU directives can be limited to establishing essential safety requirements, the development of technical specifications being left to specific private European standardisation organisations (ESOs).[26] While such specifications are formally of a nonbinding, voluntary nature, Member States are obliged to presume that products 'manufactured in conformity with harmonized standards ... conform to the "essential requirements" established by the Directive' and thus to allow them to have market access.[27] Harmonised standards are those standards that the European Commission has mandated,[28] and which are to be adopted following a specific procedure which entails the Commission's assessment of whether the harmonised standards comply with its initial request and the requirements contained in the corresponding EU harmonisation legislation. If so, they will be officially published. The EU also contributes to the financing of these standards to ensure that they are developed and revised in support of the

[24] GDPR, Article 4(20).
[25] This account draws on Senden (2017).
[26] More elaborately, Joerges, Schepel & Vos (1999), at 7.
[27] Council Resolution of 7 May 1985 on a new approach, OJ 1985, C136/1. See e.g. Pelkmans (1987) and Joerges, Schepel & Vos (1999) and the latest revision of its legal framework: Regulation 1025/2012, OJ 2012, L 316/12.
[28] The number of which has now increased to some 20 percent of all European standards. See Commission Communication 'A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020', COM 2011/311 final.

objectives, legislation and policies of the Union.[29] While such a harmonised standard is formally still a piece of private regulation adopted by a private organisation, it is at the same time a top-down highly conditioned, supervised and recognised form of private regulation. Recently, this has led the Court of Justice of the EU to conclude that these harmonised standards 'form part of EU law' and that they are 'necessary implementation measures' of an act of EU law.[30] Harmonised standards must also be considered as having legal effects, regardless of the fact that they are only of a voluntary nature, as compliance with the Directive's essential requirements may be evidenced by other means as well.[31]

Another example in the transnational domain concerns the interaction in regulating safety in civil aviation between ICAO (the public International Civil Aviation Organization, established in 1944) and IATA (the private International Air Transport Association, established in 1945).[32] While ICAO has set so-called Standards and Recommended Practices (SARPS) in different fields and developed a global aviation safety programme and an audit and oversight mechanism (USOAP), IATA has also set numerous standards as well as the IATA Operational Safety Audit (IOSA). In the development of these regulatory regimes, we can identify different types of dynamics. ICAO thus incited the establishment of the multi-stakeholder International Safety Strategy Group, including IATA, its stated aim being to move beyond an adversarial relationship between government and industry and to provide a common frame of reference for all stakeholders involved; states, regulatory authorities, airline and airport operators, aircraft manufacturers, pilot associations, safety organisations and air traffic control service providers.[33] As such, it was to develop a global safety strategy which was concluded in the form of the Global Aviation Safety Roadmap. ICAO then aligned its own global aviation safety programme to this Roadmap. When it comes specifically to the relations of ICAO with technical standardisation bodies, it is stated in one of its resolutions[34] that 'in the development of SARPs, procedures and guidance material, ICAO should utilize, to the maximum extent appropriate and subject to the adequacy of a verification and validation process, the work of other recognized standards-making organizations. Where deemed appropriate by the Council, material developed by these other standards-making organizations should be referenced in ICAO documentation'. There is thus no question of mandating private organisations in this regard, but there is clearly the possibility of incorporating such standards into own regulations. This appears just one form of the

[29] See recitals 38 and 39 of the Regulation and Articles 15–19.
[30] Case C-613/14, Elliott, ECLI:EU:C:2016:821, paras. 40–43.
[31] Ibid., paras. 42–43.
[32] Now with 280 airline members, representing 83 percent of total air traffic. See www.iata.org/Pages/default.aspx, last accessed 12 February 2018.
[33] Global Aviation Safety Roadmap, at 4; see https://flightsafety.org/files/roadmap1.pdf, last accessed 12 February 2016.
[34] Appendix A to Assembly Resolution A35–14.

public endorsement of private regulation. As regards IATA's Dangerous Goods Regulation, one can thus note ICAO's administrative approval thereof, as it recognised it as the field guide for the application of its own rules in this field.[35] One can even witness the legislative endorsement or codification of private regulation, such as in the case of the EU Regulation[36] and the CITES Convention referring to the IATA Live Animals Regulations as the applicable legal standard to follow for the transport of live animals by aircraft. Another impact we can see concerns the reference in (domestic and EU) law to the IOSA audit standards that IATA has set, as a compliance criterion that aircraft have to meet before being allowed to enter (domestic and EU) airspace.

