The Appropriate Level of Enforcement in Multilevel Regulation: Mapping Issues in Avoidance of Regulatory Overstretch

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1. Introduction

The notion of ‘multilevel regulation’ was coined, inter alia, to add a legal/regulatory dimension to the vast range of studies on multilevel governance. This paper will build on earlier work by the authors related to the increasing interconnectedness of norms in the global, EU and domestic legal orders, and the different legal designs of these norms. In this ‘normative web’ a new question relates to a topic that is so far understudied: the appropriate ‘level’ of enforcement. Enforcement is understood here as ensuring compliance with transnational norms, by legal means, especially by monitoring and sanctioning (e.g. by a domestic regulatory agency), and involving adjudication (e.g. by a court decision on a violation of a transnational environmental standard), but possibly also implementation in as much as putting norms into practice


2 Føllesdal, Wessel and Wouters, op.cit.


5 The appropriate fora for regulation are addressed in another paper presented at this conference, which analyzes the attributes and the potential of the key transnational nanotechnology governance arrangements; see E.Kica and R.A. Wessel, ‘Transnational Arrangements in the Governance of Emerging Technologies: The Case of Nanotechnology’.

6 We acknowledge the importance of non-legal instruments of enforcement, but focus here on legal instruments: the performance of legal acts (e.g. legislative, administrative, civil) and taking legal actions (e.g. criminal prosecution, law suits).
calls for their elaboration (e.g. of EU-directives in Member State legislation). Appropriateness is measured along two dimensions: the ‘strength-level’ and the ‘location-level’.

In the first dimension the term ‘level’ would relate to the appropriate ‘strength’ or ‘intensity’ of the enforcement (i.e. the extent to which norms can or should be enforced in a multilevel setting – given that norms are often enacted in a different legal order than the one in which they need to be complied with (upon implementation), and may take on a different (legal) form). Apart from the complexities flowing from this setting, recent studies have revealed that enforcement (if at all appropriate to improve compliance) may need to take a different shape. One example is formed by the many norms falling under the heading of ‘informal international law’, indicating that they are not made by traditional governmental actors through legal procedures and that their legal nature is less obvious, whereas their enforcement may take on an explicit legal and indeed coercive form.\(^7\)

The second dimension relates the term ‘level’ to the appropriate legal order and would assess the criteria to establish whether enforcement is best guaranteed at either the global, the EU or the domestic legal order – or that we should perhaps consider ‘transnational enforcement’.\(^8\) Factors will include the actors involved, the decision-making process and the (legal) nature of the norms. An element in this assessment will be the question of whether the (EU) notion of ‘subsidiarity’ could form a guiding principle in establishing the appropriate level of enforcement.

Another way of looking at this would be to view the two dimensions in terms of ‘smart regulation’: \(^9\) smartness in ‘strength-level’ links to theories such as of Gunningham et al.\(^10\) on starting with (preferably combinations of the) least interventionist instruments (and then escalating-up the ‘pyramid’ – if necessary); smartness in location-level links to theories on subsidiarity\(^11\) – and meanwhile we also find that these issues relate as regulatory relations manifest as dynamic ‘actor-strength-location combinations’.

The following section will first of all address the general notion of regulatory enforcement, from a regulatory and an enforcement perspective. This will be followed by a section where we subsequently discuss appropriateness of enforcement from the dimensions of location-level and of strength-level. Finally we present a simple model for


analysis of appropriate matching of strength and location level scenarios of enforcement.

2. The Notion of Regulatory Enforcement

2.1 The Relation between Regulation...

In limiting our scope to enforcement of ‘public regulation’ we merely intend to exclude forms of pure private regulation. We focus on those forms of regulation that as a matter of standard-setting come with active participation by public authorities (including agencies and representatives) or, when enforced by legal acts or legal action, through their legal effects affect the scope or nature of public interests as a matter of a government task/responsibility (e.g. environment and public safety) or of a form of (de facto) public utility (of certain goods or services – e.g. health care, telecommunication and internet.12 Meanwhile, many studies have revealed private actor impact on public regulation, either through a participation of private stakeholders on the norm-setting process, or because of an incorporation of ‘private’ standards in public law regimes.13 So, whereas extraterritorial enforcement procedures have typically been studied in international and transnational private law,14 and not so much in public law, these days the public law dimension of many of these arrangements has also become visible.15

At the same time, for the purpose of this paper, we aim to look at regulation as involving enforcement of conduct mechanisms, or at least requirements – thereby take a more ‘narrow’ view of regulation – as we focus on norms which by their legal nature

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12 Here our definition exceeds the scope of (prescribed, if only in very general terms, of) government involvement – a fully privately arranged utility, (by and large) open to use by all members of the public, is also considered as the type of ‘object’ that colours its regulation ‘public’. Compare also the notion of ‘public authority’ in A. Von Bogdandy, R. Wolfrum, J. Von Bernsdorff, Ph. Dann and M. Goldmann (Eds.), The Excercise of Public Authority by International Institutions: Advancing International Institutional Law, Heidelberg, etc.: Springer, 2010. The authors define the ‘Exercise of international public authority’ as “any kind of governance activity by international institutions [which] determines individuals, private associations, enterprises, states or other public institutions.”

13 Either as tacit inspiration (the public norm itself does not show its private law pedigree) or by static or dynamic reference to a private norm (i.e. as it stands at a given time or as it may change within private law). [Source to be added]

14 See the many conventions concluded in the framework of the Hague Conference on Private International Law, but also the European Union (e.g. the so-called Brussels 1 and Brussels 2 Regulations).

15 Hannah Buxbaum observes that the functioning of administrative networks involves “a choice by state agencies to cede exclusive power over territory in order to gain instrumental power over forms of conduct subject to regulation” H. Buxbaum, “The Private Attorney General in a Global Age: Public Interests in Private International Litigation”, 26 Yale J. Int’l L. 219 (2001), at 308. See also P. Verbruggen, ‘Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation’, Regulation & Governance, December 2013, pp. 512–532 (on the background presence of state regulatory capacity in relation to the enforcement of transnational private regulation).
call for enforcement, or do so on other grounds but in a manner which, as stated in the above, calls for legal means of enforcement.\textsuperscript{16} As we will see, this does not exclude ‘informal’ norms (that are – \textit{prima facie} – not covered by international law), as even these norms may come with legal means (i.e. acts or actions) to enhance or secure compliance.\textsuperscript{17} David Levi-Faur has succinctly put it as follows: “\textit{We are all immersed in the regulatory game}”.\textsuperscript{18} Regulation concerns us all and increasingly does so in role-patterns other than that of government versus citizens. Clearly, this is in keeping with the broadening in the range of what we name regulation. This is clear when we compare Selznick’s 1985 definition of regulation (“\textit{Sustained and focused control exercised by a public agency over activities that are valued by a community}.”)\textsuperscript{19} with Julia Black’s famous 2002 definition (“\textit{The sustained and focused attempt to alter the behavior of others according to standards or goals with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behavior-modification}.”).\textsuperscript{20} To say we are all immersed in matters of regulation is to emphasize that regulation is no longer merely a tool of government, but also one of businesses and of civil society organizations, and that each of these may be norm-subject to instances of regulation – to say nothing of individual citizens.

Given this variety of regulators and regulatory motives, it also makes sense that nowadays we find a broader variety of regulatory \textit{strategies} applied in a variety of regulatory relations – aside from the ‘orthodox’ government regulation by ‘command and control’. Next to the latter strategy of \textit{hierarchical} control, there are well-established forms of \textit{community-based} control (underpinned by personal motivation, private cooperation and public criticism), \textit{competition-based} control (underpinned by efficiency and profit, typical to markets, but possibly also between regulators), and \textit{design-based} control (also known as architecture or code; underpinned by functional, often physical requirements).\textsuperscript{21} The current trend of B2B private regulation through technical standards in supply chains, enforced through certification schemes and

\begin{footnotesize}
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\item See J. Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’, in Pauwelyn, Wessel and Wouters, \textit{op.cit.}, pp. 13-34, who also points to the relevance of private actors and arrangement, but excludes cooperation that only involves private actors (at 21). See on this point in the same volume also H. Schepel, ‘Private Regulators in Law’ (pp. 356-367). In the end ‘the exercise of public authority’ (see above) seems to be the key.
\end{enumerate}
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supported by transnational informal rule making provides an excellent example of a hybrid combination of all of the afore types of regulatory control: e.g. a general hierarchical safety norm, elaborated through community-based informal cooperative rule-making in notified bodies, adopted in competition-based certification-schemes, leading to products with regional accessibility only – as in DVD’s).

