Public and Private Regulation

Mapping the Labyrinth

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Over the past three decades, a growing number of national governments and international organizations have taken action to promote greater awareness in governments' approach to the formulation, implementation and revision of legal rules. Smart regulation tools such as *ex ante* regulatory impact analysis (RIA) are being heavily sponsored internationally, and coupled with the promotion of stakeholder consultation and participatory decision-making, monitoring of the implementation of legislation, and *ex post* evaluation.[1] Guidance documents and overarching principles on "how to regulate" have proliferated thanks to the work of OECD, the World Bank and other international organizations, including the United States Office of Information and Regulatory Affairs and the European Commission, whose Impact Assessment Guidelines are being adopted as reference by many EU and non-EU countries.[2] Moreover, the need for a risk-based approach to regulation and inspections, as well as enhanced attention for "cutting red tape" – *i.e.* reducing administrative burdens generated by public legislation – are becoming firmly embedded patterns in many countries' smart regulation agenda.[3]

At the same time, in particular with the financial and economic crisis that disrupted the global economy since 2007, the idea of "how to regulate" is undergoing thorough revisiting. Undoubtedly, besides an array of disastrous consequences, the crisis has also created opportunities for a better understanding of how markets (do not) work, and how governments can interact with private players to achieve public policy goals more effectively. One of the consequences of this trend is that the "less is more" philosophy that dominated the 1980s and 1990s, mostly aimed at minimizing public interference with market forces, is no longer a dominant paradigm.[4] The need to ensure at least regular monitoring of market outcomes by public policymakers is considered as a basic safeguard of social welfare: at the same time, even the basic paradigms of competition-oriented legislation, such as the liberalization of network industries, are being challenged as potentially sub-optimal, leaving room for intermediate solutions between the *laissez faire* and "command and control" legislation.

Meanwhile, confidence in the virtues of market-generated outcomes, as well as distrust for government's ability to regulate, has led to widespread advocacy for forms of private regulation *in lieu* of public regulation. As a legacy of this belief, most guidance documents on *ex ante* policy appraisal specify that governments should award priority to self- and co-regulatory solutions before starting to consider more intrusive policy approaches.[5] As a result, key policy domains have increasingly been left in the remit of private players, with limited or no interference by public policymakers. The trend towards increasing reliance on private governance and regulation by public policymakers is visible also in the field that generated the current crisis, *i.e.* financial markets. Consider the unfortunate decision, in the United States, to delegate to private regulation a key area for public policy such as the supervision of banks'

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1. See A. Renda, *Law and Economics in the RIA World*, Intersentia, Antwerp 2011 for an overview.
2. See European Commission (2009); OECD, *OECD Reviews of Regulatory Reform, Regulatory Impact Analysis: A Tool for Policy Coherence*, OECD Publishing, Paris 2009.
3. See OECD, *Why Is Administrative Simplification So Complicated?: Looking beyond 2010*, Cutting Red Tape, OECD Publishing, 2010, doi: <10.1787/9789264089754-en>.
4. We refer to the idea that dominated economic theory and international regulatory reform in the 1980s and 1990s, *i.e.* that reducing the amount of regulation would trigger increases in competitiveness. A good example is the publication by the UK Better Regulation Task Force, titled "Regulation - Less is more. Reducing burdens, improving outcomes", dated March 2005.
5. See *i.e.* L. Senden, "Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?", 9 *Electronic Journal of Comparative Law* 1, 2005 <www.ejcl.org/91/art91-3.html>; F. Saurwein, "Regulatory Choice for Alternative Modes of Regulation: How Context Matters, 33 *Law & Policy* 3, 2011, pp. 334-366. Available at SSRN: <http://ssrn.com/abstract=1870727> or doi: <10.1111/j.1467-9930.2011.00341.x>. Co-regulation was described by H. Van Schooten & J. Verschuuren (eds.), *International Governance and Law: State Regulations and Non-state Law*, Edward Elgar, Cheltenham 2008 as an element of "non state law" backed by "some government involvement".

risk exposure[6]: the disastrous consequences of the decision to delegate risk monitoring to the private-led Consolidated Supervised Entities program in the US ultimately led Nobel Prize Joseph Stiglitz to argue that "self-regulation is preposterous". And even Nicolas Sarkozy commented that self-regulation was finished, and that principles-based regulation lost all its credibility in the financial services sector.

