

# Non-Judicial Enforcement of Transnational Private Regulation

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## 1. Introduction

Transnational private regulation (TPR) is a phenomenon of growing significance across a wide range of policy domains, including the environment, food standards, labour rights and financial markets. Thinking about regulatory regimes generally, they are now conventionally described as comprising three distinct elements – some norms, rules or goals around which the regime is organised, feedback or monitoring mechanisms to detect deviations from the norms, and mechanisms for modifying behaviour which deviates (Hood, Rothstein et al. 2001). The making of both national and transnational private norms has received a significant amount of attention in the literature (eg (Hallström 2004; Schepel 2005)), but monitoring and enforcement have been relatively neglected. In this paper I ask to what extent the enforcement of TPR regimes is similar to or different from national public regimes of regulation and what effect do differences in enforcement have on the reach of regimes. Reach is perhaps narrower in one way because it is dependent on contracts in many instances (in contrast with generally applicable public law instruments), but more extensive in other ways because less restricted by jurisdictional boundaries. Weaknesses associated with the voluntary character of much TPR are likely to be more apparent than real in circumstances where participation in TPR, whether through adopting widely accepted technical standards or norms of Corporate Social Responsibility, or participating in associational codes, is a *de facto* condition of market participation. Given the ubiquity and significance of TPR in many sectors it is striking that the world of enforcement of private regulation is carried out in relative privacy and that this lack of transparency is liable to affect the credibility and legitimacy of regimes.

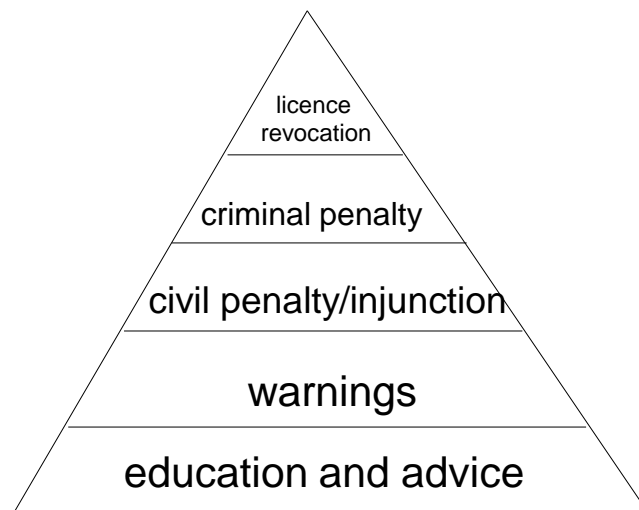
Some of the weaknesses, both of reach and legitimacy, associated with TPR regimes may be addressed in hybrid regimes involving public enforcement of transnational norms which are set privately, and the private transnational enforcement of public norms. Research on global business regulation suggests that there is frequently a significant gap between the generation of regulatory norms and their enforcement within global and transnational regimes. Expectations that globalized norms might and should be accompanied by global enforcement are both implausible and unnecessary. Self-regulatory and private mechanisms of enforcement are

significant both for the implementation of inter-governmental and governmental norms and for privately generated norms (Braithwaite and Drahos 2000: 10).

Whilst it is possible to draw analytical distinctions between public and private norms and enforcement I suggest that it may be more fruitful simply to think of multiple actors within regulatory regimes with a range of capacities and motivations (Hancher and Moran 1989). I am aware also that considerations of relationships between public and private activity are liable to play differently in different legal systems. In this chapter I start with a brier analysis of the nature of regulatory enforcement and its application to TPR regimes, and then go on to consider the varied nature of hybrid enforcement regimes.