These examples show the different ways in which the public regulator may decide to bring private regulation into its own realm and therewith even decide to give it public law effects or effects akin to that. But the dynamics also go the other way round. The *private-to-public axis* thus refers to cases where complementarity comes about as a result of the private regulator itself taking the lead in determining the core standards and requirements of the regulatory regime and bringing in the public regulator or regulation in one way or another in this process. Here the area of civil aviation is again highly illustrative when it comes to the many forms complementarity can take. IATA has clearly been a front-runner in the development of certain safety standards, such as the already-mentioned regulations for the transport of dangerous goods and of live animals. Especially when it comes to the development of the dangerous goods regulations over time, the interaction between IATA and ICAO shows an interesting picture. One could say that initially private regulation in this area emerged for gap-filling reasons, as ICAO was not taking any action and that next there was some regulatory competition between IATA and ICAO in this field, while then moving to a situation of regulatory cooperation and coordination, before ICAO approved IATA's rules as the applicable field guide. In a similar vein, the International Business Aviation Council (IBAC) has engaged in standard-setting because of the need for sector-specific standards, the International Standard for Business Aircraft Operations (IS-BAO) being an example of this. IBAC worked closely with ICAO to achieve international standardisation under the ICAO umbrella and the standards thus incorporated in the IS-BAO were already contained in ICAO standards but were partially rewritten in consultation with IBAC before being incorporated into the IS-BAO. This reflects the fact that the IBAC operates in a manner in which public and private regulatory processes influence and nudge one another on a mutual basis. IATA has also collaborated on a voluntary basis with ICAO to produce a Guide on Fatigue Risk Management Systems, which is linked to the ICAO SARPs on fatigue management. As such, it aims first and foremost to

[35] Senden (2013).

[36] Council Regulation 1/2005 on the protection of animals during transport and related operations, OJ 2005, L3/1, Annex I, chapter 2, point 4.1.

provide air operators with information as to how a fatigue risk management system can be put in place that would ensure an appropriate implementation of the public law SARPs. So, here IATA is also providing more implementing types of measures of public law standards. Furthermore, the approximately 900 IOSA audit standards and recommended practices have been derived from all relevant ICAO standards, as well as from regulations of the European Aviation Safety Authority.

Yet, it must also be noted that complementarity originating in the private-to-public axis may have a different bearing, in the sense that private regulation emerges because of the gaps left by the public regulator and without the public regulator or regulation being involved at all in the private regulatory process. The area of private security companies is a more general example of this. In such cases the private regulation complements the public regulatory framework because it has been incited by the very absence of public standards, thus serving the purpose of gap filling. Sometimes, public law standards are then incorporated in the private regulatory regime or reference is made to public law standards. The latter has occurred, for instance, in the case of the Voluntary Principles which have been referred to in TPR in the field of private security companies. So, in these cases there is no question of public law setting top-down rules that need to be complied with in private regulation with a view to securing market access or any other public policy goal, but of public law standards having 'filtered through' to the private regulatory regime on a voluntary basis via incorporation, reference or as a source of inspiration.

The *mixed public-private axis* concerns in particular those cases where the initiative for a regulatory regime cannot be clearly located with the public or private regulator, but where this can rather be seen as a joint public-private initiative. Sometimes such an initiative is geared not so much towards the development of new standards or rules as it is towards establishing institutional cooperation for a better implementation and compliance with both public and private standards. These initiatives are geared towards enhancing consistent and integrated approaches, reducing overlap and the duplication of efforts. Such complementarity gets its shape in particular through bringing about more structural and institutionalised forms of cooperation through the conclusion of memoranda of cooperation and understanding and through having observer status or participating in another way in each other's committees, working groups etc. The area of safety in civil aviation again provides interesting examples of this, including the Memoranda between ICAO and IATA in relation to training programmes for young professionals; for the sharing of information, also in relation to their respective audit programmes (IOSA and USOAP); and the setting of joint standards for assessing accident rates.[37]

[37] Assessing the accident rate in global civil aviation requires, amongst other things, common taxonomies and definitions for what actually constitutes an aviation accident and in incident reporting systems.

2.3.3 *Horizontal Complementarity*

One can also distinguish between different forms of horizontal complementarity. These concern a reference by private regulators to other private standards or even the adoption, incorporation or recognition of other private standards, as well as the joint development of private standards. When it comes to a reference to other private standards, the BASR standard developed by the Flight Safety Foundation, which refers to IATA's Dangerous Goods Regulation, can be mentioned. The adoption or incorporation of other private standards goes a step further, with the IOSA standard of IATA – which gleaned materials from several standardisation bodies, including ISO, SAE and ANSI – providing an example. The already mentioned IS-BAO standard has been granted official recognition by the European Committee for Standardization (CEN) in the form of a CEN Workshop Agreement. The Global Aviation Safety Roadmap presents an example of the joint development of standards; as mentioned previously, it was developed jointly by the Industry Safety Strategy Group, which comprises a number of international private organisations and companies: IATA, Airbus, Boeing, ACI, CANSO, the FSF and IFALPA.

Such horizontal complementarity seems to be more present and also likely to occur in areas where private regulation does not come about in a top-down regulated framework. Private regulation in the areas of private security companies and, most visibly, civil aviation has developed in a more bottom-up way and both areas show horizontal complementarity, albeit to varying degrees. One explanation for this may be that safety regulation in this area has developed over a very long period of time, and as a result is highly regulated both on the public and private level, and in both normative and technical terms. This has also added to the need for alignment between private regulators and regulation. Furthermore, the private standard-setting within the area of civil aviation takes place within the framework of private organisations that are of a permanent and representative nature. As such, they not only have a certain institutional stability but also have gained a certain reputation over time. In comparison, in the area of private security companies such frameworks are (still) very much lacking and the private standard-setting activity itself is still at a very embryonic level.