Hierarchical control typically seems to fit a relation between a superordinate regulator and a subordinate regulatee; as a two-party, ‘one on one’ regulatory relationship. Relations may however be more complex, certainly if we take into account alternative strategies and cumulative or hybrid strategies. Thus in reality we find various types of relations, with different specializations of (professional) regulatory role-play (of pure and of hybrid kinds) and within these types of relations various actor positions (of a government, market or civil society nature), with various possible strategies used (again in pure and hybrid form).

So, we need to first separate three relational configurations, that of first party regulation (of self-regulation; where regulator and regulatee coincide), that of second party regulation (where regulator and regulatee stand separately, the former being the one to introduce, alter or terminate regulations and the latter being subject to these actions – albeit not necessarily as a matter of hierarchy), and finally, that of third party regulation (where between regulator and regulatee we find a third regulatory agent, specialized in an intermediary or supportive regulatory function, such as auditing and certification).

Upon these ‘pure’ configurations hybridity is possible when positions within relations are shared, such as in co-regulation, as when businesses and governments and or NGO’s together act as regulators (some of which may effectively be self-regulating as if in a first party relation, while others are operating as in a second party context), or when configurations are coupled, such as in meta-regulation, when government facilitates self-regulation (e.g. linking second party government regulation to first or second party business or business and NGO regulation). Given that regulator, regulatee and intermediary positions in all of these relations may be held either by governments, businesses and NGO’s, in fact there are 39 possible types of regulatory relations (3 first party, 9 second party and 27 third party). Clearly, if we consider the variety of regulatory interests behind these actor relations and the many possible types of (combined) strategies within, then it will not come as a surprise that together pure and hybrid regulatory combinations can easily run into the millions.22

So, the challenge is on, to somehow still make sense of a regulatory environment where citizens organized as NGO’s and (industrial organizations of) businesses operate, not merely as regulatees coping with government regulation, but also as regulators (separately or jointly), vis a vis (other) businesses, and vis a vis (other) NGO’s and governments – possibly overlapping with regulation from other regulators or regulator combinations – amounting to a state of ‘regulatory capitalism’; of (non-)governmental

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regulatory strategies competing, on a global scale, to channel behavior of (diverse groups of) regulatees.\textsuperscript{23}

2.2 \textit{...and Enforcement}

While the relation between regulation and legal enforcement may be somewhat underresearched, this is not the case for the relation between the (validity of) legal norms and their enforcement. In classic Austinean approaches to law the enforcement of a norm is part of its (legal) nature.\textsuperscript{24} Regardless of the value of the approach of, for instance, Kelsen in offering tools for the identification of (valid) legal norms by simply looking at their source, its main practical weakness is obvious when their application and effectiveness is not taken into account. Yet, also in Kelsen's view "a general legal norm is regarded as valid only if the human behaviour that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity".\textsuperscript{25} Hence, the answer to the question why a particular norm is valid in a legal system, is: "because the system is valid". Why then is the system valid? "Because it is accepted in practice". Kelsen (but Hart also) has thus based his concept of a legal system on assumptions or presuppositions which derive their validity from the fact that they are accepted in practice.\textsuperscript{26} Given the focus on (compliance by) enforcement through legal means, the existence, within valid legal systems, of secondary rules (of recognition, change and adjudication), is crucial – to ensure that primary rules (of conduct) are indeed put into practice.\textsuperscript{27}

Hence, while legal positivism offered us a useful way for identifying legal norms, the question of 'compliance' with these norms has always been part and parcel of the project – as also shows in the mechanisms that Black refers to in her (above cited) definition of regulation: i.e. 'information-gathering' and 'behavior-modification'; next to 'standard setting'. The question of compliance is, taken from a legal perspective, often related to the possibilities for judicial supervision. Despite the fact that most common law systems indeed base their concept of legal order on the notion that "it is by


\textsuperscript{24} See in particular [Austin...].

\textsuperscript{25} Kelsen (1967) at 11, and Kelsen (1991). It should be noted, however, that this is not necessary at the moment of the \textit{creation} of the norm. In Kelsen's view termination of a norm is possible because \textit{1} the norm never became efficacious; or \textit{2} it became efficacious, but ceased to be so later (at 213). The minimum of effectiveness of a norm may also be found in the work of Weinberger; see for instance Weinberger (1987) at 103, Weinberger (1981) at 67, and MacCormick & Weinberger (1992) at 6. Cf. also Raz (1970) at 63-64.

\textsuperscript{26} Cf. Ruiter (1993) at 19.

exercising the courts’ opinions that one finds the laws on which they act” (Raz), it has been observed in legal theory that this cannot mean that the addressees of the norms are only the courts, for if the rules (norms) did not exist for the public at large how were they to regulate their activities in legally relevant affairs. Norms exist before they are applied by the courts. The validity of the source does not depend on its being recognised by the courts: the norm is recognised and applied precisely because it is valid. What the courts determine is the meaning or content of the norm. This conclusion allows us to leave aside the famous critique on legal positivism by Dworkin, who, like Raz, but for different reasons, also started at the ‘end of the line’ (the judicial decision) in his analysis of the legal order. In this respect it is helpful to keep in mind that judges too are legal institutions (in the sense that they exist and operate by virtue of the law), which underlines that legal validity cannot (solely) be derived from their conduct.

While these notions were developed prior to the regulation debate, it is helpful to keep them in mind when considering regulatory enforcement. In general, it seems that the analysis in the present paper calls for a restrictive function of possibilities for enforcement within a legal order. The role of supervisory mechanisms seems to be reduced to tools that can be helpful in the adaptation of the ‘social reality’ to the ‘legal reality’. In legal institutional terms, supervision may help turn what was created as a ‘normative’ institution into a ‘real’ institution. Regardless of any validity questions, this is what we want to achieve in the end. In that sense enforcement is a tool to ensure compliance with a certain norm. There are no reasons to exclude regulatory norms from this analysis. While – like with any other norm – we would be hesitant to relate the validity/existence of a regulatory norm to the possibilities for its enforcement, a practical role for enforcement mechanisms can also not be denied in relation to regulation.

This element seems to be accepted in the regulation literature as well. Thus it has been noted that in its simplest and narrowest sense, regulation refers to a set of authoritative rules accompanied by a mechanism, usually a public agency, for

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29 Ibid. See also H.L.A. Hart, supra, pp. 141-147, esp. 145-146.
31 Dworkin pointed to the binding nature of moral principles, which in his view are undeniably part of the legal order because judges have the discretion to interpret or leave aside legal norms (on the basis of unwritten principles). According to Dworkin these principles could not be identified with the help of the pedigree-test offered by legal positivism. See for instance Dworkin (1977).
32 Of course, any particular legal system may arrange this differently by accepting court decisions/case-law as a distinct and autonomous source of law, to the extent that judges can be the authoritative voice of legal norms, albeit primarily valid only inter partes.
33 Nevertheless, supervision and compliance control may prevent inverse customary law from developing, whereby a desuetude would deprive states of obligations they had on the basis of the original norms.
34 In that respect, Macrory pointed to the limited value of sanctions in regulatory regimes; R. Macrory, Regulation, Enforcement and Governance of Environmental Law, London: Cameron May, 2008. See on the ‘optimal penalties for noncompliance’ also C.S. Decker, ‘Flexible enforcement and fine adjustment’, Regulation & Governance, December 2007, pp. 312–328.
monitoring and promoting compliance with those rules.\textsuperscript{35} And as argued by Stewart: “The objectives of transnational regulation, including harmonization and enhanced protection, will not be achieved unless the regulatory norms adopted [...] are effectively implemented and enforced against market actors operating in and across different jurisdictions”.\textsuperscript{36} Despite its focus on ‘transnational’ regulation, this statement seems valid across the board. In any case, the forms of regulation addressed in the present paper could largely be qualified as ‘transnational’ as they include public regulation to be found in areas such as environmental health and safety (‘EHS’), consumer protection, investment, financial products and services, intellectual property and competition.\textsuperscript{37}

As announced in the introduction to this paper, we view enforcement as ensuring compliance with legal norms, by legal means. Compliance, in turn, is understood as “conformity between behavior and a legal rule or standard”.\textsuperscript{38} Raustiala furthermore reminded us that this should be seen in distinction from the effectiveness of a norm, “understood as the degree to which a legal rule or standard induces desired changes in behavior. In that context a focus on compliance is often misplaced and may even be counterproductive.\textsuperscript{39} Indeed, in our attempt to make a sensible link between regulation and legal enforcement we should remain aware of that pitfall. Enforcement is meant to ensure compliance, but compliance is not necessarily the best indicator of the effectiveness of the norm in he sense of it ‘becoming real’ in the legal sense described above.