## **2. Enforcement or Compliance?**

There are a number of schools of thought on the nature of regulatory enforcement. For some enforcement is about the formal processes through which agencies address infractions of regulatory rules which they discover through a variety of mechanisms including complaints, market surveillance and inspections. For others the puzzle of behavioural modification within regulatory regimes is about understanding how and why regulatees comply with regulatory rules, and the relationship of such compliance, broadly conceived, with a more limited set of enforcement practices (Parker 2000). In their classic work on *Responsive Regulation* Ayres and Braithwaite offer the enforcement pyramid model which seeks to link the two approaches, suggesting that the capacity for low level and non-coercive steering of behaviour is linked to the capacity to escalate up a sanctions pyramid through warnings and civil penalties through to more stringent sanctions such as criminal penalties and licence revocation (Ayres and Braithwaite 1992).



### **Example of an Enforcement Pyramid**

*Adapted from Ayres and Braithwaite 1992*

The enforcement pyramid model is derived from Braithwaite's earlier empirical research on regulatory enforcement (eg (Grabosky and Braithwaite 1986)). The strategy for deploying the enforcement pyramid is derived in part from a game theoretic approach which is capable of addressing the variety or orientations towards compliance exhibited by regulated forms. The analysis draws on the well known classification of regulatees in respect of compliance which basically combines assessments of motivation and capacity. Those who have both the motivation and the capacity to comply are fundamentally compliant, those with capacity but lacking motivation (unless it is made the most financially attractive path) are the 'amoral calculators, and the incompetents simply lack capacity and motivation is irrelevant. ((Kagan and Scholz 1984) but see also (Baldwin and Black 2008)). This analysis is conventionally deployed to understand the varied responses of businesses to regulatory requirements.

For firms which fundamentally seek to be compliant, education and advice, at the base of the pyramid, are liable to be sufficient to steer behaviour back to compliance. Infractions are treated as accidental and are corrected once notified. For the 'amoral calculators', the firms which seek to take the path towards maximising profit, the pyramidal approach suggests that enforcement activity should start at the base of the pyramid but with the credible capacity to escalate up the pyramid where compliance is not forthcoming. Once the enforcement approach is clear, enforcers should be 'contingently forgiving' and return to the base of the pyramid in the expectation that firms will understand the financial and reputational losses associated with criminal prosecution or licence revocation are more costly than complying (Ayres and

Braithwaite 1992). Such an approach is dependent on enforcers having available sufficiently stringent sanctions, and the capacity to use them, such that compliance at the base of the pyramid is the most profitable course of action for the firms (Gunningham and Grabosky 1998: 402). In many jurisdictions formal enforcement is time consuming and costly, and may involve uncertainty, for example over the stringency of penalties to be handed down by a court (or even over whether there is judicial agreement that an infraction has occurred). Where, for whatever reason, effective escalation up the enforcement pyramid is not possible, the capacity for 'speaking softly' is limited because there is no big stick to back it up (Ayres and Braithwaite 1992). A third class of regulatees is the incompetents with whom neither education and advice nor the threat of stringent enforcement is likely to yield compliance because the firms concerned lack the capacity to implement regulatory norms within their businesses. Unless such firms can be encouraged to develop implementation capacity the favoured enforcement approach is to seek their incapacitation through licence revocation or other equivalent measures such as compulsory administration or disqualification of directors.

The pyramidal approach to regulatory enforcement raises the important questions why some firms are fundamentally more compliant than others and what are the internal orientations and processes of firms which lead them not only towards compliance but also beyond compliance with regulatory requirements, in the sense that they may adopt and implement standards which exceed legal minima so as achieve better environmental or employee welfare outcomes (Gunningham and Sinclair 2002). For some firms the commitment to go beyond compliance is represented in internally developed codes of corporate social responsibility (Parker 2007), for others it is found in the membership of self-regulatory or other private regulatory regimes. Critically the motivations lying behind such initiatives are frequently not strongly connected to anxieties about formal enforcement, but rather are more concerned with addressing market processes affecting financial and/or reputational positioning of firms or the participation of firms within their wider community (Taylor 2005).

Set within this context the question of how behaviour is modified within regulatory regimes, whether private or public, is as much concerned with compliance as with enforcement. Accordingly a strict contrast drawn in the literature between authoritative centralised enforcement of public regulatory rules, on the one hand and non-authoritative private rules with limited capacity for enforcement on the other (Jacobsson and Andersson 2006: 258-259) appears to be wide of the mark. Enforcement of public and private rules is far from systematic, in each case contingent on a range of factors.