2.3.4 *Transforming the Public-Private Distinction*

Concluding this section, it can be noted that, in terms of actors, processes, instruments and effects, TPR clearly differs from public hard law regulation. Yet, we have also seen that while the distinction between public and private actors remains relevant, the distinction between public and private instruments may become blurred; while private standards and rule-making subscribe to a voluntary approach

in a way that is similar in character to soft public law,[38] meaning that in principle they will not have legally binding force in and of themselves, we have seen that they can certainly acquire legal effects, depending on their relationship with, and embedment in, public law frameworks. The distinction between a public and private norm may thus lie foremost in the public or private nature of the adopting organisation, but no longer so much in the substance and legal effect of the norm itself. Whenever the public regulator decides to mandate the adoption of a private norm, refers, confirms or endorses it in its legislation, uses it as a yardstick in auditing and compliance procedures or in administrative approval procedures and so on, the dividing line between a public and a private norm becomes fluid. Not so surprisingly, this also evokes the question of whether or not such private regulation actually qualifies as law.[39] Yet, in other cases the mutual public and private regulatory impact is limited to being a source of inspiration or voluntary referencing, or to mere cooperation in standard-setting. We therefore conclude that public-private complementarity does not eliminate, but rather transforms, the public-private distinction.

2.4 ASSESSING AND SHAPING PUBLIC-PRIVATE COMPLEMENTARITY

The analysis in the previous Section 2.3.4 has already touched upon the relevance of the policy context for the development of the public-private relationship in regulation and enforcement. In this section, I will be reflecting somewhat more in depth on this context-dependency in the case studies, connecting this to the question of when, and in what ways, complementarity may actually contribute to the effectiveness of smart mixes (Section 2.3.1). Then other, more general contextual factors that may impact the shaping of effective smart mixes will be considered (Section 2.3.2), while finally looking at how the legitimacy concern and the law may constitute such a factor in and of itself (Section 2.3.3).

2.4.1 *The Contribution of Public-Private Complementarity to an Effective Smart Mix*

Taking a formal or procedural approach to effectiveness would mean that compliance with the set rules would already be considered as being effective.[40] Yet, what interests us is what the added value of public-private complementarity from a substantive perspective can be. Regulation would then be considered effective only when it had led to the achievement of the set policy goals, such as the alleviation or

[38] Cafaggi (2014).

[39] See Senden (2017) for a discussion of this as regards harmonised standards in EU internal market legislation and the mentioned Elliot case.

[40] Cf. the framing thereof as legal effectiveness in Chapter 1.

reversal of an environmental problem. An important question, then, is: What elements need to be part of a complementary public-private regulatory approach in order for it to be capable of providing such problem-solving effectiveness? Mechanisms ensuring compliance with the set rules may actually be a precondition for this, based on the presumption that the rules put into place could indeed contribute to solving the problem in question. So, in that sense, formal or legal effectiveness may also be a precondition for ensuring substantive or problem-solving effectiveness, even if this will not suffice in itself.

The following assessment elements have been identified in earlier research as being relevant to ensuring that private regulation can realise the policy goals for which it strives.[41] The first two elements relate to the extent to which private and public actors, substance-wise, are on the same page: Do private interests align with public policy objectives, and is there industry commitment and capacity to realise the set goals? Three other elements point to formal or procedural effectiveness mechanisms: what are the means used to render the regulation effective (what is the design/governance of the TPR and according to what impact/performance indicators are its effects measured); is there any form of government pressure and oversight; and are credible sanctioning policies provided for? In themselves, these elements already show that there is a presumption that a certain level of public-private complementarity of a TPR regime will add to ensuring its effectiveness. As such, they can also be considered to be key issues that need to be addressed with a view to designing smart regulatory mixes. In the following text we will reflect on how these elements may have come to the fore in the development of TPR in the areas considered in this chapter – data protection, civil aviation and private security companies – by looking deeper into the drivers behind these TPR regimes and into why a certain interaction with the public regulation level has occurred.

In the area of data protection, the importance that is given to data protection as a fundamental right in the European context has led to a strong role for the European legislature, which has established a regulatory framework for this particular purpose. Thus, the starting point here has been the existing public regulatory framework, and it is only because European legislation has fallen short in adequately dealing with the problem of data protection beyond EU borders that BCR are seen as an adequate tool to fill gaps in this protection and, in a way, to complement public regulation.[42] Under the new EU Regulation, BCR are seen as an adequate basis for the transfer of data, but a strong public regulatory framework is still considered necessary to ensuring a high level of protection, and BCR should be given shape within the boundaries set by this public law framework. This highly conditioned self-regulation presumes great alignment between EU policy and corporate goals, as

[41] Within the framework of the HiiL-project mentioned in Footnote 3, this chapter.
[42] Moerel (2012).

well as significant corporate investment in complying with the public regulatory framework. It also goes along with stronger public oversight mechanisms, as national data protection supervisors have to ensure compliance.