"The problem of risk supervision in financial markets is perhaps the single most astounding black hole of public policy in the past century."[7] But how could such a huge regulatory gap emerge? Some commentators have pointed the finger at the lack of real policy appraisal in the US financial regulation: as a matter of fact, tools such as RIA are not compulsory in the United States beyond secondary legislation passed by government agencies;[8] since the SEC is an independent agency, its decisions were not subject to a publicly available, motivated economic analysis, which would have included risk assessment. However, this amounts only to a fairly incomplete explanation: suffice it to recall that in the EU, a long, detailed and costly Impact Assessment produced in 2004 by the European Commission on the capital adequacy directive that would form integral part of the "Basel II" package, after considering the results of four external studies, reported that "even if no regulatory regime is able to completely eliminate the possibility for banking crisis, the new framework should nevertheless help reduce the frequency of such incidents".[9] As one of us reported in a recent book, the fact that the subprime mortgage crisis led also to a credit crunch and an economic crisis in the EU also depends on the very bad functioning of the large exposure reporting system foreseen by the "Basel II" package: in a nutshell, banks that had limited information about their risk exposure enjoyed relative discretion in selecting information to be sent to supervisory authorities: this ultimately led the system to walk on thin ice, until the system broke down.[10]

Against this background, the financial crisis can teach us two separate lessons from the two sides of the Atlantic. In the US, reliance on the private sector was simply ill-conceived, especially since private players have been invited to coordinate to solve a market failure, with no control whatsoever on the side of government. To the contrary, in the EU the supervision of risk exposure was not fully delegated to the banking sector: however, public policy was based on a badly designed reporting system, which – although compulsory – led to an exacerbation of information distortion in the system. With a degree of over-simplification, one could say there was a failure of private regulation in the US, and a failure of public regulation and oversight in the EU.

The recent history of financial markets, though certainly being the "poster child" of this uncertain generation of public policy, is however only the tip of a much larger iceberg. Although private governance is often aimed at ensuring the (private) production of public goods, commentators have started to spot cases in which reliance on private regulation is either excessive or misplaced. Examples are numerous, and relate to a wide spectrum of policy domains: from the "Action Plan" implemented in the US by the Utilities Solid Wastes Activity Group (USWAG) to foster the adoption of strict standards for groundwater safety;[11] to the obscure effects of widespread public-private interaction in crucial initiatives such as the Africa Stockpiles Programme;[12] to the failure of private regulation to keep down international roaming tariffs in the EU (which led to action being taken by the Commission in 2007); and to many examples of self-regulation, *e.g.* in legal professions and pension schemes.

So, should we just get rid of the idea that private players can be good regulators? The answer, of course, is no. As a matter of fact, there is widespread agreement on the fact that many forms of private governance pursue highly desirable goals from a societal perspective.[13] For example, voluntary certification and standardization bodies often aim at re-allocating entitlements, solving collective action problems and raising the awareness of end consumers on the respect of minimum health- or environment- related standards. In some cases, private players decide to coordinate in order to solve market failures that governments are unable to tackle; in other cases, private regulation aims at fixing government failures, especially when international supply chains penetrate territories with very weak rule of law enforce-

6. In 2004, after the highly contested 1999 Gramm-Leach-Bliley Act passed by the Clinton Administration – and also due to the lack of explicit statutory authority to require investment bank holding companies to report their capital, maintain liquidity, or submit to leverage requirements – the Securities and Exchange Commission (SEC) created the Consolidated Supervised Entities (CSE) Program as a way for global investment bank conglomerates that lacked a supervisor under law to voluntarily submit to regulation. This gradually led to delegating to private banks the supervision of risk and the preservation of sustainable banks' debt-equity ratios, beyond the reach of public policymakers. In 2008, the Chairman of the SEC Christopher Cox declared that "when Congress passed the Gramm-Leach-Bliley Act, it created a significant regulatory gap by failing to give to the SEC or any agency the authority to regulate large investment bank holding companies, like Goldman Sachs, Morgan Stanley, Merrill Lynch, Lehman Brothers, and Bear Stearns". He added very simply that "the last six months have made it abundantly clear that voluntary regulation does not work", and put the CSE Program to an end.
7. SEC Chairman Cox reflected on the fact that today "a massive hole remains: the approximately $60 trillion credit default swap (CDS) market, which is regulated by no agency of government. Neither the SEC nor any regulator has authority even to require minimum disclosure".
8. A. Renda, *Impact Assessment in the EU: The State of the Art and the Art of the State*, CEPS, Brussels 2006.
9. SEC (2004)921, Proposal for a Directive of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions (recast), 14 July 2007, <http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2004/sec_2004_0921_en.pdf>.
10. Renda 2011; FSB, Larosiere report, Turner report.
11. In 2008, a chain of events led to the collapse of an earthen dam in Tennessee, and a toxic stew containing 5.4 million cubic yards of coal ash inundated a portion of Roane County and contaminated a river coursing through a far larger region of Appalachia (quote)
12. R. Falkner, "Private Environmental Governance and International Relations: Exploring the Links", 3 *Global Environmental Politics* 2, 2003, pp. 72-88.
13. More generally, an important difference can be established between industry-led and NGO-led private regulatory schemes.

ments; in other cases, private players organize to avoid that public regulators step into a specific policy area to regulate directly; and in yet another range of cases, private players coordinate to achieve socially undesirable goals, such as collective boycotts, cartels, exchange of information among competitors and other anticompetitive behavior.[14]

Against this background, what creates concern is that public bodies seem to have developed no means to design collaborative forms to control the evolution of public/private governance. This paper thus seeks to lay the foundations for a better understanding of private governance for public policy purposes. Section 1 below briefly summarizes the main reasons for the emergence of private governance and its justification from a theoretical perspective. Section 2 provides a taxonomy of existing forms of private governance. Section 3 describes current trends, including the emergence of meta-private regulators that aim at bridging the gap between public policy and private governance. Section 4 concludes by proposing a theoretical framework for the assessment of private governance by public policymakers.