### **3. Private Non-Judicial Enforcement of TPR**

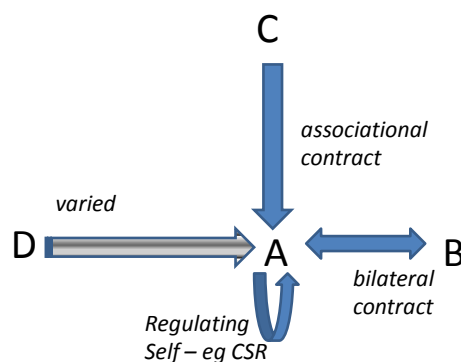
There is widespread recognition that transnational private regulation, to be considered regulation at all, must involve effective enforcement (Meidinger 2003: 252). But what constitutes effective enforcement? Much of the empirical research on regulatory enforcement generally suggests that the informal techniques of education, advice and warnings are central in many cases, but backed by the capacity for occasional application of more stringent measures including civil and criminal penalties and in some cases, licence revocation and analogous incapacitating measures such as the disqualification of directors or the issuing of prohibitions. The legal basis for such formal enforcement within public regimes is typically the grant of statutory powers to enforcement officials variously in government departments, local government authorities or regulatory agencies with a degree of operational independence.

The available mechanisms for formally enforcing and promoting compliance with transnational private regulation are closely linked to their legal basis. One way to analyse the mechanisms of enforcement is to distinguish them by reference to who enforces (figure 2). The redeployment of the capacity/motivation analysis assists in the identification of actual and potential enforcers. Many private regulatory regimes stem from the limited capacity of governments and seek to address the problem that those with the capacity may lack the motivation. Arguably the greatest capacity for enforcement lies with the targets of regulation, and so the issue is one of understanding and keying into their motivations. Beyond the targets of regulation capacity is typically widely diffused and dependent on context. The point is illustrated by the role of third party gatekeepers in transnational private enforcement of some public regimes, as diverse as the role of airlines in enforcing immigration rules on passengers (and sometimes in ways that would not be open to governments themselves) (Gilboy 1997), and the role of banks in enforcing US prohibitions on internet gaming in a context where prosecution authorities cannot reach the owners of gaming servers located in other countries (Scott 2005). Elaborating on the potential for NGO strategies for making global and transnational rules stick Braithwaite and Drahos argue that the targeting of those with gatekeeping capacity, not only by governments and not only in respect of public rules, provides a generalised means to promote enforcement. Many of those organisations with gatekeeping capacity are categorised as ‘soft targets’ for enforcement as they do not benefit from regulatory infractions (Braithwaite and Drahos 2000: 618). Requiring ‘regulated actors to pay for gatekeepers to audit their compliance’ and effectively monitoring the integrity and performance of such private monitors provides a central mechanisms for overseeing both public and private rules, they suggest (Braithwaite and Drahos 2000: 69). There

are concerns that such private audit processes may mask the variability of substantive obligations in private codes, and that they are insufficiently transparent to provide robust reassurance to consumers and other stakeholders (Haines 2005: 133-4)

In the case of corporate social responsibility and other self-imposed norms, a multinational enterprise has to devise ways both to detect deviation from the norms and to correct such deviations. In this corporate context the implementation of private norms is likely to be complementary to, or in competition with, efforts to comply with publicly set norms (Parker 2000). In some instances the capacity for formal sanctions may reside with a trade association or other self-regulatory body. But in other cases the enforcement capacity may lie elsewhere, with buyers, certification bodies, consumers or investors (Haufler 2003). For example, the capacity to apply social sanctions such as gossip (which punish through reputational damage with adverse market consequences (Bernstein 2001)) and related market sanctions, such as ending contracts or declining to enter them, are liable to be diffused. Where regulatory norms are incorporated into contracts the capacity to apply formal sanctions through enforcing contract terms is also diffused, not only amongst the contracting parties, but sometimes also amongst third parties contracted by either party to certify compliance. Investors and insurance companies may also enforce private (and public ) regulatory norms as part of their regular commercial practices (Furger 1997; Richardson 2002).