Following Stewart, we then view regulatory enforcement as involving “enforcement actions brought by public authorities or private plaintiffs against actors subject to public regulatory requirements. These include administrative orders requiring or prohibiting specified conduct, administrative imposition of penalties, criminal prosecutions, and civil actions brought by governmental officials for specific relief or civil penalties – in all cases backed by the coercive power of the state. In the era of the regulatory welfare state, enforcement can also include governmental activities or denial or revocation of permits or licenses to carry on productive activities or withdrawal of state-provided grants and other forms of financial assistance for failure to meet specified requirements or conditions”.\textsuperscript{40} This is not to say that we fully exclude softer ways to enhance compliance (such as reputational incentives) as these are often

\begin{thebibliography}{9}
\bibitem{36} Stewart, \textit{op.cit.} at 47.
\bibitem{37} \textit{Ibid.}, at 41.
\bibitem{38} K. Raustiala, ‘Compliance & Effectiveness in International Regulatory Cooperation’, at 388
\bibitem{40} Stewart, \textit{op.cit.}, at 42.
\end{thebibliography}
part of complex enforcement regimes. The bottom line – again following Stewart – is that “the legal system is capable of distinguishing whether a regulated actor is or is not in compliance with regulatory requirements, which in turn implies applicable regulatory norms have a suitable hard-edged character that will support such distinctions.”

Yet, compliance research in political science and political economy studies often puts the value of (enforcement) instruments to enhance compliance into perspective (arguing that there are often other reasons to explain the generally complying behaviour of actors). Accepting these lines of reasoning – as lawyers – we maintain the need for legal systems to be able to distinguish between compliance and non-compliance with a norm, but also to contain ‘secondary’ norms governing arrangements and procedures for implementation and (thus) enforcement. These secondary rules form the basis of legal enforcement, as they facilitate either (elaborated) standard setting (at another level than that of the enactment of an informal norm) or supervision and, if need be, sanctioning. Legal acts and legal actions are possible only, if secondary norms (of legal power and of adjudication) provide a basis. These acts and actions may be of a public law nature (as of criminal and administrative law) but also of a private law nature (as through contracting and tort). As we clarified in the above, our focus is on public regulation and so we discuss private law enforcement only if there is some ‘public dimension’ to it (i.e. a public interest as a matter of government responsibility, or as a matter of a public utility good or service).

Part of the challenge of compliance is to ensure legitimate and effective ways of regulatory enforcement, as a prerequisite matter of regulatory significance – a condition sine qua non to actual uptake or adherence by regulatees (‘on the ground’). Without neglect of matters of (political) acceptability and equity, this issue is mainly on how regulation can effectively and efficiently achieve its objectives.

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41 Ibid. at 43.
42 E.g. Guzman 2008, 211; Checkel 2005, 804; Beach 2005, 127. See for further references also A. Von Staden, ‘Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights’, unpublished paper, available on SSRN.
43 Again this could be framed as the pursuit of ‘smart(er) regulation’: regulation with leads to regulatees’ (such as businesses) improved performance, at a price acceptable to them and to the community. This definition leans on Gunningham and Graboski’s definition, which is intended for environmental policies, supra, footnote 8, p. 10: “... ‘smarter regulation’, which, for our purposes, means that which promises improved environmental performance, but at a price acceptable to business and the community.”.
3. The Appropriate Level of Enforcement

3.1 Location: Global, Regional or Domestic?

The reasons to opt for a certain regulatory level have been addressed in literature quite extensively. The most obvious argument driving the choice is the extent to which regulation can effectively take place at the domestic level. Free trade in goods and services and capital mobility have called for what is sometimes labeled 'harmonization up': opening up domestic markets calls for regulation beyond the state. Subsequent research projects on for instance the development of Global Administrative Law (GAL) have pointed to the negative consequences of moving up regulation in terms of for instance a loss of remedies. At the same time it has been noted that certain types of enforcement can only be implemented at the domestic level, where (for instance in the environmental area) regulations are sanctioned through criminal law or through administrative penalties.

The present paper raises the question to which extent these ('subsidiarity') arguments make sense in relation to legal regulatory enforcement. It is often the case that compliance of norms is sought at another (lower) level than where the norm was created in the first place. The UN Security Council saga on anti-terrorism measures (painfully) reminded us of norms enacted at the global level of which enforcement was delegated to the EU and the domestic levels. At the same time, enforcement of norms jointly agreed on by national regulators may benefit from a consistent and harmonized way of enforcement to prevent discrepancies from occurring (and undermining the whole idea of regulation in a certain area). In that sense Stewart pointed to four reasons why decentralized domestic implementation and enforcement may fail:

1. governments and agencies may fail to agree on specific primary or secondary norms, either because of disagreement or uncertainty over norms, bargaining failures, or the need for flexibility to deal with future changes;
2. governments or agencies may decide for a variety of political and policy reasons not to carry out their undertakings;
3. states or agencies may lack legal and administrative capacity to effectively implement the agreed norms; and
4. the agreed regulatory instruments and strategies may have intrinsic efficacy limitations.

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44 Add reference.
45 See B. Kingsbury, N. Krisch, and R.B. Stewart, ‘The Emergence Of Global Administrative Law’, Law & Contemporary Problems, 2005, pp. 15-61; and the many subsequent GAL publications by these and other authors.
46 Macrory, op.cit. at 12-13.
47 Add reference.
48 Stewart, op.cit., at 48.
While these may indeed form reasons to ‘move up’ systems to ensure or enhance compliance (e.g. though the creation of transnational regulatory administrative bodies adopting incentives such as sanctions or subsidies\(^ {49} \)), it is more difficult to explain the choice for, let’s say, the UN or the EU or the OECD. One reason is formed by the availability of institutionalised (legal) enforcement. This would for instance explain why some norms can only effectively be enforced once they have been adopted by the EU or in domestic legislation (consider for instance the norms on food safety initiated by the Codex Alimentarius Commission or the financial rules of the Basel Committee). The availability of supervisory mechanisms at a certain level, may not only form a reason to locate the enforcement at that level, but also not to create alternative or additional mechanisms at a higher level.

‘True’ transnational enforcement may take place when a regulatory regime allows the actors themselves to police compliance. Examples may be found in the Financial Action Task Force (FATF) on anti-money laundering, CITES on bio-diversity, the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal, or the Cartagena Biosafety Protocol [check]. The possibility of using individual (citizen) complaints in a system of enforcement is for instance mirrored in the system of the Aarhus Convention on public information, participation and access to justice in environmental cases. Private law certification systems – as for food (e.g. IFS), medical devices companies (e.g. ISO 13485/2003), sustainability and energy-efficiency (e.g. LEED) – may also come with transnational enforcement as they incorporate transnational norms in equally transnational schemes, that often operate through chains of contracts throughout B2B supply-chains and in B2C sales contracts. Some maybe purely private, many will have a public regulation aspect.

3.2 Strength: Strong or Soft?

Apart from the appropriate location level of governance for regulatory enforcement we also address the appropriate level of intensity or strength (a final question will be to which extent the two dimensions interact: is softer regulatory enforcement better suited at a level beyond the state and does stronger enforcement find its natural place in a domestic legal setting?). As indicated above, we do not equate formal law with hard law and informal law with soft law. In relation to ‘informality’, the debate in political science and political economy largely concentrated on the pros and cons of the use of soft law. As indicated by, for instance, Guzman and Meyer, soft law would work well for mere coordination, but will be less easy to use to establish cooperation;\(^ {50} \) and Kanbur pointed to the relation between the “intensity of enforcement” and “the nature and


character of formality and informality”. However, the legal scholarly debates have clearly moved beyond the soft law debate. Drawing on a two-year research project involving over forty scholars and thirty case studies, the argument can be made that the international legal order has radically transformed in the past, on all three axes of actors, processes and outputs. Recently, it was noted that there even seems to be a stagnation of formal international law-making, in favour of more informal international law-making. The term ‘informal’ international law-making is used in contrast and opposition to ‘traditional’ international law-making. Informal law is ‘informal’ in the sense that it dispenses with certain formalities traditionally linked to international law. These formalities may have to do with output, process or the actors involved. It is exactly this ‘circumvention’ of formalities under international and/or domestic procedures that generated the claim that informal law is not sufficiently accountable.