1. Private Governance: A Theoretical Framework

The variety of private regulatory schemes in place is remarkable, encompassing *i.e.* common rules, memorandums of understanding, regulatory contracts, codes of conduct and voluntary agreements by which economic actors, social players, NGOs and organized groups establish themselves voluntarily to regulate and organize their activities.[15] In some cases, private regulation emerges spontaneously, independently of any legislative or policy initiative (*e.g.*, in the case of forestry where was the failure of reaching consensus at the Rio conference in 1992, or advertising codes of conduct). In other cases, it blossoms as a response to the threat of command and control regulation (*e.g.*, industry agreements on passive safety measures for cars; Responsible Care; the ICC Business Charter for Sustainable Development; the global confectionary industry's code of conduct banning forced child labor; or even the failed attempt to strike a co-regulatory deal to set pan-European, affordable roaming tariffs for the use of the mobile phone across EU member states).[16] In yet another set of cases, private regulation takes the form of an industry association with a specific mission and a management board that even represents external interests, in order to ensure alignment with the public interest, often as a result from public opinion campaigns (so-called "naming and shaming", sometimes also aimed at individual companies, such as Starbucks or Nestlé). Finally, in some cases private regulation simply hides a cartel (*e.g.*, in antitrust cases such as *i.e. Allied tube* and cases of collective boycott involving industry associations).[17]

Against this background, academics have traditionally shown very little faith in the virtues of private regulation: as observed by Anthony Ogus, "self-regulation, understood narrowly as law formulated by private agencies to govern professional and trading activities, has been rigorously criticized by lawyers and economists alike".[18] Some lawyers tend to see it as an example of modern corporatism, whereas economists tend to spot traces of collusion in most private regulatory schemes; political science frames private regulation either from the perspective of transaction cost politics, in which public policymakers delegate certain functions to private regulators;[19] or as the result of rent-seeking behavior.[20] Overall, the potential for abuse has been highlighted by scholars from all social sciences.[21] At the same time, this traditional approach is believed to have been excessively

14. F. Cafaggi, *New foundations of transnational private regulation*, EUI w.p. Private regulation series, 2010.
15. As reported by Vogel (D. Vogel, "The Private Regulation of Global Corporate Conduct: Achievements and Limitations", 49 *Business Society* 2010, p. 68), there are now more than 300 industry or product codes, nearly all of which address labor or environmental practices; many sectors and products are governed by multiple codes. More than 3,000 global firms now regularly issue reports on the social and environmental practices and many of these firms have developed their own codes and/or subscribe to one or more industry or cross-industry codes. The largest private business code, the UN Global Compact, has more than 3,500 corporate signatories. More than 2,300 global firms have endorsed the Business Charter for Sustainable Development developed by the International Chamber of Commerce and more than 46,000 firms have been certified as complaint with ISO 14001, an environmental process standard. More than 70 major global financial institutions from 16 countries, representing assets of 4.5 trillion dollars, have signed the United Nations Principles for Responsible Investment.
16. Responsible Care was adopted by several national chemical industry associations in part to forestall national laws establishing more stringent plant safety standards following the Union Carbide chemical plant explosion at Bhopal, India, in 1984. The International Chamber of Commerce's Business Charter for Sustainable Development was initiated by global firms who feared that the 1992 Rio "Earth Summit" would lead to an expansion of global environmental regulations. The global confectionary industry adopted a code of conduct banning forced child labor in part as a response to the threat of American trade sanctions on imports of cocoa from West Africa. During the 1990s, many apparel producers and retailers endorsed voluntary international labor standards to secure Congressional support for the renewal of China's most favored nation status as a trading partner. See Vogel 2010.
17. I. Maher, "Competition Law and Transnational Private Regulatory Regimes: Marking the Cartel Boundary", *in* Scott, Cafaggi & Senden, *Journal of Law and Society* Special Issue, April 2011, *The Challenge of Trans-National Private Regulation: Conceptual and Constitutional Debates*.
18. A. Ogus, "Rethinking Self-Regulation", 15 *Oxford Journal of Legal Studies* 1995, pp. 97-108.
19. D. Epstein & S. O'Halloran, *Delegating Powers. A Transaction Cost Politics Approach to Policymaking under Separate Powers*, Cambridge University Press 1999; C. Tuohy & A. Wolfson, "Self-Regulation: Who Qualifies?", in P. Slayton & M.J. Trebilcock (eds.), *The Professions and Public Policy*, University of Toronto, Faculty of Law, Toronto 1978.
20. G. Tullock, "The Welfare Costs of Tariffs, Monopolies and Theft", 5 *Western Economic Journal* 1967, pp. 224-232.
21. A.C. Page, "Self-Regulation: The Constitutional Dimension", 49 *Modern Law Review* 1986, pp. 141-167; P. Cane, "Self Regulation and Judicial Review", 6 *Civil Justice Quarterly* 1987, pp. 324-347; I. Harden & N. Lewis, *The Noble Lie: The British Constitution and the Rule of Law*, Hutchinson, New York 1986; Ogus 1995, pp. 97-108; A. Shaked & J. Sutton, "The Self-Regulating Profession", 47 *Review of Economic Studies* 1981, pp. 217-234.