*Figure 2 Modes of Transnational Private Regulatory Enforcement*



- A – Organisation Subject to Private Regulation
- B – Contracting party – eg buyer
- C – Association of which A is a member
- D – Third parties – eg consumers, auditors, certification bodies, investors

Where a firm sets down its own codes then enforcement potential is aligned to the ordinary employment relationships within the firm. The capacity of multinational enterprises for the promulgation and enforcement of norms within their own company structure is of great potential significance, though challenging to implement within diffuse organisations (Engwall 2006: 170-1). It is suggested that firms generally follow a set of internal norms rather than strict legal rights in dealing with employees (Rock and Wachter 1996). Large firm also have substantial capacity to set and enforce rules for others through bilateral contracts (discussed below).

Regimes of self-regulation are typically based on collective contracts between member organisations. The rules, the available sanctions and the processes for detecting and enforcing are each liable to be set down in the collective contract between the members. In her work on self-organising regulation of common pool resources Elinor Ostrom has suggested that, the availability of monitoring and graduated sanctions is a key principle of successful regime design (Ostrom 1990: 94-101). How well self-regulatory arrangements for monitoring and enforcing are specified and implemented is likely to be shaped by the interests of the members in establishing and participating in the regime. Penalties may range between warnings to financial penalties and ultimately expulsion from the group. The credibility of such sanctions, and the capacity to create an enforcement pyramid will be based on the importance of membership to the members. In some sectors participation in an effective self-regulatory regime, or a particular regime, is a *sine qua non* for market participation. There may be some competition for membership and so regimes may need to compete on their credibility in the market place (Ogus 1995). Where regimes are successful and important for market participation members are likely to comply with enforcers well before expulsion is invoked as a sanction. In other instances self-regulatory regimes may only work where they are gentle with their members, with the regime being more dependent on the members than the members on the regime. In such instances rigorous enforcement is unlikely.

There is a good deal of contingency around the capacity for enforcement within self-regulatory and private regulatory regimes. However, in some instances they are bolstered externally through a variety of forms of bilateral contractual arrangements. Indeed, it has been suggested that the supply chain constitutes the primary institutional setting and the 'ultimate source of authority' for giving effect to mechanisms of 'non-state market driven governance' (Cashore, Auld et al. 2004: 23, 25). Some purchasers of products specify in their contracts not only the product specification but also the private regulatory standards with which a supplier must comply. The specification of private standards extends beyond self-regulatory regimes to include

other forms of private standards regimes, such as those administered by the ISO and various general and more specific standards bodies operating at international, European and national level. Contractual specification of private standards is likely to be accompanied by sanctions within the contract for failure to follow the applicable standards and may also include mechanisms of accreditation, certification or inspection by the purchaser or, increasingly, by a third party organisation.

How are such contractual regimes enforced? The first point to make is that enforcement is likely to take place in private. A certain amount of research has been undertaken on the resolution of contractual disputes and has found a surprisingly (to lawyers) large amounts of dispute resolution involves the parties in reaching workable solutions without reference to the contractual provisions or to their lawyers (Macaulay 1963; Beale and Dugdale 1975). Remedies are likely to involve the rejection of products that do not meet or do not sufficiently meet required specifications, financial arrangements including return of or suspension of payments made under the contract and, in many instances, measures to bring conduct back into compliance and provide some assurance that it is and will remain in compliance.