There is evidence of the slowdown in formal international law-making. Abbott, Green and Keohane calculate that “during the first few years of the 21st century, growth rates in IGO [formal international organizations] formation have decreased by 20% compared to the previous decade”. These authors also point out that growth rates in both treaties and formal IGOs decreased “despite continuing increases in the sensitivity of societies to one another, reflected in such phenomena as increasing trade, particularly services, and outsourcing”. Whereas formal international law-making has slowed down, a rich tapestry of novel forms of cooperation, ostensibly outside international law, is thriving. It has been argued that cross-border agreement takes

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51 R. Kanbur, Conceptualising informality: regulation and enforcement, IZA discussion papers, No. 4186, 2009; http://nbn-resolving.de/urn:nbn:de:101:1-20090612107
52 The project was funded by the Hague Institute for the Internationalization of Law (HiiL). See the project website at www.informallaw.org, and the two books referred to above,
54 Informal law was extensively defined in J. Pauwelyn, ‘Informal International Law-making: Framing the Concept and Research Questions’, in Pauwelyn, Wessel and Wouters (eds), Informal International Lawmaking, supra, pp. 13-33.
55 See, for example, Eyal Benvenisti, ‘Coalitions of the Willing’ and the Evolution of Informal International Law’ in C. Calliess, G. Nolte and P.-T. Stoll (eds), Coalitions of the Willing: Avantgarde or Threat?, Carl Heymanns Verlag, 2007; B. Kingsbury and R. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations’, in S. Flogaitis (ed.), International Administrative Tribunals in a Changing World (Esperia, 2008) 1-20, at 5, framed this critique as follows: ‘Even in the case of treaty-based international organizations, much norm creation and implementation is carried out by subsidiary bodies of an administrative character that operate informally with a considerable degree of autonomy. Other global regulatory bodies – including networks of domestic officials and private and hybrid bodies – operate wholly outside the traditional international law conception and are either not subject to domestic political and legal accountability mechanisms at all, or only to a very limited degree’.
58 Abbott et al., supra note 57 at 2.
different forms and involves a different constellation of actors and processes, outside
the traditional confines of international law. Thus, we have witnessed the creation of
the International Conference on Harmonization (ICH, in respect of registration of
pharmaceuticals), the Wassenaar Arrangement on export controls of conventional arms,
the Kimberley Scheme on conflict diamonds, the Proliferation Security Initiative, the
International Competition Network, the Copenhagen Accord on climate change, the
Group of 20 (G-20), the Financial Stability Board, the Ruggie Guiding Principles on
Business and Human Rights, the Internet Engineering Task Force, the Global Strategy
on Diet, and the list goes on. Although the International Organization for Standardization
(ISO) was founded in 1947, the number of ISO standards has grown from under 10,000
in 2000 to more than 19,000 today. Relatively recent topics such as the internet,
competition or finance have been regulated from the start through informal norms and
networks and in most of these areas creating legally binding treaties or traditional IGOs
is not even a topic of discussion.

All of this goes well beyond the phenomenon of soft law as it addresses not only
informal output but also new and informal actors and processes. Moreover, even in
terms of output, there is nothing ‘soft’, i.e. vague, aspirational or deeply contested about
most of the internet, medical devices, environmental or financial norms developed in
recent years. If anything, the process of their development is highly regulated and strict,
based on consensus, and the expectation as to compliance with these norms is
extremely high (higher than in respect of many traditional treaties). What characterizes
these finance, medical devices or internet norms is not so much that they are non-
binding under international law (the hallmark of ‘soft law’) but rather that they are
outside traditional (public) international law altogether. Similarly, the shift toward
informal law-making described here goes beyond ‘global administrative law’. There is
nothing ‘administrative’ about the G-20, after all, a meeting of heads of state at the
highest political level. Yet, the G-20 and its communiqués epitomize the new trend. Nor
do we consider that the solution to this turn to informality is ‘administrative’. It goes
beyond managerialism and requires both politics and courts.

The relevant question for the present paper is to which extent enforcement
mechanisms can or should be adapted to the nature/strength of the regulatory norm.
After all, as we have seen, the norms in themselves are usually far from abstract – it is,
above all, the intention of the actors to not produce legally binding norms that makes the difference.

Stewart has listed different types of regulatory instruments used for securing compliance with regulatory requirements:  
- command and control instruments (prohibiting or mandating specified conduct by regulated actors);  
- market-based and information-based regulatory instruments (to steer the conduct of regulated firms in the desired direction by directly imposing a price on disfavoured conduct or mobilizing consumers, investors, and the public general, to reward firms and products with superior regulatory performance and shun those with inferior records);  
- network regulatory strategies (making use of private and hybrid public-private institutions, including arrangements for co-regulation; these arrangements seek to economize on the role of enforcement);  
- collateral compliance mechanisms mobilized by public regulation (a range of mechanisms triggered by the fact that public regulation is enforced beyond the state, ranging from adoption by different domestic courts to demands by third party certifiers, or the simple fact that (technical) standards when adopted may have an ‘inherent’ compliance mechanism).

A well-established (Australian) approach to this enforcement quest was presented by Braithwaite and elaborated upon by Gunningham and Grabosky. It builds upon the regulatory design principles that: (1.) single instruments seldom suffice to yield the desired effect (so regulators should consider combinations); (2.) it is preferred to use the least interventionist measures (so regulators should apply a mix of prescription and coercion that achieves results at least costs to the regulatees and, consequently, to the regulator); (3.) if necessary a responsive escalation of enforcement such be applied (ascending, as it where, a dynamic instrument pyramid, from low to high coercion).

Braithwaite suggested a 2-dimensional pyramid for government regulation, from low coercion at the bottom level to high coercion at the top (see image below). The basic idea behind this is that two types of failure may reveal in enforcement strategies: (1.) a strategy (i.e. an intervention) may be adhered to by most, but not all regulatees. Consequently a tailored responsive strategy may be needed, escalating strength only as regards those who are initially non-compliant; (2.) a strategy as such may initially, before introduction, seem broadly viable but then prove not to work in practice –

---

63 Stewart, op.cit., at 50-58. These clearly resemble the abovementioned, more general regulatory strategies of hierarchy, competition, community and code, while the latter two of these seem to be taken together with the former into collateral mechanisms (which often involve the 3rd party regulatory relations as also mentioned in the above).
65 Supra, footnote 8, pp. 387-408.
66 See on the pyramid also P. Mascini, ‘Why was the enforcement pyramid so influential? And what price was paid?’, Regulation & Governance, March 2013, pp. 48–60.
67 Gunningham and Graboski, supra, p. 395-396.
pointing at a need for a sequenced, escalating approach for all norm subjects, with greater coercion.

Ad. 1 - To start with low coercion builds upon assumed virtuousness of regulatees (wanting to share in the regulator’s objectives). Only upon disappointment in these expectations do strategies become more coercive, by way of a targeted gradual escalation (never more than necessary, but with the possibility of reaching a truly coercive ‘tip’), so as to provide a credible deterrent (and ensuring equality, as a ‘level playing field’, between regulatees, as all regulatees will be held to comply – those who are most reluctant possibly at higher cost to themselves).

Ad. 2 – To start with low coerciveness could be, from a government point of view, to first call for and/or facilitate voluntary self regulation by (a branch of) business(ess), on the proviso that a failure to meet objectives, mandatory regulation will be introduced. Thus regulatory interventions would escalate only in response of a clear need and will not come unannounced. A possible escalating sequence being to move from (enforced) self-regulation, to informational regulation (e.g. ‘naming and shaming’), competition-based regulation (e.g. subsidies, taxes, tradable rights, stricter liability, certification), hierarchical regulation (e.g. prohibitions and orders and fitting sanctions – excluding discretion of norm-subjects, but also of norm-authorities in making exceptions or being lenient), and techno-regulation (e.g. excluding certain services or goods from practical use).

Given how not only governments regulate, but businesses and NGO’s do so too, Gunningham and Graboski have expanded this 2-dimensional approach to a 3-dimensional one, whereby three faces (which, unfortunately, we can only present in a 2D way), represent the perspectives of three types of regulators, governments, businesses and NGO’s (or, somewhat confusingly, ‘third parties’). It thus becomes possible to escalate the pyramid from different sides, but also that, while escalating, a jump is made from one to the other face – e.g. when government responds with strict(er) enforcement upon the inability of business to yield the desired change in conduct by self regulation. Thus complementarity of instruments as deployed by different actors becomes a vital issue, whether or not as a co-regulatory effort. This also calls for a proper analysis of which instrument combinations are or are not viable, while jumping from one to the other side of the pyramid – while carefully reflecting on relevant interests and values (e.g. companies may be rent seeking while being involved in co-regulation).

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68 Gunningham and Grabosky regard business regulation as a matter of self regulation only. We believe that a broader perspective (also 2nd and 3rd party regulation) is well possible, albeit sometimes as a matter of factual dependency.
5. Narratives of Appropriate Regulation/Enforcement Relations

Before looking at explicit models of matching location- and strength-levels to different actor and relational configurations, we first need to consider the actual narratives of legal enforcement of transnational informal standards more closely.