In the area of private security companies, there is an at least equal, if not higher, need for fundamental rights protection because people's lives may actually be at stake. The main problem here lies in the fact that private security companies engage in security activities that traditionally were within the exclusive competence of public authorities, such as the police force. While fundamental rights conventions and rules do apply to such public bodies, they do not in and of themselves apply to private bodies like private security companies. Moreover, so far no specific international public regulatory framework has been developed with a view to regulating private security companies from the human rights perspective. So, the focus of the various TPR regimes in this field has essentially been on providing a regulatory framework in the first place, by 'translating' public human rights standards to this new private sphere and tailoring them to the activities of private security companies. As such, these regimes are primarily geared towards filling the gap that public regulation leaves. While one could thus consider the private regimes in this domain to complement existing public rules, which are limited in their application to public bodies, one must also observe here that the level of vertical complementarity is still limited. Industry commitment and capacity, as well as the alignment of the public and private interests of these regimes, are still problematic; in addition, government pressure and oversight are limited for the reasons previously explained. This is also reflected in the overall effectiveness of these regimes, which is still limited, and the free rider problem, or the way in which private security companies that are caught infringing on fundamental rights can rather easily disappear and start a new business elsewhere.

A similar interest is at stake in the area of civil aviation, as ensuring aviation safety involves an extensive duty of care for all public and private parties concerned; if this is not taken seriously enough, the consequences for passengers can be grave. For airlines and other responsible actors, it is difficult to cover up negligent behaviour by simply disappearing and starting a new business as a private security company can. One could say that because of the fewer possibilities of free rider behaviour, and the potentially high implications for reputation and business in case of accidents and incidents, there is a huge incentive to work towards the same goal with other relevant actors – both public and private. The private and public interest in securing safe air traffic are therefore very much aligned, and one can also say that there is a high industry commitment to this. In that sense, it comes as no surprise that this sector has already been quite highly regulated for many years. So in contrast to the area of private security companies, the area of civil aviation demonstrates a multitude of public and private regulatory actors on all levels (national, regional and global) that have been engaged in dealing with and regulating the manifold safety

and security aspects of civil aviation since its very inception. This very multitude of actors can also be seen as an explanatory factor for the more diversified interaction between the public and private levels. An important distinction with the areas of data protection and private security companies is that civil aviation not only has a longer history of national regulation, but also has one leading international public law organisation in the field – ICAO – that has been engaged in setting global safety and security standards since the 1950s. Many private organisations, including IATA, have been established out of a desire to influence the standard-making process within that public organisation. As we have already seen, this desire – but also the desire for one's own private regulation and enforcement in this sector – has been incited by the fragmentation, gaps (e.g. de-icing standards) and (low) level (DGR) of public standard-setting, the need for sector-specific standards such as for business aircraft (IS-BAO) and the deficiencies in public compliance/enforcement which, for example, led IATA to set up its own auditing system (IOSA). Another benefit of private regulation is considered to be that it is geared directly towards private, industry actors and is not dependent upon implementation by states. This has provided a platform for not only for developing more *ad hoc* and structural forms of both vertical and horizontal complementarity, but also for building vertical institutional cooperation, which has enhanced inter alia the development of complementary safety strategies and the exchange of information. The alignment of public and private audit standards, and their application in ensuring compliance with the set safety standards, is also a very strong feature of this public-private complementarity. The drivers for actively engaging in building such a public-private partnership are stronger when there is a huge common interest on the part of both the private sector and public government, such as where there is a joint duty of care and high reputational risk at stake. Looking at the ever-decreasing accident rate in the ever-increasing air traffic, this complementarity can be considered to have contributed to the set policy goal of ensuring a high level of safety in civil aviation.[43]

On a final note, empirical research has also shown that transnational private standards are often stricter than public standards. Public regulatory regimes are considered to establish minimum mandatory standards; private regulatory regimes often adopt stricter standards or focus more on implementation and compliance monitoring. Such a relationship implies that the public standard, where it exists, constitutes the common basis, which may lead to regulatory competition between private actors proposing stricter standards as has been the case, for instance, in food safety regimes. Public standards define a floor and private standards go beyond, adding requirements or calling for more rigorous compliance programmes.[44] Codes of conduct and guidelines often include rules that explicitly demand compliance

[43] See https://aviation-safety.net/statistics/, last accessed 12 February 2018.
[44] Cafaggi (2014).

with international and domestic laws. Such TPR topping up of public standards may also be considered to add to the effectiveness of the overall regulatory framework.