partisan vis-à-vis private regulation: recent efforts to analyze the emergence of private regulatory schemes has led to a more nuanced and balanced approach to this form of governance, especially with respect to NGOs-driven private regulatory schemes and the growing number of multi-stakeholder initiatives at transnational level.[22]

Today, the role of private governance schemes is again under the spotlight, mostly since traditional forms of public intervention are facing enormous, and probably insurmountable difficulties in coping with certain policy problems. The weaknesses of public regulation emerge more specifically at the transnational level where difficulties to coordinate, inconsistency between standard setting and enforcement, divergences between administrative and judicial enforcement and within the latter among domestic courts make transnational public regulation an insufficient response. We refer in particular to three outstanding policy domains.

Firstly, there are goods and services that transcend national boundaries and as such do not lend themselves easily to direct regulation by national policymakers. This is mostly the case of international public goods, (*e.g.*, deforestation, emission reduction), for which international regulatory cooperation is heavily needed, in particular since absent coordination a "race to the bottom" occurs, which can lead to disastrous outcomes such as a "tragedy of the commons".[23] Early experiences such as the Forestry Stewardship Council (FSC) and the Marine Stewardship Council (MSC) have filled an enormous policy gap created by the lack of international cooperation. Only recently, as testified by forthcoming work at the OECD, the need to strengthen international regulatory cooperation has been placed under the spotlight in the global policy community.

Secondly, there are markets that exhibit very fast-changing dynamics – so fast-changing that public policymakers become awkward when trying to regulate them. This is the case, in particular, of high-tech and knowledge-intensive markets, in which the fast pace of change and the highly technical nature of the information needed to regulate effectively leads policymakers with the need to rely on private parties, at least for the definition of implementing measures and technical specifications. Examples include, but are not limited to, standardization policy, international roaming, net neutrality regulation, cloud computing, privacy on the Internet, and Internet governance.

Thirdly, as a residual category, there are policy problems that inevitably require heavy reliance on the expertise of private actors, since the latter are the most informed parties, or the best positioned players to fix a given failure, or simply the only parties holding control over given, essential resources. These fields include widely diverse policy domains, such as (again) financial risk regulation, but also sustainability reporting and critical infrastructure protection, in which an estimated 85% of critical infrastructure is in private hands.[24]

Against this background, the origins of private governance schemes can be related to various causes and motivations, which can be broadly classified as follows.

- ***Signaling.*** Some private governance schemes respond to signals sent by the market or by civil society (*e.g.*, sustainability reporting, ethical trading, environmental protection and business "greenwashing", respect of labour rights, child labour etc.).[25] These include schemes that emerge due to the need to sustainably govern common resources (*e.g.*, in the case of the FSC and the MSC).[26]
- ***Controlling the value chain.*** Other schemes were created due to the need to control the supply chain, especially in the case of large retailers relying on local suppliers in countries with very weak rule of law (*e.g.*, the GlobalGAP scheme, corporate social responsibility, food safety). In the area of food safety the adoption of the supply chain approach by public regulation earlier in Europe and later in the US has delegated and empowered large MNC with the regulatory power and responsibility to control safety along the chain.[27] In the area of CSR codes are often implemented via contracting as illustrated by the