5.1 Mapping Enforcement

Locationwise, we position informal standards as *de jure* beyond multi-levelledness (i.e. not (supra)national, nor international – but transnational), while *de facto* perhaps leaning more to a domestic approach (of ‘trans-governmental networks’) or to a more international approach (of ‘international agencies’), whilst their enforcement may involve a multi-level process of regulation through legal acts and legal actions taken at ‘other’ jurisdictional levels.

Thus, to speak of enactment taking place at another level than enforcement, makes sense in a *de facto* way (referencing at some localized system of law: international or (supra)national), but *de jure* transnational norms are outside any location that may be understood as a localized legal system... which is expressed in their (actor, process, and output) informality and is exactly why we are confronted with the issue of their enforcement (i.e. no legal system: no secondary rules of enforcement).

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Consequently we may picture the relation between transnational standard-setting and (multilevel) enforcement as follows:

This image presents six possible enforcement narratives, while, for reasons of simplicity, excluding possible iteration (and ‘bottom-up’ enforcement).

Arrows a, b and c are about single-step and single-level enforcement. They show how public or private actors on either the international, supranational (read ‘European Union’) or domestic level adopt a transnational norm, either because they participated (through representatives) in the standard setting process and have ex- or implicitly bound themselves to enforcement through legal acts or legal action within their competence, or because they are ‘outsiders’ to the standard setting activity but feel that the norm fits a need that they are confronted with in terms of legal acts or legal action under consideration. In both cases we assume that actors are not legally bound to such enforcement, since the norms are informal (i.e. not obligatory), but we also assume that the norms lean themselves to be enforced – inter alia – through legal means. Such enforcement may take place either though public law or private law means and may be part of various (hybrid) regulatory strategies (hierarchic, competitive, informational, social, and code) and across various regulatory relations (1-2-3 party; involving two or more of government, market or civil society actors).

We may find that enforcement merely ‘unfolds’ at one level. This is most likely at the domestic level, as when an informal norm on pharmaceuticals is adopted in a criminal law provision (standard setting), the adherence of which is then checked by a health inspection and may, upon infringement give cause to criminal prosecution and sanctioning. At the domestic level one can imagine that some standards are prescribed in a way which leads to decentralized enforcement, as when, for instance, adherence to a building standard is molded as a criterion of issuing permits, and/or decentralized (i.e. municipal) oversight and administrative sanctioning.

Arrows 1, 2 and 3, demonstrate how such ‘decentralization’ is especially likely in a multilevel constellations when an informal transnational norm is formally adopted by an actor at one level (along the lines as described in the above – as participatory self-binding or regulatory inspiration), with the intent of having this implementation (as a
‘1st degree’ form of enforcement – by legal act) enforced (as a ‘2nd degree’ effort) at a lower level. Effectuating 2nd degree enforcement at the lower level enforcement will, of course, depend on responsiveness at this lower level. If the relation between levels is hierarchical (as a matter of inter- or supranational legal relations) then this is formally ensured – possibly with institutional means of monitoring and sanctioning – as in the EU against its Member States. If no hierarchical relation exists, it will depend on either competitive incentives (public or private, when either states and or (associations of) businesses see a competitive advantage in legal implementation and enforcement of the ‘upper level’ standards), social incentives (when governments, (associations of) businesses or NGO’s experience social or political pressure – whether or not by participating in the organizing this pressure – which creates willingness to adopt and enforce ‘upper-level’ standards), or technological incentives (as certain commodities or utilities will no longer be available if especially governments or businesses do not implement and/or enforce the ‘upper-level’ standards). 70 As these narratives demonstrate, enforcement takes place along either public law or private law acts or actions, with actions being specifically relevant when enforcement takes place in terms of sanctioning or adjudication (as opposed to implementation by elaborated standard-setting).

Next to the three ‘single level’ enforcement narratives (N_{(ai)}), built solely around arrows a, b and c, the conjunction between arrows a, b and c, arrows 1, 2 and 3, yields four multi-level narratives (N_{(ml)}) of which one covers all levels (N_{(a)}):

N4_{(ml)} - T_{n}(X) => a+1 (e.g. 1st degree enforcement through adoption by an international organization, and/or within a treaty, with 2nd degree enforcement at supranational level only)

N5_{(ml)} - T_{n}(X) => a+3 (e.g. 1st degree enforcement through adoption by an international organization, and/or within a treaty, with 2nd degree enforcement at state level)

N6_{(ml)} - T_{n}(X) => b+2 (e.g. 1st degree enforcement through supranational adoption with 2nd degree enforcement by member states)

N7_{(a)} - T_{n}(X) => a+1+2 (e.g. 1st degree adoption by an international organization, and/or within a treaty, with 2nd degree enforcement by a supranational organization, followed by 3rd degree enforcement by member states)

Although we present examples of a public law nature, again it is possible that private law organizations (whether business or transnational regulatory networks/bodies) operate on the various levels and either push for enforcement at lower levels or are compelled or invited to effectuate such enforcement – in as much as within the ‘public regulation’ scope.

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70 Alternatively one could refer here to the enforcement instrument types named by Stewart (see 3.2).
The next table presents all seven narratives schematically, while (for reasons of simplicity) setting aside the possibility of differentiating in $T_n(X)$ between $T_n(X_{in})$ and $T_n(X_{tn})$, so depending on whether the transnational norm is enacted by an international agency or a trans-governmental network – to say nothing of possible varieties in regulatory actor/relation configurations.

<table>
<thead>
<tr>
<th>Narratives</th>
<th>International</th>
<th>Supranational</th>
<th>Domestic</th>
</tr>
</thead>
<tbody>
<tr>
<td>$N1_{(s)} = T_n(X) =&gt;$</td>
<td>a</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>$N2_{(s)} = T_n(X) =&gt;$</td>
<td>-</td>
<td>b</td>
<td>-</td>
</tr>
<tr>
<td>$N3_{(s)} = T_n(X) =&gt;$</td>
<td>-</td>
<td>-</td>
<td>c</td>
</tr>
<tr>
<td>$N4_{(m)} = T_n(X) =&gt;$</td>
<td>a</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>$N5_{(m)} = T_n(X) =&gt;$</td>
<td>a</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>$N6_{(m)} = T_n(X) =&gt;$</td>
<td>-</td>
<td>b</td>
<td>2</td>
</tr>
<tr>
<td>$N7_{(a)} = T_n(X) =&gt;$</td>
<td>a</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

5.2 Mapping Strength and Location

As stated in the above, it is a popular presumption that there is a correlation between high strength (‘hard law’ enforcement) and low location (e.g. domestic) enforcement, and reciprocally between low strength (‘soft law’ enforcement) and high location (e.g. international) enforcement. This could be pictured as follows:

<table>
<thead>
<tr>
<th>Strength</th>
<th>Location</th>
<th>High (international/global)</th>
<th>Low (domestic)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intense (‘hard’)</td>
<td>![image]</td>
<td>![image]</td>
<td>![image]</td>
</tr>
<tr>
<td>Gentle (‘soft’)</td>
<td>![image]</td>
<td>![image]</td>
<td>![image]</td>
</tr>
</tbody>
</table>

(@ =usually/normally; !=exceptionally)

With slightly more refinement, we could distinguish a ‘middle location level’, being supranational, but also other forms of regional cooperation (between states), whilst the ‘moderate strength level’ may, be placed between intense (‘hard law’) and gentle (‘soft law’) strength levels.

From a legal perspective this could be regarded as a fuzzy concept, but one could reason that cases of ‘bright-line’ (often substantive) standards with soft sanctioning or, conversely, ‘balancing’ (perhaps even procedural) standards with hard sanctioning, would provide a legal fit with this strength level. One could also reason that the supranational legal perspective ‘generally’ comes with a more coordinative power allocating approach (where rules of conduct are veiled under power transfer, or follow from discretion granted to member states). Finally, one could reason that these strength levels would follow from the regulatory strategies (hierarchy, competition, community, and code) or Stewart’s compliance instrument types (command and control,
market/information-based, and collateral compliance mechanisms). For reasons of simplicity, we assume here that 3 strength-levels can be distinguished ranging from intense (Hierarchy & Code – H), via moderate (Network & Competition – N) to gentle (Community & Informational – C).