2.4.2 *Contextual Factors Impacting on Shaping Effective Public-Private Complementarity*

Accepting or adopting public-private complementarity as a means or strategy to create an effective smart mix with a view to the realisation of certain policy goals is just one side of the coin. The other side of the coin is that such a proactive design policy has to take due account of a number of contextual factors that will impact on and/or limit such a policy. While it is thus submitted in the literature that 'different instruments involve varying degrees of effectiveness, efficiency, equity, legitimacy, and partisan support' and that 'some instruments will be more effective in carrying out a policy in some contexts than another',[45] it is also considered that 'policy instruments are rarely selected on the basis of their implementability and effectiveness. Different policy fields tend to show preferences for their own "favourite" types of policy instruments and use these repeatedly regardless of their actual contribution to problem solving'.[46] It is thus necessary to look somewhat more into the specific factors or variables that have been identified as having a bearing on instrumental choice. These can be located at the macro, meso and micro levels of analysis.

2.4.2.1 The Macro Level

The macro level refers to the relevance of context at a higher, more general level, going beyond the individual realm (the micro level) and the specific policy domain (the meso level). It rather concerns factors which determine societal structures, processes and problems and their interrelationships. Such factors include, first of all, time and place; these are key elements in determining what may be seen as core values of a state or other type of community, both at a given point in time and in a specific place. For example, while the efficient use of financial resources may be highly valued in times of economic crisis and budgetary constraints, this may be considered less important in prosperous times. Likewise, differences in place may refer to a different perception or assessment of the importance of certain values and the legitimacy of certain instruments because of different cultural norms and institutional or political arrangements (e.g. liberal democracies and more conservative regimes) in different locations and regions of the world.[47] Values like efficiency and

[45] Howlett (2004), at 5–6, with reference to Salamon & Lund (1989).
[46] Bressers & O'Toole Jr (1998), at 214.
[47] Howlett (2004), at 5–6.

legitimacy may thus be differently balanced because of such differences. Zooming in further on place as a relevant factor, there is the importance of the general economic, social and political context thereof, in which some combinations of instruments may work well in one context but not in another. Political culture, national policy styles, social divides, organisational structures of the decision-maker, networks and agencies are all issues that are considered to have an important impact on both instrument selection and policy implementation. Preferences of state decision-makers, and the nature of the constraints within which they operate, are thus understood to be highly relevant determinants for the choice of policy instruments.[48] This also includes political calculations, which may vary from electoral advantage, policy learning, past precedents and the ideological preferences of state and societal actors.[49] Howlett also found on the basis of existing studies of instrument choice that these take 'great care to observe sectoral nuances in instrument choice but still indicate that there are different national propensities to favour certain instruments in "normal" circumstances – a clear indication of the existence of national policy styles'.[50] Also important is that the preservation of the balance of power has been emphasised in the literature as a relevant choice determining factor. Majone has thus argued that, because of the balance of power, the selection of different policy instruments has little impact on a policy's success. Instruments that could change this balance would probably not be selected to begin with, and using them in the implementation process would also occur only insofar as the balance of power allowed for this. In other words, the selected instruments would never pose a serious threat to the existing balance of power.[51]

2.4.2.2 The Meso Level

At the meso level, the specific policy/sectoral context is a determining factor. Importantly, instrument preferences are thus considered to be linked to relatively long-term aspects of the policy-making context. Howlett concludes in this regard that instruments are primarily chosen on the basis of the empirical situation on the ground in the sector or issue area concerned, in conjunction with the nature of the constraints and capacities of the applicable political regime. Since state capacities and societal targets, as factors that affect implementation styles, are rather long lasting, such styles and instrument choices can be expected to change infrequently.[52] Elements that have been said to have a bearing on instrumental choice at this level are 1) the clarity and unambiguous nature of the policy goals that are

[48] Howlett (2004), with reference to Bressers & O'Toole (1998).
[49] Howlett (1991), at 15.
[50] Ibid.
[51] Majone (1998), at 221.
[52] Howlett (2004), at 9.

set,[53] 2) costs and benefits and the extent to which these are known (information gaps) and 3) aspects of the social setting in a sector or policy domain, such as the network of actors involved or the nature of the networked relationship. Bressers and O'Toole have thus argued that 'in general, the more an instrument's characteristics help to maintain the existing features of the network, the more likely it is to be selected during the policy formation process' and that there is a process that results in instrument determination, rather than a particular actor who 'chooses'.[54] The analysis in Section 2.3 has also shown that it matters how such public/private networks may have developed over time, and the role the law may play in framing not only substantive rules in the field at issue but also the network cooperation. Another relevant element is considered to be the adaptive and responsive nature of policy instruments, given also the specific features and complexities of the policy/sectoral context and the uncertainties and risks involved.