22. A.K. Dixit, *Lawlessness and Economics: Alternative Means of Governance*, Princeton University Press Princeton, NJ 2004; F. Cafaggi, *La responsabilité des regulateurs privés*, RIDE, 2005; F. Cafaggi, *Self-regulation in European private law*, Kluwer 2006; F. Cafaggi, *New Foundations of Transnational Private Regulation*, EUI w.p. Private Regulation Series 2010; Senden 2005; K.W. Abbott & D. Snidal, "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit", 42 *Vanderbilt Journal of Transnational Law* 2009, p. 501; T. Büthe, "Private Regulation in the Global Economy: A (P)Review", (Guest editor's introduction to a special issue on 'Private Regulation in the Global Economy') 12 *Business and Politics* 2010; T. Büthe & W. Mattli, *New Global Rulers: The Privatization of Regulation in the World Economy,* Princeton University Press, Princeton, NJ 2011; Scott, Cafaggi & Senden, *The Challenge of Trans-National Private Regulation, Journal of Law and Society* Special Issue, April 2011.
23. G. Hardin, "The Tragedy of the Commons", 162 *Science* 1968, No. 3859, pp. 1243-1248.
24. Renda 2010.
25. The term "greenwashing" is used to refer to cases in which which green marketing is deceptively used to promote the perception that an organization's aims and policies are environmentally friendly. American environmentalist Jay Westerveld coined the term in 1986 in response to a hotel's efforts to encourage guests to help the environment by reusing towels. See, for an application to the oil market, M.A. Cherry & J.F. Sneirson, "Chevron, Greenwashing, and the Myth of 'Green Oil Companies'", 3 *Journal of Energy, Climate, and the Environment* 2012, pp. 133-154.
26. See, for an introduction to the governance of common resources, F. van Waarden, "Governing Global Commons: Public-Private-Protection of Fish and Forests", in J. Swinnen, J. Wouters, M. Maertens & A. Marx (eds.), *Private Standards and Global Governance. Legal and Economic Perspectives*, Edgar Elgar , Cheltenham 2010. And for applications to the MSC and FSC, see F. Gale & M. Haward, "Public accountability in private regulation: contrasting models of the Forest Stewardship Council (FSC) and Marine Stewardship Council (MSC)", Refereed paper presented to the Australasian Political Studies Association Conference University of Adelaide, 29 September-1 October 2004 and D. Curtin & L. Senden, "Public Accountability of Transnational Private Regulation: Chimera or Reality?", 38 *Journal of Law and Society* 1, 2011 pp. 163-188.
27. G. Gereffi, J. Humphrey & T. Sturgeon, "The Governance of Global Value Chains", *Review of International Political Economy* 2005; F. Cafaggi, "New foundations of transnational private regulation", *Journal of Law and Society* 2011 p. 20 *et seq*.

case of private service military company and by private security services.[28]

- ***Complementing public regulation.*** Some private governance initiatives emerge as a complement to existing public policy, to facilitate implementation and compliance with existing public regulation. Institutional complementarity between private and public emerge at standard setting level, monitoring and enforcement.[29] This is the case, *i.e.* of the "new approach" to standardization in force in the EU since Directive 98/34 of 22 June 1998.[30] Also, to some extent GlobalGAP can be seen as complementing existing public regulation.[31]
- ***Replacing/pre-empting public regulation.*** There are private governance schemes that were created with a clear objective to pre-empt and avoid public regulation. This approach is often labeled private regulation in the shadow of legislation,[32] and can be observed, *i.e.* in several environmental regimes.
- ***Inter-firm coordination and co-opetition.*** Some forms of private governance are dictated by the need to enhance inter-firm coordination for pro-competitive purposes. This is typically the example of patent pools.[33]
- ***Collusion/mutual benefit.*** Some private governance arrangements can also hide strategic anti-competitive purposes, as is the case for collective boycott schemes and cartels. Also, existing (and often concealed) private agreements between content providers and ISPs for the purpose of enabling copyright infringement in cyberspace often go beyond what public regulation would entail, especially in terms of copyright scope and respect for user privacy and network neutrality.

28. F. Francioni & N. Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, Oxford University Press, Oxford 2011; L.A. Dickinson, *Outsourcing War and Peace, Preserving Public Values in a World of Privatized Foreign Affairs*, Yale University Press, New Haven 2011.
29. F. Cafaggi, *Self-regulation in European Private Law*, Kluwer 2006; Cafaggi 2010.
30. H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Hart Publishing, Oxford 2005.
31. See, *i.e.*, K. Sorsa, *Private-regulation in global value chain – a trade barrier or an opportunity for public-private co-operation?* Available online at <http://regulation.upf.edu/dublin-10-papers/1H4.pdf>, stating that "without GlobalGAP, farmers and exporters in DCs would have to come to grips themselves with complicated EU regulations on food safety and those of the member states as well", and that in this sense, "private food schemes help to reduce the transaction costs by making information about European regulations on food safety systematically available and practically achievable", <http://regulation.upf.edu/dublin-10-papers/1H4.pdf>.
32. A. Héritier, "New Modes of Governance in Europe: Policy-making without Legislating?", *in* A. Héritier (ed.), *Common Goods: Reinventing European and International Governance*, Rowman & Littlefield, Langham 2002, pp.185-206.
33. J. Lerner & J. Tirole, *Industry Self-Regulation and Adverse Selection*, 2004-711; NBER Working Paper 9175, September 2002; R. Merges, "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations", 84 *California Law Review* 5, 1996, pp. 1293-1393; N. Gallini, *Private Agreements for Coordinating Patent Rights: The Case of Patent Pools*, IEL Paper in Comparative Analysis of Institutions, Economics and Law no. 5, 2011.

The most appropriate public policy approach towards these various forms of private governance is of course different, depending on the motivation for its creation. This is why, in order to develop a theoretical framework for the assessment of private regulatory schemes, it is essential to develop a taxonomy of such schemes, so that tailored policy appraisal tools can be designed.