<table>
<thead>
<tr>
<th>Strength</th>
<th>Location</th>
<th>High (international/global)</th>
<th>Middle (Supranational)</th>
<th>Low (Domestic)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intense (H)</td>
<td>!</td>
<td>@</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moderate (N)</td>
<td>@</td>
<td></td>
<td>@</td>
<td></td>
</tr>
<tr>
<td>Gentle (C)</td>
<td>@</td>
<td>@</td>
<td>!</td>
<td></td>
</tr>
</tbody>
</table>

(\(@ =\)usually/normally; \(\circ =\) occasionally; \(! =\)exceptionally)

Of course, and as stated in the above, although this model allows for three degrees of frequency in types of location-strength matches, it remains overly simplistic.

Criticism, we believe, would target both (A) varieties in enforcement acts and actions and (B) varieties in the transnational norm which is being enforced.

A – concerning enforcement the criticism would be

- that taking H, N, and C as relevant range from hard to soft strength is too simplistic, because, for example, N- and C-strength may de jure seem less intense than H, but de facto they may, given the institutional environment in which they are deployed (i.e. markets, media & public opinion), be experienced at least as intense as H. Basically this criticism is about the possible contrasts or dissimilarities between de facto and de jure strength (\(S_{\text{leg}} \neq S_{\text{fact}}\)).

- that though depiction in the immediately above table allows for narratives with unlikely positions being taken (\(S_{\text{high}}\) at \(L_{\text{low}}\) – see the boxes containing a \(\circ\) or !), it does not address the plausibility of a narrative sequence of de-escalation or escalating up in strength, nor a normative approach to this.

B – concerning the transnational norm to be enforced the criticism would be

- that we are assuming this norm to be of the lowest strength and of a non-jurisdictional location. In assuming low de jure strength we neglect the possibility of de facto high(er) strength of \(T_n(X)\), through de facto enforcement incentives, such as competitive advantage, social responsibility or techno-regulation. We also need to consider the de facto high or low location (as when a norm is set by an International agency or a Trans-governmental network, as this could provide a de facto default location for enforcement. So, on both strength and location we need to basically be aware of a possible dissimilarities between de facto and de jure characteristics (\(L_{\text{low}} \leftrightarrow L_{\text{high}}\) and \(S_{\text{low}} \leftrightarrow S_{\text{high}}\)).
that there may be a correlation between variations in the *de facto* strength of \( T_n(X) \) and variations in strength of, not only *de facto*, but also *de jure*, i.e. legal means of enforcement – as *de facto* impacts require legal regulation.

When we address criticism A, we should be open to a large variety of options, because if we hold on to the simple threefold strength levels (abbreviated to H-N-C; Hierarchy, Networks&Competition; Community), while allowing iteration, then the multi-level enforcement narratives (4-5-6-7) present a multitude of configurations:

<table>
<thead>
<tr>
<th>Multilevel Enforcement Narratives</th>
<th>International</th>
<th>Supranational</th>
<th>Domestic</th>
</tr>
</thead>
<tbody>
<tr>
<td>( N4_{(ml)} = T_n(X) \Rightarrow a+1 )</td>
<td>H</td>
<td>H</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>N</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>C</td>
<td>C</td>
<td>-</td>
</tr>
<tr>
<td>( N5_{(ml)} = T_n(X) \Rightarrow a+3 )</td>
<td>H</td>
<td>-</td>
<td>H</td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>-</td>
<td>N</td>
</tr>
<tr>
<td></td>
<td>C</td>
<td>-</td>
<td>C</td>
</tr>
<tr>
<td>( N6_{(ml)} = T_n(X) \Rightarrow b+2 )</td>
<td>-</td>
<td>H</td>
<td>H</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>C</td>
<td>C</td>
</tr>
<tr>
<td>( N7_{(al)} = T_n(X) \Rightarrow b+2 )</td>
<td>H</td>
<td>H</td>
<td>H</td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td></td>
<td>C</td>
<td>C</td>
<td>C</td>
</tr>
</tbody>
</table>

In total, this yields three times nine configurations for the three partial \( N_{(ml)} \) narratives, and three times nine configurations for the one full \( N_{(al)} \) narrative, so in total fifty-four(\(2 \times 27 = 54\)) possible configurations:

- of \( N4_{(ml)} \): \( N5_{(ml)} \) and \( N6_{(ml)} \): \( \sum 3x(HH, HN, HC; NH, NN, NC; CH, CN, CC) \)
- of \( N7_{(al)} \): \( \sum (HHH, HHH, HHC; HNH, HNN, HNC; HCH, HCN, HCC)+(NHH, NHN, NHC; NNH, NNN, NN; NCH, NCN, NCC)+(CHH, CHN, CHC; CNH, CNN, CNC; CCH, CCN, CCC) \)

Note, firstly, that if we are also addressing criticism B, by varying types of transnational norms, as two if we vary only in *de facto* location level, or as four, when we would vary both *de facto* location and *de facto* strength, then the above number would increase to 108 and 216 respectively.

Note, secondly, that in the above table, we took the narrative from a high to a low location level as point of departure. The opposite narrative, from domestic or supranational upward to supra- and/or international, is also possible, and basically brings the same (216) configurations – so in all we have 432 narratives. Clearly, the bottom-up enforcement trajectories will not have a hierarchical thrust behind them. Having said this, there are certainly scenarios where competition-, technology- or community-based considerations trigger an upward sequence of enforcement. The USA,
China and the EU, for instance, present challenging domestic and supranational markets and communities, which could lead to an extraterritorial application, at a higher level (or levels) of transnational standards (probably enacted at a de facto low level, such as of trans-governmental networks), subsequently adopted at lower levels (arrows b and c) and them moving upward (arrow 4 – possibly in two stages).

5.2 Mapping Enforcement by Legal Means

Finally, a brief (mapping) remark is in place as to the different enforcement mechanisms – implementation, adjudication and sanctioning – and their legal manifestations through legal acts and legal actions. Legal acts are actions taken with intended legal effects (amounting to the creation, alteration or termination of rights and/or obligations), based upon a legal power (granted by a respective secondary rule), such as in legislative, administrative and civil law acts. Legal acts may be primarily about standard-setting (e.g. legislative and administrative), but also about supervision (e.g. order cooperation, search warrants), application of a sanction (e.g. sentencing) or a court ruling (e.g. court injunction). Legal actions are judicial proceedings brought by one party against another for protection of a right, against a wrong that is done, or to prevent a wrongdoing. A legal action may be preceded by action between concern parties only, to later, if unsuccessful, take the form of a court case or an alternative form of legal dispute resolution. Generally speaking, to undertake a legal action not only presupposes the existence of a right (claim or privilege; based upon a legal norm), but also an action right (providing the procedural legal right to, ultimately, enter into a lawsuit).

As follows from these definitions, legal acts may be relevant both to adopting a standard from a transnational norm, into a particular legal order (or jurisdiction) and to acts concerning supervision or sanctioning of respective behavior. From a legal standpoint to assume, that legal enforcement in terms of supervision and sanctioning is possible without standard setting (of the norm to be enforced) taking place within the relevant legal order (international, supranational or domestic), makes sense only if either:

a. the transnational standard is incorporated/adopted in a norm of a hierarchically higher legal order, which have direct legal effect in the lower order (so the legal order can focus on supervision and sanctioning); (or)

b. (if not a.) if the transnational standard is incorporated or adopted in a norm of the legal order in which further enforcement, by monitoring and sanctioning will take place.

---

71 Add reference.
Whatever will be the case, legal powers or action rights will be relevant for either supervision and sanctioning, but also for adoption/incorporation of the transnational norm. As to the latter a few things need to be considered carefully.\textsuperscript{72}

\textit{Firstly}, adoption can be voluntary or mandated. Within a legal order a transnational norm can be adopted as it is considered the best possible norm to a given public interest; solely on the basis of intra legal order decision-making. Mandated adoption takes place when a hierarchically higher legal order so orders – merely by procedural command or by explicit reference to the norm, which merely needs implementation (as fine-tuning or perhaps as a minimum standard that may be ‘gold plated’). EU-directives are a clear example of the latter.

\textit{Secondly}, adoption of a transnational norm can be explicit or implicit. Implicit adoption takes place when the enactment itself displays no reference to the transnational norm, but merely cites its content (possibly with slight modifications). Perhaps an accompanying explanatory memorandum or a verbatim report of procedures in the making of the norm holds a reference to the transnational norm – if only to convince skeptics – but legally speaking this would be relevant only to possible future interpretive disputes. Explicit adoption, however, would mean that the standard setting legal act does provide a clear reference to the transnational norm, possibly without actually repeating the content of that norm but by mere reference to its ‘label or number’, or by not only referencing, but also literally citing the content of the standard.