Many supply chains are organised around 'relational contracts' in which we might expect social and economic rather than strictly legal solutions to predominate. We might also expect, even within social settings, an implicit form of enforcement pyramid to emerge as adverse remarks and disapproval provide initial steps for addressing problems in a context there may be potential for formal enforcement of contractual penalties. Lisa Bernstein's research on the global regulatory system which links national diamond trading cartels, the World Federation of Diamond Bourses, for example, finds there is a high degree of informality in concluding and enforcing executory agreements, but potential for escalation to pre-arbitration and arbitration processes for resolving disputes. A member of one of the cartels who does not speedily abide by an arbitration decision is liable to have the arbitration decision and their photograph published in prominent places in the rooms of each of the national cartels (not just the one in which the trader was a member). Suspension and expulsion are also possible remedies for members who do not honour commitments (Bernstein 1992: 128).

Even where agreed remedies for breach of contractual terms are invoked this is largely a matter for the parties, unless they find themselves unable to resolve the dispute. Resort to arbitration and litigation may itself be regarded as a form of escalation, since it involves costs to the parties, some uncertainty of outcomes and, in the case of litigation, the risk of adverse publicity. An alternative form of escalation within relational contracts is for one of the parties to exit the



arrangement. The potential for exit depends on the economic positioning of the parties.

Retailers with strong brands have found themselves able to exert a good deal of power over suppliers, including the ending of contractual relationships. This phenomenon of retailer power has become increasingly significant in the groceries industry with large supermarket chains dominating supply in an increasing number of OECD countries, and with increasing requirements being placed on suppliers to comply with private standards such as those developed by GlobalGap (Havinga 2006). Small and medium suppliers are sometimes highly dependent on one or a small number of retailers for the sale of their products and for them options are much more limited.

In instances where disappointed buyers have weak capacity to enforce contractual norms individually, some aggregated mechanisms to discipline sellers have emerged. Amongst the best known are the mechanisms for rating sellers on EBay. Buyers are invited to, and many do, rate sellers performance. Sellers with poor ratings are liable either to find it difficult to sell or, other things being equal, will have to sell at a lower cost than higher ranked sellers (Scott 2004; Calliess 2008). In this case the standards are, in effect, market norms on such matters as speed of delivery, consumer expectations of the product, and so on. Monitoring is carried out by diffuse buyers, and behaviour modification derives from the anticipated damage to the ability of sellers to sell in the market place should ratings be adverse. This interesting example of enhancing consumer information in order to facilitate regulation by the market, however imperfect, is likely to shape new mechanisms of transnational private regulation in years to come.

Collective action by consumers is also a feature of the enforcement of other regimes. The market for ethical and sustainable products has grown significantly on the back of consumers exhibiting 'preferences for processes' (Kysar 2004), prioritising assurances that producers have been paid a fair price, child labour not employed, or sustainable sources only used for production. The emergence of certification linked to labelling (C & L programmes) has been of particular significance (McNichol 2006). C & L programmes offer a market mechanism to demonstrate compliance to consumers (Meidinger 2008). The marketing potential associated with participation in regimes such as FairTrade and the Forest Stewardship Council (FSC) would be completely undermined if consumers could not be confident that the norms associated with these regimes were not enforced. Transparency of such regimes is becoming increasingly important to their credibility (Meidinger 2008). In the case of the FSC enforcement has a double dimension since the initial NGO campaigns of boycotts and public information were concerned

with persuading major retailers to sign up private regulatory principles to which they did not previously subscribe (Meidinger 2003). The widespread adoption of FSC standards in the UK was subsequently brokered by a UK government agency (McNichol 2006: 362-3).