1.1 Building a Taxonomy of Private Governance

As already recalled above, any attempt to reach a complete taxonomy of existing forms of private governance is inevitably doomed to remain incomplete. So far, authors such as Abbott and Snidal (2009) have tried to reach an operational taxonomy by distinguishing existing schemes based on the nature of their participants. Figure 1 shows their "governance triangle", in which a large number of governance organizations are located along a triangular space based on the relative prevalence of State actors, NGOs or private firms. In addition, we have highlighted a number of areas, namely the area of business associations, such as the International Chamber of Commerce, which produce relevant private regulation *i.e.* in the form of codes of conducts; and the top area of the triangle, which hosts forms of International Regulatory Cooperation such as the OECD and other forms, which the OECD itself is currently studying. Most of the private governance schemes we have been discussing and defining in the previous pages are anyway located in the middle-lower area of the triangle: in the figure, we have highlighted the Forest Stewardship Council, the Marine Stewardship Council, and the Global Reporting Initiative.

However, the taxonomy developed by Abbott and Snidal (2009) based on the nature of participants provides an insufficient basis for the evaluation of the effectiveness and the welfare-enhancing nature of private governance schemes. More recent attempts by the same authors have led to the definition of a different framework, which refers to the phases of the policy cycle carried out by the scheme under scrutiny. Figure 2 shows an elaboration on the so-called ANIME framework, which distinguishes between forms of private governance and the phases of the policy cycle in which these forms become active. Under this theoretical framework, some private governance schemes focus on specific steps of the policy process, such as enforcement and compliance. One typical example is conservation and land trusts, or forms of regulation by contract that aim mostly at fostering compliance where litigation would prove costly, unpredictable or simply impossible. Other forms of private regulation mostly focus on the setting of technical standards, as is the case of CSR schemes incorporating ISO standards. Other organizations focus either on the implementation of existing public regulation, or on monitoring and compliances. To the contrary, there are some types of organizations that replace public policy in all its aspects, including the setting of the overarching agenda in a given policy field.

Figure 1. The Governance Triangle in Abbot and Snidal (2009)

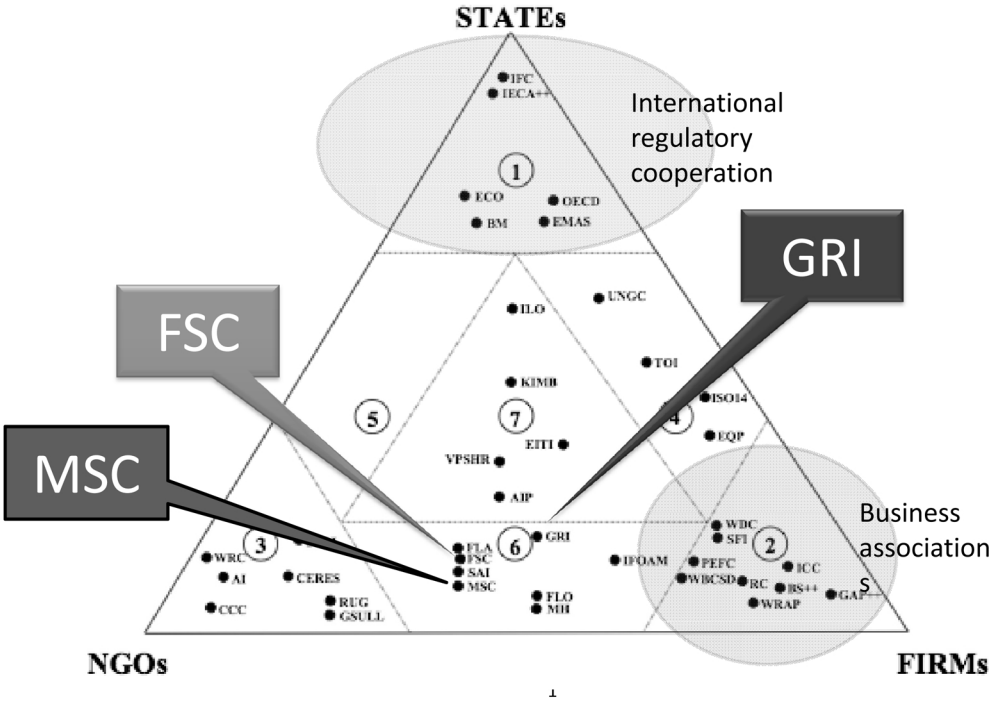
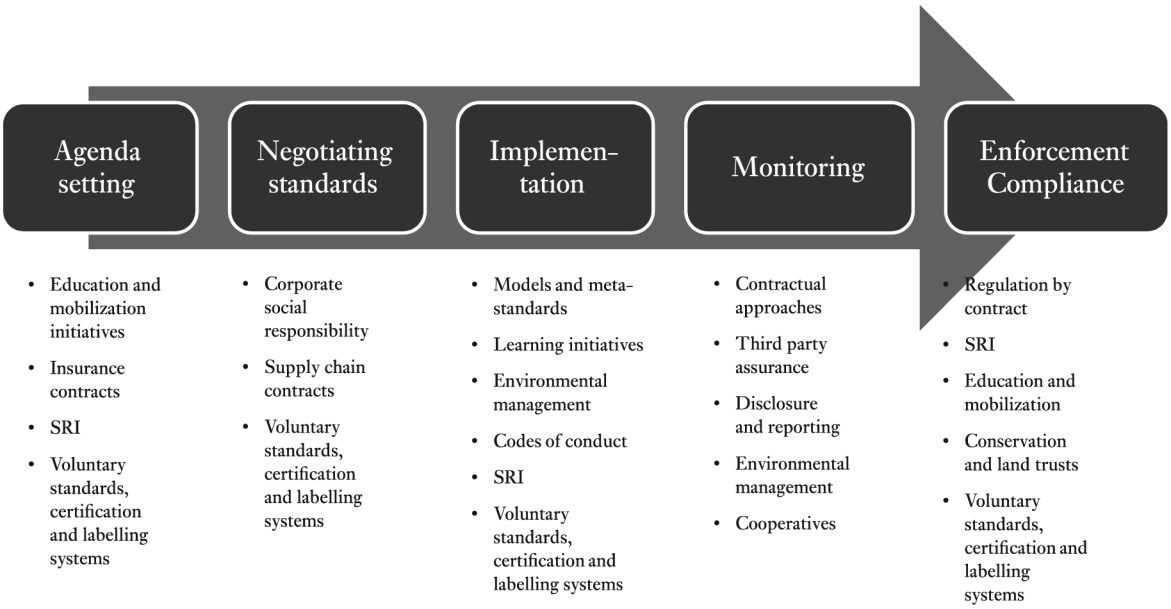