\textit{Thirdly}, adoption can be static or dynamic. Explicit adoption by merely referencing to the label or number of a standard, may be intended to allow changes to that standard under the same number/label, to directly become the standard under the adopted norm – perhaps with more restrictions to the norm-subjects behavior. This is also known as \textit{dynamic} referencing.\textsuperscript{73} When explicit adoption comes with explicit citation, this may taken to be indicative of a static reference, which means that when the transnational standard is changed, the adopted standard does \textit{not} change with it. This is known as \textit{static} referencing. It should be kept in mind, that implicit adoption may also come with a dynamic twist. When implicit adoption results from a mandate by a higher legal order, changes to that mandate come with legal effects. Changes in an authoritative legislative, administrative or judicial interpretation of that mandate (especially of the substantive rule of conduct elements, or conditions of the delegated legal powers, that it prescribes) may lead to dynamic adaption of the norm. This applies especially in supranational legal configurations, such as the EU, but also in other legal orders that (by virtue of a constitutional or legislative provision in the lower legal order) come with direct effect (including interpretative authority from organizations at that level).

\textsuperscript{72} This part needs further referencing.

\textsuperscript{73} A mere example (for now): under Italian law dynamic reference is called \textit{rinvio} ‘mobile’ as opposed to \textit{rinvio fisso} or ‘recentizio’ (which, in turn, is known also as ‘incorporation by reference’. See Maurizia De Bellis, The New Public Law in a Global (Dis)Order: A Perspective From Italy, \textit{Jean Monnet Working Paper} 17/10 (Public Law and Private Regulators in the Global Legal Space - series).
Changes in a mandate to incorporate some transnational standard, also bring a dynamic dimension to an adopted standard. That does not come as a surprise, as generally, lawmakers have the power not only to introduce but also to alter and terminate an existing legal act. It does become interesting when there is a superior legal order (with superior legal authorities) that may hold lower order authorities responsible to timely mandated implementation and which may come with direct effect (and compensation of damages for failure to implement – the *Francovich* principle).74

*Finally,* on a comparative but relevant note, there may and often will be *open* norms within a given legal order, such as under private *tort(s)* law, or under public law provisions of *due care* (e.g. in a general environmental standard or in a provision of an environmental permit),75 which may have been introduced before a relevant transnational norm was enacted, or which was – somewhat inconsiderately – introduced without knowledge of an existing relevant transnational norm. The norm content has to be determined on a case to case basis, considering *inter alia* the activity in case, other facts of the case, the objective(s) of the norm (e.g. public or occupational safety or protection of health), the interests of the norm-subject, and usual practices in the relevant area (e.g. industry). This is where transnational standards may enter stage as ‘filling in’ most fittingly, or most aptly interpreting the open norm-object – to the ultimate interpretation of the relevant public office, or court. This type of dynamic usage (by tacit adoption) often takes place under labels such as 'state of the art defense', broadly (through ‘thick stakeholder consensus’76) accepted practicable or technical means, onto, perhaps, claims of acceptance of a transnational norm as endowed with the (adhortative) legal status of, (proto-) customary law.

And, of course, for adopted or incorporated transnational standards to be enforced to – hopefully – full compliance, also will take the necessary secondary rules.

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74 A subject that would deserve more elaboration, but which is also broadly discussed elsewhere. See, *inter alia*, Stewart, 'Enforcement of Transnational Public Regulation', op.cit., p. 14

75 The reader be reminded that the subject of adoption of norms is generally placed under the heading of legislative and general administrative orders, but that individual administrative acts (for individual cases), and provisions of these, such as permit provisions, may, underpinned by a general public interest norm related to the legal power from which they originate, hold implicit and explicit (voluntary and mandated) incorporations of transnational norms.

## Legal enforcement: applying legal means (acts & actions) towards compliance

<table>
<thead>
<tr>
<th>Transnational norm</th>
<th>Implementation by adoption of the standard</th>
<th>Oversight, sanctioning, Adjudication</th>
</tr>
</thead>
<tbody>
<tr>
<td>By an International Agency</td>
<td><img src="image" alt="Diagram" /></td>
<td><img src="image" alt="Diagram" /></td>
</tr>
<tr>
<td>By a Trans-Governmental Network</td>
<td><img src="image" alt="Diagram" /></td>
<td><img src="image" alt="Diagram" /></td>
</tr>
<tr>
<td>Ditto (see above)</td>
<td><img src="image" alt="Diagram" /></td>
<td><img src="image" alt="Diagram" /></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Legal act</th>
<th>Legal action¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes – voluntary or mandated adoption/incorporation</td>
<td>Administrative law demands, actions and acts (supervision and/or sanctions (e.g. permit or grant suspension or revocation; admin. penalty)</td>
</tr>
<tr>
<td>- legislative (in public or private law)</td>
<td>Criminal law complaints, prosecution, rulings (punitive, reparatory)</td>
</tr>
<tr>
<td>- administrative (e.g. grants, licenses, informational)</td>
<td>Civil law suits by private persons or government</td>
</tr>
<tr>
<td>Various techniques: implicit, explicit (static/dynamic)styles</td>
<td></td>
</tr>
</tbody>
</table>

| No – but applicability of a standard from a hierarchically superior legal order or existence of an open norm | Above acts and actions of civil (e.g. tort), administrative (e.g. revocation) and criminal² nature |

¹ Legal acts may enter area of oversight, sanctioning and adjudication, but with mere intent of oversight or sanctioning in individual case
² Criminal sanctions are less likely because the lex certa principle may not allow for open criminal norms with (vague) substantive references to transnational standards.

Apart from the choices pointed out in the afore paragraphs 5.1 and 5.2, the immediately above mapping of legal acts and legal actions brings a further variety in options – such as the choice, regarding one and the same transnational norm or adoption thereof, between (vertical/public) government supervision and sanctioning, and (horizontal/private law) monitoring and legal action between citizens (including, possibly, class actions). Clearly, these choices also relate to the chosen regulatory strategy. We will, however, leave these options aside in our the remainder of this discussion (in par. 5.4 and, Concluding, 6.).

### 5.4 Matching Strength and Location

When we return to the earlier found 216 (or even 432) possible narratives, clearly to flesh all of these out step-by-step would be a painstaking activity. Things would, however, already be more simple if were to start our analysis from a given instance of adoption (starting from arrows a, b and c). In most of these narratives (N4-6⁽ᵐˡ⁾) only three options follow (with only the one ²ᵈ degree enforcement step to be placed, upon ¹ˢᵗ degree enforcement by adoption). Only in one narrative, across all levels (N7⁽ᵃˡ⁾)
there will be nine enforcement steps, given that these extend beyond the 2\textsuperscript{nd} into the 3\textsuperscript{rd} degree.

Rather than to provide a steps per narrative description and analyse, we prefer to point merely at the basic normative considerations that are likely involved in these steps.

In this normative-design approach, towards optimally effective and efficient enforcement\textsuperscript{77} we assume that the theoretically optimal default mix of location- and strength-levels of enforcement is that of the lowest possible location ($L_{\text{low}}$) matched by the lowest legally relevant strength ($S_{\text{low}}$). This assumption rests upon the promise of the principle of subsidiarity (enforcing as close as possible to the ‘ultimate’ regulatees – avoiding more unnecessary ‘distant’ intermediary regulators/enforcers), and upon the promise of virtuousness of regulatees (enforcing through the least interventionist means of enforcement – in the hopes of swift and almost spontaneous regulatee engagement, without unnecessary prescription and coercion).\textsuperscript{78} While trying to establish this default optimum in practice we may, however, encounter enforcement failure along two lines:

a. at low location-levels we may be faced with subsidiarity failures, for instance because the relational scope of relevant transaction (e.g. EU-supranational trade) exceeds the jurisdictional scope of regulation (e.g. domestic);

b. at low strength-levels we may be faced with virtuousness failures, for instance because perverse transaction incentives (e.g. high profitability or low chance of reputational damage) outweigh the negative consequences of violation (e.g. naming & shaming).

As a consequence to either or both, the default optimum may not depict the most effective and efficient legal means of enforcement, and so not provide the desired contribution to compliance. If so, an alternative location-strength match has to be established, which provides a (remedial) facility, without such failure (or with some degree of remediableness).\textsuperscript{79} So, we look for ‘regulatory positions’ as alternative (remediable) ‘regulatory placing’, which stands away from our default optimal mix, as it alternatively matches location and strength of enforcement with greater effectiveness and efficiency... looking at different positions along a virtual location and strength axis, and perhaps at both.

\textsuperscript{77} Without suggesting a necessary causal relation between legal enforcement (as manipulable independent variable) and compliance (as dependent variable), but focusing especially on ensuring that applied legal acts and legal actions are targeted (not under-, nor overinclusive, and ergonomically fitting with relevant secondary rules).