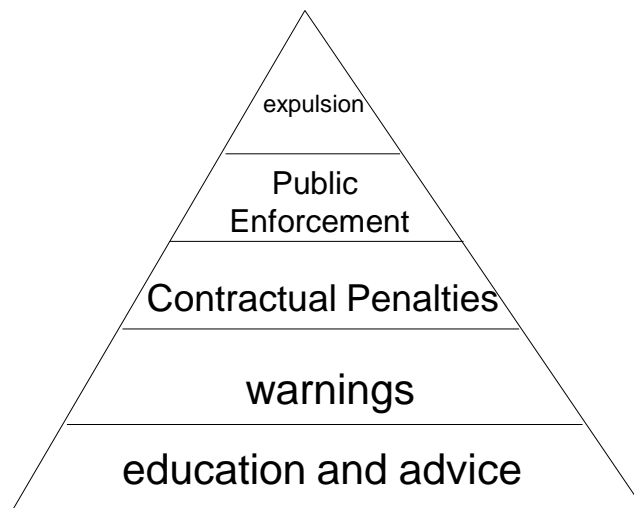
The potential for private enforcement of regulatory norms is not restricted to situations where contracts are present. In their research on environmental compliance that goes beyond legal requirements, Gunningham, Kagan and Thornton have suggested that the existence of an implicit social licence with local residents, community groups and NGOs enables these groups 'to act as effective watchdogs and de facto regulators, shaming and otherwise pressurising companies into beyond-compliance environmental performance' (Gunningham, Kagan et al. 2003: 152). Whilst this analysis originates with the local community relationships surrounding extractive industries it is possible to conceive of social licences operating transnationally around such issues as labour rights.

#### **4. Hybrid Non-Judicial Enforcement of TPR**

Thus far I have focused on public enforcement of public regulatory regimes and then on private enforcement of private regimes. I turn now to mixed models, including public enforcement of TPR regimes and private enforcement of public regimes. The full set of instances of public enforcement of TPR regimes would, of course, include judicial enforcement. There is a lively debate as to the extent to which the courts should seek to discover and give effect to private norms (Bernstein 1996), but that need not concern us here. Such debates are more concerned with the bilateral resolution of disputes than with some more broadly conceived idea of regulation. Furthermore, just as the overwhelming majority of public enforcement of public regulation occurs without reference to courts, towards the base of the enforcement pyramid, the same is likely to be true of public enforcement of TPR regimes. In this respect public enforcement of private regimes is not analogous to private enforcement of public regimes, the latter emphasising litigation as the chief mechanism of enforcement in such areas as environmental regulation and competition law (Boyer and Meidinger 1985).

An initial question is why would public authorities become involved in enforcing TPR norms? Within some TPR regimes regulatory capacity is incomplete, in the sense that there may be no mechanisms for monitoring and/or enforcement. Alternatively mechanisms that exist may be weak. In other instances norms from TPR regimes may be optional, as with technical standards and codes of corporate social responsibility (CSR), but national or supranational legislators may want to incorporate them into public regulatory regimes to reduce public costs and exploit

private expertise in setting such norms. In the case of CSR, implementation by firms may offer mitigation in regulatory enforcement actions, or may be a condition for setting a regulatory action or for issuing a licence (Parker 2007: 218-220). In a third case private regulators, seeking to promote compliance with their rules may find that their organisational capacity and expertise, by themselves, are insufficient to promote compliance and the authority of others, notably state actors, should be invoked to give more robust effect to the regime (Jacobsson and Andersson 2006: 259). Rees has described how the self-regulatory regime over the US nuclear power industry is, in some cases, dependent on the capacity to invoke state enforcement of safety rules and he refers to this as the 'gorilla in the closet' (Rees 1997). In this instance public enforcement constitutes a form of escalation towards the apex of what turns out to be a hybrid enforcement pyramid. Intriguingly the ultimate sanction within some private regimes, to expel a member, may be too drastic (and also counter-productive if it leaves the expellee unregulated or liable to use their knowledge to disrupt the regime (Bernstein 1992: 129)) such that invoking a less drastic public enforcement action provides a significant escalation short of the ultimate sanction (Figure 3 below). These are the kind of considerations which have placed many TPR regimes within a set of hybrid arrangements under which enforcement (and prior to that incentives to join a non-state regime) may be pursued by public regulators. More generally it has been observed that states have become increasingly important in some sectors as 'mediators, arbiters and legitimacy providers' (McNichol 2006: 371) and that whereas regimes have previously been characterised as state, business or civil society, there is a degree of convergence of regimes on a centre ground characterised by the participation of each of these groupings (Abbott and Snidal 2009) .