Figure 2. Functional Typologies: The ANIME Framework



Source: elaboration on Abbott and Snidal (2009) (which publication?) and T. Roberts [1]

1. T. Roberts, "Innovations in Governance: A Functional Typology of Private Governance Institutions", 2011 *Duke Environmental Law & Policy Forum*. Available at SSRN: <http://ssrn.com/abstract=1690831>.

1.2 Regulation as a Form of Public-Private Cooperation: A Transaction Cost Politics Approach

From a theoretical perspective, the emergence of private schemes that govern private behavior beyond, and often independently of, public legislation can be approached from a variety of perspectives – although in reality, almost none of them has been fully applied to this issue. First, an important precondition for delegating the achievement of public policy goals to private governance is a vision of the "art of the state" that is focused on facilitating the interaction of private parties, rather than on command and control regulation. This is typically a legacy of the work of Ronald Coase[34] and, even more importantly, the subsequent elaboration by Guido Calabresi and Douglas Melamed,[35] which led to the identification of certain private institutions – so-called "rule 4"

34. R.H. Coase, "The Problem of Social Cost", 3 *Journal of Law and Economics* 1960, pp. 1-44.
35. G. Calabresi & A.D. Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", 85 *Harvard Law Review* 1972, p. 1089.

organizations – that emerge with the specific purpose to reallocate entitlements and thus save on transaction costs.[36] In addition, the literature on the optimal governance of common resources suggests that private parties can interact to efficiently correct market failures and optimize governance of common resources, avoiding risk of depletion.[37]

But even more notably, a very useful way of looking at the potential for private regulation to achieve public policy goals is an adaptation of the "Williamsonian", "make or buy" approach, which sees private governance as the result of an implicit decision to externalize a given phase of the policy process. Just like private businesses decide whether to insource or outsource a give part of the production process based on a comparison between administrative costs and transaction costs, the choice of private regulation would emerge in a policy decision only where evidence suggests that this is the most cost-effective way of achieving a given policy outcome; or whenever this option maximizes net benefits. In choosing private regulation, then governments should take into account the public interest – something for which it was democratically appointed.

From a more theoretical standpoint, private regulation can thus emerge in two main forms: (i) when civil society directly empowers private regulators for the achievement of socially desirable results (see, *e.g.*, Ostrom[38]); and (ii) when civil society 'delegates' regulatory powers to government, and the latter decides to delegate regulatory activities to private players through self- or co-regulation. In this latter case a "double delegation" scenario occurs, where delegation by government is based on different rationales compared to the initial delegation made by civil society. When this happens, government must also guarantee the achievement of public policy goals by creating and implementing monitoring mechanisms and procedures, which become a safeguard for civil society as a whole.