2.4.2.3 The Micro Level

The micro level concerns the relevance of the personal context for instrumental choice. Individual perceptions and subjective values – key elements in instrumental choice – interact with organisational and systemic factors. Two relevant issues, therefore, are 1) how actors inside and outside governments view instruments and 2) who is involved in making choices about instruments. What criteria do those actors use to judge the suitability of instruments for addressing policy problems?[55] Clearly, behavioural aspects come into play here, giving rise to the important empirical question of whether decision-makers tend to choose the same instruments regardless of the problem at issue, or whether they select different instruments to match the given situation.[56] As Linder and Peters argue, favouring the same instruments across problem contexts suggests a strong link to the decision-maker's attributes and setting while, 'conversely, if choice varies systematically by problem situation, the setting then would exert its influence on choice not through how instruments are viewed but by the way problems are structured'.[57]

2.4.3 *The Law As a Factor Impacting on Effective Public-Private Complementarity*

In general, little attention is given to the role of the law in the various instrumental-choice/smart-mixes approaches as discussed in Section 2.1. Yet, the instrumental

[53] Ibid., at 5.
[54] Bressers & O'Toole (1998), at 220.
[55] Howlett (1991), at 15.
[56] Linder & Peters (1989), at 37–38.
[57] Ibid.

function of the law – if we see it as a tool to be used to steer towards certain goals – squares well with such approaches, as do important legal principles such as proportionality and subsidiarity and good governance principles such as consistency and coherence. At the same time, these approaches rather fail to take into account limits to instrumental choice ensuing from the guarantee function of the law, which concerns the realization and protection of certain values by the law. Such limits may thus concern not only fundamental and human rights and compliance with competition law rules, but also key elements of sound governance,[58] which include the democratic balancing of interests and the participatory nature of decision-making; a broad, diverse membership; balanced funding sources; a functional and legal separation of powers in standard-setting, monitoring and enforcement functions; and a high level of accountability and transparency in the activity of the regulatory regime in order to avoid regulatory capture by certain private actors. More specifically, while private regulation can be seen as the expression of contractual freedom and private autonomy, there is not only the risk that the self-interest of private actors may prevail in the regulatory, monitoring and enforcement process, but also that it may have *de iure* or *de facto* binding effects on third parties, without this relying on an electoral mandate or a decision-making process that ensures democratic legitimacy or accountability. This risk is higher in a monopolistic market, where it is not possible for the parties concerned to follow other rules.

For these reasons, it is therefore insufficient for a smart-mixes approach to achieve legitimacy solely on the basis of output, or how effectively it achieves the desired policy goals; it must also ensure procedural and input legitimacy. If private actors involved are given any normative power akin to that of public authorities, this exercise of power should meet constitutional requirements to ensure that all of the interests of all concerned stakeholders are taken into account. This becomes even more important when private regulation is actually difficult to distinguish from public regulation in its nature and effects.[59] Any evaluation of the effectiveness of TPR regimes thus has to incorporate legitimacy values as well as preconditions for effectiveness.[60] Otherwise, these regimes risk not achieving sufficient trust and credibility amongst those who are affected by, and who must apply, the set rules.[61]

Often the law plays a role in ensuring such values and imposing limits at the three levels identified in Sections 2.3.1, 2.3.2 and 2.3.3. At the systemic, macro level, one

[58] Cf. also the limits contained in instrument choice in the former EU Inter-Institutional Agreement on Better Lawmaking, OJ C 321, 31.12.2003, p. 1–5 and the current Better Regulation Toolbox of the European Commission, in particular its Tool 18 on the choice of policy instruments; accessible via https://ec.europa.eu/info/files/better-regulation-toolbox-18_en, last accessed 12 February 2018.

[59] Cf. also Curtin & Senden (2011).

[60] Cf. Cafaggi (2014) and Senden (2013).

[61] See e.g. Six & Verhoest (2017).

can thus witness within Western democracies – as these have evolved in the post-World War II era – an increasing emphasis on fundamental rights protection in international, regional (e.g. EU) and national legal frameworks. In addition, however, market organisation principles such as those contained in national and regional competition laws, consumer protection laws and environmental laws are gaining in relevance in instrument choice and in framing public-private complementarity. At the meso level, relating to the specific policy contexts, similar legal constraints ensuing from general principles of law but also from a particular body of national, regional and/or international public regulation that may have been put in place to deal with a certain problem may impose themselves. The legislator may also have already devised a certain enforcement strategy that ties the hands of supervision and enforcing agencies. In this respect, it has also already been seen that the law may play a very important role in shaping the interaction and complementarity between the public and the private regulatory and enforcement level, not only by setting a legal framework and conditions for the use of TPR but also by giving it certain effects. As seen, the public endorsement of private regulation may thus take the form of ex post facto administrative approval, policy alignment or legislative endorsement, as well as incorporation in public standards or in monitoring/compliance processes. Such forms of complementarity may actually in themselves add to both the legitimacy and effectiveness of TPR, as they demonstrate an acceptance of the exercise of regulatory authority by the private regulator and therewith a certain level of trust in the private body as a source of regulation on the part of the public regulator or enforcer.[62]

In the context of the EU, the applicable legal framework of the various policy sectors is also a highly relevant factor, as the EU is constrained by the principle of conferred powers. The EU may only take regulatory action if it is so empowered by the European Treaties, and the powers attributed to the EU also differ in various policy domains in the sense that they can be of an exclusive or shared legislative nature or merely of a supporting and policy-coordinating nature.[63] Clearly, this also determines to a significant degree the instruments by which it may operate, not only in the internal EU sphere but also in the external sphere, e.g. to tackle global problems like climate change.[64] The attributed powers have to be exercised in conformity with the legal basis provisions in the Treaties from which they ensue, which also underscores the relevance of how the actors involved in the decision-making process actually interpret these competencies and determine how best to

[62] Van der Voort (2017).