*Figure 3 A Hybrid Enforcement Pyramid*  
*Adapted from Ayres and Braithwaite 1992*

A broader recognition of hybrid enforcement capacity amongst businesses, civil society and governments caused Gunningham and Grabosky to re-cast the pyramid in three dimensions with each of these societal groups identified on one face (Grabosky 1997; Gunningham and Grabosky 1998: 397-404). The enforcement capacity represented shows the capacity of each kind of actor to escalate sanctions, with considerable potential both for overlap and for hybrid approaches. Thus, for example, some low-level, but well publicised publicly enforced sanction such as securing an undertaking of compliance against a business, might be amplified by civil society organisations such as the media or NGOs giving publicity to the sanction, and businesses reevaluating the riskiness of current or future contracting with the firm involved. As noted above there is no monopoly over coercion held by the state.

EU regimes for consumer protection provide a number of examples of different forms of relationship with TPR regimes. It is quite common for national regulatory regimes to refer to technical standards set by the ISO and other standardisation bodies. The International Organisation of Securities Organizations (IOSCO), an international body of national public regulators, has indicated its approval for standards put forward by the International Accounting Standards Board, a private body, thus effectively incorporating IASB rule making into supranational and national regulatory practice. It has been suggested that not only does the IASB gain authority for its rules through this action, but that IOSCO derives authority from the technical expertise of the private body (Jacobsson and Andersson 2006: 261).

Within the EU regime on product safety a hierarchy of legislative and private standards is created. Compliance with the general product safety requirement may be demonstrated first by compliance with an EU legislative standard, second by compliance with a national legislative standard, third by compliance with a European private standard, emanating from, for example, CEN or CENELEC, the general and electrical standards bodies, respectively, and fourth by compliance with a national standard, originating with national standards bodies such as AFNOR, DIN or the BSI (Directive 2001/95/EC, Article 3 (Scott 2010)). Such standards are, for some products, mandatory under national legislation. Where they are not, compliance with the standards provides a means of demonstrating compliance and reducing the discretion involved in monitoring and enforcing for consumer protection agencies. Enforcement measures for unsafe consumer products include voluntary and mandatory recall (arrayed pyramidally, one assumes), application of fines and, in some cases imprisonment, and destruction of products. My understanding is that the destruction sanction is not applied in pyramidal fashion. An importer or producer may be given an option to destroy an unsafe product themselves, but where a non-compliant product presents a serious risk, destruction by the firm involved, or by the enforcement agency is applied as a sanction without recourse to lower level sanctions.

EU consumer protection legislation provides also a mechanism for public enforcement of self-regulatory codes where private enforcement is absent or inadequate. Under the terms of the Unfair Commercial Practices Directive, prohibited conduct includes holding oneself out to be a member of a self-regulatory regime where either the firm is not a member or, even if a member, does not routinely comply with the requirements of the regime (Directive 2005/29/EC article 6(2)(b)). The latter circumstance may, in practice, be difficult to identify with precision since a degree of non-compliance and punishment by the regime is anticipated by the EU regime. Perhaps routine refusal to accept the judgments of the enforcers of the self-regulatory regime would be an appropriate indicator. National legislatures have set down the mechanisms for enforcement for such misleading practices. Under Irish legislation there is an elaborate architecture for enforcement by the National Consumer Agency which includes the informal mechanism of education, advising and warning, with a range of formal low level steps including seeking undertakings and issuing prohibition notices prior to the more punitive steps of applying administrative penalties and seeking fines and/or imprisonment in criminal litigation. For each measure the agency is entitled to publish details of the infractions and the sanctions, thus creating an additional, socially based sanction of naming and shaming wrong-doers (Consumer Protection Act 2007). Adverse publicity and reputational damage is thought to concentrate

minds in firms with valuable brand images to protect to a greater extent than relatively small fines.