\textsuperscript{78} Gunningham and Graboski, supra, pp. 391-395.

\textsuperscript{79} O.E.Williamson, The mechanisms of Governance, Oxford University Press 1996, p. 210: “comparisons of actual forms of organizations with ideals. As observed earlier, hypothetical ideals are operationally irrelevant. Within the feasible subset, the relevant test is whether (1) an alternative can be described that (2) can be implemented with (3) expected net gains. This is the remediableness criterion.” We suggest here that this concept or criterion can also apply to describing an alternative (to default optimality) that can lead to (legal) enforcement with greater effectiveness (and efficiency) (than the default optimum) – as it circumvents failure factors relating to matched choices of location and strength.
In the determination of alternative positions we need to identify various failure factors, while addressing both strength and location. These factors could be applied to our (3x3)+{(1x9)}-scope of possible matches, but also to our 108, 216 or even 432 narratives – to say nothing of the underlying variability in actor and relational settings.

Before we name some of the key failure factors – as is all we have room for in this contribution – we need to emphasize that the relative wording of the theoretical default optimum of lowest possible location and lowest possible strength (i.e. enforcing transnational norms as closely as possible to the citizen, by using the least possible interventionist measures) already indicates the need for practical considerations. Given the anchor point of transnational norms (the objects of the legal enforcement effort), it seems to not embark from the lowest location and strength levels, but assume a more practicable default optimum, relating to the de facto position and nature of the applicable transnational norm, i.e.:

a. closest to the de facto location level – so, for instance, domestic or supranational when the norm is enacted by a trans-governmental network (say of the European competition regulators), and global or supranational when the norm is enacted by an International agency (say the working group for ITU-standards);

b. closest to the de facto strength level – so, for instance, as an informational norm when the transnational norm is presented as a social norm (say concerning dietary recommendations), and as a hierarchical or techno-regulatory norm when the underlying transnational issue is presented as a world wide ban on products related to child labour.

From this practical default optimum the analysis can take place, with the same reluctance on upscale or escalating as in the theoretical default optimum, but from the more realistic contextual position that the transnational norm already depicts a ‘preliminary’ analysis of minimally required location and strength levels to have a chance at being effective – taken to the extreme: international agencies will not be the...
likely levels for standard setting regarding European Security and Defence Policy and conversely trans-governmental networks will not be likely norm-authorities as it comes to matters of Internet cyber security.

In the above, par. 3.1, we cited Stewart in pointing at four reasons why decentralized domestic implementation and enforcement may fail – ranging from legal (e.g. no proper primary or secondary rule(-making), political (e.g. insufficient consensus), administrative (e.g. insufficient capacity or resources), to regulatory (intrinsic efficacy problems). It is not that these themselves readily translate into the notion of subsidiarity failure, but that this notion is applied by taking score on these points while looking from the lowest (practicable/de facto transnational) location level up. Generally, domestic and supranational levels of legal orders/jurisdictions will do better at having secondary rules, than international levels. The ‘score card will have to show, while departing from the (practical) default optimum, if all relevant failure (or reversely success) factors show a similar score and if not, trade-offs will have to be considered also in the light of the aspired strength of the instrument and the capacity for escalating strength.

<table>
<thead>
<tr>
<th>Failure/success factor</th>
<th>Low Location Level</th>
<th>High Location Level</th>
<th>Appraisal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic</td>
<td>Supranational</td>
<td>International</td>
<td></td>
</tr>
<tr>
<td>1 - Legal</td>
<td>+/–</td>
<td>+/-</td>
<td></td>
</tr>
<tr>
<td>2 - Political</td>
<td>+/-</td>
<td>+/-</td>
<td>+/-</td>
</tr>
<tr>
<td>3 - Administrative</td>
<td>+/-</td>
<td>+/-</td>
<td>+/-</td>
</tr>
<tr>
<td>4 - Regulatory</td>
<td>+/-</td>
<td>+/-</td>
<td>+/-</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(+ poss. escalation)</td>
</tr>
</tbody>
</table>

In Gunningham and Graboski’s view on, let us say, ‘smart strength’, two failure/success factors are at play: prescription en coercion.80 Prescription concerns the extent to which the norm-authority channels more aspects of and significant change in norm-subjects’ behavior, while coercion concerns the measure of extrinsic control (as ‘negative pressure’) exercised onto norm-subjects to adjust to the prescribed standard. Self-regulation is (certainly) low on coercion but (probably) high on prescription; in tax-instruments usually have a reciprocal interventionist profile.

When, roughly taken together, prescription and coercion make for a measure of strength that may initially be employed with low strength but then (responsively; i.e. when necessary) escalate-up. Again roughly, we could picture the following sequence (from-to): (enforced) self-regulation, to informational regulation (e.g. ‘naming and shaming’), competition-based regulation (e.g. subsidies, taxes, tradable rights, stricter liability, certification), hierarchical regulation (e.g. prohibitions and commands and fitting sanctions – excluding discretion of norm-subjects, but also of norm-authorities in

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80 Gunningham and Graboski, supra, p. 391 (-404).
making exceptions or being lenient), and techno-regulation (e.g. excluding certain services or goods from practical use).

<table>
<thead>
<tr>
<th>Escalating Strength Levels of Regulatory Intervention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prescription ⇔ Coercion ⇔ High</td>
</tr>
<tr>
<td><strong>Low</strong></td>
</tr>
<tr>
<td>Community &amp; Informational Network &amp; Competition Hierarchical &amp; Code</td>
</tr>
<tr>
<td>High</td>
</tr>
<tr>
<td>(1-2-3) – refers to applicability of 1st, 2nd and 3rd party regulation relations</td>
</tr>
</tbody>
</table>

In conjunction between levels of location and of strength, away from the default optimality a remediable alternative must be determined on the basis of trade-offs between the above failure/success factors. For instance:
- the first three factors named by Stewart seem less important when strength levels are low, but become more important (and at some point a condition sine qua non) at high strength levels;
- when a location level's jurisdiction does not encompass the ‘relational scope’ of transactions, then its effectiveness will be low or absent – for example domestic regimes falling short in addressing global market certificates; regardless of strength levels.

The relevance of failure/success factors will, of course, vary not only with the relational configuration (1-2-3 party, plus actor types), but also to contingent background factors. Here we have deliberately chosen to provide a building block through normative modeling, setting aside contingencies; the application (and validation of relevance) to empirical cases is a next step.

6. Concluding Remarks: Towards a Typology of Appropriate Regulation/Enforcement Relations

The art is then how to link multilevel to multi-actor regulation, combining iteration between de facto transnational and de jure international, supranational, and domestic regulation. In doing so we suggest a remediable upscaling and escalatory approach as interventions ‘move’ from a (practical) default optimum mix to higher strength and location levels. Broadly speaking this may lead to a matrix of possibilities combining a particular level (from domestic to international) and a particular strength (from community-based to hierarchical and code-based) – each time upon involvement of one
or more of three types of regulators (governments, businesses (associations), civil society orgs./NGO’s).

<table>
<thead>
<tr>
<th>Transnat norm</th>
<th>Enforcement strength levels</th>
<th>Enforcement location levels</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Agencies</td>
<td>constituency code</td>
<td>Government</td>
</tr>
<tr>
<td></td>
<td>crime command prohibition</td>
<td>RY</td>
</tr>
<tr>
<td>B. Networks &amp; Competition</td>
<td>Taxes certificates</td>
<td>Business</td>
</tr>
<tr>
<td></td>
<td>Tradable rights</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Torts subsidies</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Property Contracts</td>
<td>3</td>
</tr>
<tr>
<td>D. Community &amp; informational</td>
<td>enforcement self-regulation</td>
<td>NGO</td>
</tr>
<tr>
<td></td>
<td>Regulative code</td>
<td>R0</td>
</tr>
<tr>
<td></td>
<td>Naming &amp; shaming</td>
<td>Default optimum</td>
</tr>
</tbody>
</table>

No.s 1-2-3 (along triangle) refer to applicable 1st, 2nd and 3rd party regulation relations

One, two or three actors as named in the triangle in the above table are involved at different levels of 1st, 2nd and perhaps even 3rd degree enforcement, while applying strategies and instruments named, considering – hopefully; wisdom (to be effective and efficient) permitting – failure/success factors while departing from a de facto default optimum of subsidiarity and virtuousness. More schematically this could be pictured by dividing the area in the table into nine boxes (3 strength x 3 location level combinations, with actor triangles in each. Enforcement narratives (432 maximum) could then be defined as moves across these boxes (from box to box) – but we feel we have already taken the maximum of the readers’ concentration.