[63] See Articles 5(1) and (2) Treaty on European Union and Articles 2–6 of the Treaty on the Functioning of the EU.

[64] It must also be noted that the set of EU instruments is itself already limited as it is very much constructed as an 'integration through law' approach and, for instance, the EU has limited economic/financial instruments at its disposal to steer towards certain policy goals.

implement them. But here one can also refer to the relevance of observation by Majone, quoted in Section 2.4.2.1, that the instrumental choices that will be made will not seriously upset the balance of power which actually underlies the framing of competences in the Treaties.

2.5 CONCLUDING REMARKS

The focus of this chapter has been on considering what vertical, public-private complementarity entails and what factors impact on its 'smartness'. Considering examples of different policy domains and sectors, we have seen that there may be many different connections – both formal and informal – between public and private actors and regulation at the various stages of the policy cycle, including rule-making, implementation, monitoring and enforcement. Therefore, these may come about as a result of rather top-down conditioned co-regulatory processes, but also in a more bottom-up, interactive dynamic process of coordination, cooperation and voluntary confirmation, or even the codification of private regulation in public regulatory frameworks. Such dynamics clearly reveal a certain alignment of private and public interests, which has been seen to contribute to the realisation of a smart mix and therewith to effective problem-solving and the realisation of the set policy goal. This effectiveness has been put centre stage in many theoretical smart-mix approaches. Yet, this chapter has also sought to demonstrate that the achievement of a truly effective public-private smart mix requires consideration of a broader array of factors, which go beyond the specific features of the policy domain or sector at issue in the here and now (the meso level). These concern not only individual, behavioural aspects and patterns that have a bearing on instrumental choice (the micro level), but also systemic (i.e. political, economic and social) features of a community or state – including its adherence to certain values and principles (the macro level) – which may vary both in time and place.

At all of these levels, the law comes in as an important factor for ensuring a smart public-private mix, both as an instrumental steering mechanism in itself and as a substantive yardstick by providing constitutional guarantees. A smart mix requires constitutional guarantees with a view to ensuring not only its output legitimacy but also its input legitimacy. Output legitimacy in the sense of problem-solving effectiveness and the realization of policy goals – such as consumer protection and climate protection – may be enhanced by ensuring that the interests of all stakeholders are considered and all parties are involved in the decision-making process, thereby enhancing their support for the set rules. As such, the move towards better solutions for prevailing problems from a smart-mixes perspective must include a broad understanding of legitimacy as an indispensable variable and thus also more consideration of the role of the law; in its guarantee function it constitutes an important factor in conditioning the behaviour and actions of those involved in

the regulatory and enforcement process on the basis of core values that underlie any particular system at a given point in time and that are expressed in the law as fundamental rights and principles. This is the case regardless of whether a smart-mixes approach comes about as a result of intentional design or as a result of some dynamic process. In the latter case, it may need adjustment or improvement from a legitimacy perspective to actually enhance the effectiveness of a smart mixes approach.

REFERENCES

Ayres, I. & Braithwaite, J. 1992. *Responsive Regulation. Transcending the Deregulation Debate*. Oxford, Oxford University Press.

1994. *Responsive Regulation. Transcending the Deregulation Debate*. Oxford, Oxford University Press.

Baldwin, R. & Black, J. 2008. 'Really Responsive Regulation'. *Modern Law Review* 71(1), 59–94.

Bressers, H. Th. A. & O'Toole, L. J., Jr. 1998. 'The Selection of Policy Instruments: A Network-Based Perspective'. *Journal of Public Policy* 18(3), 213–239.

Cafaggi, F. 2014. 'A Comparative Study Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement', EUI Working Papers, 2014/12015 http://cadmus.eui.eu/bitstream/handle/1814/33591/LAW_2014_15.pdf?sequence=1/handle/1814/16526, www.eesc.europa.eu/resources/docs/a-comparative-analysis-of-transnational-private-regulation-fcafaggi_12062014.pdf.

Curtin, D. & Senden, L. A. J. 2011. 'Public Accountability of Transnational Private Regulation; Chimera or Reality?'. *Journal of Law and Society* 38(1), 163–188.

Eberlein, B., Abbott, K. W., Black, J. & Meidinger, E. 2012. 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis', *Comparative Research in Law & Political Economy*, Research Paper No. 29, 2012, available at: http://digitalcommons.osgoode.yorku.ca/clpe/33.

Gulbrandsen, L. 2014. 'Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs'. *Regulation & Governance* 8 (1), 74–92.