Instances of transnational private enforcement of public rules are perhaps less visible than public enforcement of private rules. The compliance functions of multinational enterprises include understanding and implementing public regulatory requirements, include national variations, across the enterprise (Kagan 2000). The example of gatekeeping by banks in respect of online gaming and of airlines in respect of immigration, noted above, also exemplify transnational private enforcement of public rules.

One last variation on the theme is private enforcement of private regimes, transnationally, over public actors. One set of examples which spring to mind are the development of performance league tables by trade associations and media organisations over public bodies such as competition and telecommunications regulators and universities. Such league tables implicitly set standards through the selection of the indicators which are measured, involve the producer of the league table in collecting data, and then steer behaviour of the targeted organisations by reference to publication of performance comparative to others in the league table. The hypothesis with performance indicators generally is that organisations which are regulated in this way focus adjustments to their behaviour on the aspects of performance that are measured and published (Miller 2001). The publication of credit ratings in respect of sovereign debt also exemplifies the application of private regime over public sector bodies, in this case governments (Scott 2002).

## **5. Conclusions**

The enforcement of TPR regimes occurs very largely in a secret world frequently as dependent on markets and networks as they are on hierarchy for effectiveness. Weaknesses which are shaped by such contingencies are to some extent compensated for by the potential for public enforcement or, indeed the displacement of private with public regimes. The hidden nature of such enforcement should not surprise us too much, since in many jurisdictions low level regulatory enforcement is also fairly opaque. Accordingly there are common questions which may be asked of regulatory enforcement generally as to its legitimacy.

Legitimacy, the sense that some set of governance arrangements are more or less acceptable (and thus followed), is liable to be a product both of procedural and substantive considerations, inputs- and outputs-based legitimacy (Scharpf 1998). Legal scholarship has tended to emphasise

the procedural basis for legitimacy which includes considerations of compliance with rule of law values such as equality of treatment, transparency and non-retrospectivity and extends to such matters as the giving of reasons and meeting of legitimate expectations. Other approaches have placed greater emphasis on outcomes displacing a more traditional legal emphasis on input or process criteria for legitimacy with substantive evaluations. Law and society scholarship on regulation, for example, has chiefly concerned itself with the effectiveness of implementing regulatory norms - for example aiming to maximise compliance (Parker 2000).

Within the literature which applies principles of law and economics to the emergence and operation of social norms the chief criterion of evaluation is economic efficiency, although other possible values which might underpin substantive legitimacy are recognised, including equity and corrective justice (Katz 1996: 1745). The issue of legitimacy of private regimes is significant, in part, because it may guide decisions as to when deference to such regimes by governments should be shown (Katz 1996: 1752). However, we should recognise that in many instances private regimes, particularly at the transnational level, have come about, in part, because of the limited capacity of government to provide appropriate or any regimes. This may be for political reasons – a reluctance to impose public roles which might scare off foreign direct investment for example – or because of a lack of reach of national governments over targeted activities because they occur wholly outside the jurisdiction. Within regulatory scholarship advocacy of broad principles based regulation, which tends to create spaces for various forms of private regulation to fill in detailed requirements, is seen to be a superior form of outputs-based regulation than the kind of detailed public rules which invite create compliance (McBarnet and Whelan 1991; Parker 2000: 547).

Few instances of enforcement of TPR regimes are ever likely to be litigated although there may be potential for ‘appeal’ to arbitrators or courts over enforcement action which gives rise to contractual disputes. The linkage between TPR regimes and public enforcement does give some potential for public oversight of TPR regimes, chiefly at national level. Most obviously national regulators may blow the whistle on regimes which they consider to be fraudulent in the claims they make about benefits to consumers from products produced within such regimes.

To a large extent the effectiveness and legitimacy of TPR regimes and their enforcement is likely to be a product of market and social processes in combination with private law and public oversight or engagement. The more trustworthy and effective regimes are liable to emerge where there is a range of commercial, NGO and perhaps also governmental actors involved. It has been noted that TPR regimes are increasingly taking on this kind of tripartite form as each

type of participant brings to the regime something lacking in the others (Abbott and Snidal 2009).



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