Gunningham, N. & Sinclair, D. 1999. 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection'. *Law & Policy* 21(1), 49–76.

Gunningham, N., Grabosky, P. & Sinclair, D. 'Smart Regulation'. 2017. In Drahos, P. (ed.), *Regulatory Theory, Foundations and Applications*, Canberra, Australian National University Press, 133–149.

1998. *Smart Regulation, Designing Environmental Policy*. Oxford socio-legal studies. Oxford, Oxford University Press.

Heremans, T. 2012. *Professional Services in the EU Internal Market – Quality Regulation and Self-Regulation*. Oxford, Hart Publishing.

Howlett, M. 1991. 'Policy Instruments, Policy Styles, and Policy Implementation: National Approaches to Theories of Instrument Choice'. *Policy Studies Journal* 19(2), 1–21.

2004. 'Beyond Good and Evil in Policy Implementation: Instrument Mixes, Implementation Styles, and Second Generation Theories of Policy Instrument Choice'. *Policy & Society: Journal of public, foreign and global policy* 23(2), 1–17.

Howlett, M. & Rayner, J. 2004. '(Not so) "Smart Regulation"? Canadian Shellfish Aquaculture Policy and the Evolution of Instrument Choice for Industrial Development'. *Marine Policy* 28, 171–184.

Joerges, Ch., Schepel, H. & Vos, E. 1999. 'The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardization under the "New Approach"', *EU Working Paper LAW*, No. 99/9.

Linder, S. H. & Peters, B. G. 1989. 'Instruments of Government: Perceptions and Contexts'. *Journal of Public Policy* 9(1), 35–58.

Majone, G. 1976. 'Choice among Policy Instruments for Pollution Control'. *Policy Analysis* 2, 589–613

Maxwell, W. J. 2014. 'Global Privacy Governance: A Comparison of Regulatory Models in the US and Europe, and the Emergence of Accountability as a Global Norm'. In Dartiguepeyrou, C. (ed.), *Cahier de Prospective. The Future of Privacy*. Paris, Foundation Telecom, 63–70.

Moerel, L. 2012. *Binding Corporate Rules, Corporate Self-Regulation of Global Data Transfers*. Oxford, Oxford University Press.

NWO. 2013. *Smart Governance. Part of the Social Infrastructure Agenda*, The Hague, NWO.

Pelkmans, J. 1987. 'The New Approach to Technical Harmonization and Standardization'. *Journal of Common Market Studies* 25(3), 249–269.

Salamon, L. M. & Lund, M. S. 1989. *Beyond Privatization: The Tools of Government Action*. Washington, D.C., Urban Institute Press.

Scott, C., Cafaggi, F. & Senden, L. 2011. 'Conceptual and Constitutional Challenges of Transnational Private Regulation'. *Journal of Law and Society* 38(1), 1–19.

Senden, L. A. J. 2013. *Transnational private regulation in the area of human rights*, Unitreport, available at: http://renforce.rebo.uu.nl/bouwsteenprojecten/private-actoren/.

2017. 'The Constitutional Fit of European Standardisation Put to the Test'. *Legal Issues of Economic Integration* 44(4), 337–352.

Senden, L. A. J., Kica, E., Hiemstra, M. & Klinger, K. 2015. *Mapping Self- and Co-regulation Approaches in the EU-context*, explorative study for the European Commission, DG Connect, available at: https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/dae-library/mapping_self-and_co-regulation_in_the_eu_context_0.pdf.

Six, F. & Verhoest, K. 2017. 'Trust in Regulatory Regimes: Scoping the Field'. In Six, F. & Verhoest, K. (eds.), *Trust in Regulatory Regimes*. Cheltenham, Edward Elgar, 1–36.

Van der Voort, H. 2017. 'Trust and Cooperation over the Public-Private Divide: An Empirical Study on Trust Evolving in Co-regulation'. In Six, F. & Verhoest, K. (eds.), *Trust in Regulatory Regimes*. Cheltenham, Edward Elgar, 181–204.

Van Gossum, P., Arts, B. & Verheyen, K. 2012. '"Smart regulation": Can policy instrument design solve forest policy aims of forest expansion and sustainability in Flanders and the Netherlands'. *Forest Policy and Economics* 16, 23–34, available at: http://dx.doi.org/10.1016/j.forpol.2009.08.010.

Voermans, W. 'Legislation and Regulation'. 2017. In Karpen, U. & Xanthaki, H. (eds.), *Legislation in Europe. A Comprehensive Guide to Scholars and Practitioners*. Portland, Hart Publishing, 17–32.

Walker, W. E., Rahman, S. A. & Cave, J. 2001. 'Adaptive Policies, Policy Analysis, and Policy-Making'. *European Journal of Operational Research* 128, 282–289.

Wiener, J. B. & Richman, B. D. 2010. 'Mechanism Choice'. In Farber, D. A & O'Connell, A. J. (eds.), *Research Handbook on Public Choice and Public Law*. Northampton, Edward Elgar, 363–396.