This view is consistent with the view adopted by the "transaction cost politics" approach, in which the regulatory activity is seen as a principal-agent problem, where the principal (government or Parliament) delegates regulatory power to an agent (public or private); and the latter regulates under the supervision of the former.[39] In our case, the ultimate principal is always civil society: governments are agents with respect to citizens, and become principals when delegating powers to public agencies, ministers, or private regulators. At the same time, this approach is consistent with the so-called "institutional complementarity" concept developed in comparative law and institutional analysis.[40] This implies that public and private regulation emerge through co-evolution patterns, which ultimately select "who does what" to address societal problems.[41] In our case, most co-evolution mechanisms do not select either public or private regulation: rather, in most cases the two interact and merge into hybrid forms, where some of the phases of the policy cycle are performed by delegated political agents; and other by private parties.

Against this background, private regulation can prove more effective than public regulation for a number of reasons: for example, according to Coglianese *et al.*,[42] self-regulatory schemes possess a number of potential advantages over command and control regulation, such as (i) proximity (being closer to the industry being regulated); (ii) flexibility (absence of political and administrative constraints); (iii) greater compliance; and (iv) greater potential to mobilize resources. Potential disadvantages include conflicts of interest, inadequate enforcement and accountability, and insufficient monitoring of compliance. From the perspective of internal governance, Balleisen and Eisner (2009) argue that

> "the effectiveness of private regulation in a particular context or, more precisely, the potential for credible co-regulation depends on the following five factors: (1) the depth of concern for their reputation among regulated businesses; (2) the relevance of flexibility in regulatory detail; (3) the existence of sufficient bureaucratic capacity and autonomy on the part of nongovernmental regulators; (4) the degree of transparency in regulatory process; and (5) the seriousness of accountability. Before legislators or regulatory agencies choose to delegate regulatory authority to industry organizations or corporations, they should assess the regulatory lay of the land with respect to each of these issues".

This theoretical approach enables a better understanding of the diverse combinations of public and private regulation that can be observed and designed in the real world: from pure command and control regulation to hybrid forms of public-private cooperation and "new approaches", to purely private schemes.[43] From this perspective, it becomes clear that for any private governance scheme to be viable from a public policy perspective, regardless of whether it is a spontaneous scheme or a policy-induced scheme, a suitable monitoring mechanism must be in place for public policymakers to be able

36. I. Ayres, *Optional Law. The Structure of Legal Entitlements,* University of Chicago Press, Chicago 2005; Roberts 2011.
37. Hardin 1968; M. Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, Basic Books, New York 2008; E. Ostrom. *Governing the Commons. The Evolution of Institutional Forms of Collective Action*, Cambridge University Press, Cambridge, MA 1990; E. Ostrom, *Understanding Institutional Diversity*, Princeton University Press, Princeton, NJ 2005.
38. E. Ostrom, "Coping With Tragedies of the Commons", 2 *Annual Review of Political Science* 1, 1999, pp. 493-535.
39. Epstein & O'Halloran 1999.
40. M. Aoki, *Towards a Comparative Institutional Analysis*, Stanford University Press, Stanford 2001; Cafaggi 2006; Cafaggi 2010.
41. R.D. Lipschutz & C. Fogel, "Regulation for the Rest of US: Global Civil Society and the Privatization of Transnational Regulation", *in* T.J. Biersteker, R.B. Hall & C.N. Murphy (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge University Press, Cambridge, MA 2002.
42. C. Coglianese, T.J. Healey, E.K. Keating & M.L. Michael, "The Role of Government in Corporate Governance", Regulatory Policy Program Report RPP-08, Center for Business and Government, John F. Kennedy School of Government, Harvard University, Cambridge, MA 2004.
43. Cafaggi 2006; Cafaggi 2010.

to observe whether the behavior of private regulators is sufficiently aligned with the public interest: the development of a framework for evaluating private governance in the form of self- or co-regulatory schemes is the overarching goal of this paper. Section 2 below deals with the definition of the key features of private regulation, focusing in particular on the effectiveness dimension. Section 3 outlines a potential theoretical framework for the incorporation of *ad hoc* assessment tools in the EU policy process.

2 Evaluating Private Governance: A Focus on Effectiveness

In the past two decades, significant effort has been devoted to the definition of the key features of private governance schemes, and in particular those adopted within trans-national private regulation. In the academic literature, four key dimensions are normally identified:[44] quality, legitimacy, enforcement and effectiveness. *Quality* is normally measured in terms of the traditional criteria applied to formal legislation, *i.e.* certainty, predictability, lack of ambiguity, flexibility, efficacy, malleability etc. These potentially conflicting requirements imply that high quality norms will often occupy the middle ground between both extremes. Moreover, good-quality private norms should also not upset the coherency of existing, usually formal, regulatory system(s).[45]

Legitimacy, on the other hand, is often described as referring to the degree of responsiveness, inclusiveness and representativeness of the private regulatory scheme. It includes both a substantive and procedural dimension. Authors have distinguished *i.e.* between political legitimacy and democratic legitimacy;[46] as well as between input and output legitimacy;[47] or the emerging "derivative legitimacy" in times of extensive interlinking between private regulatory bodies.[48] Established theories of legitimacy consider whether the organizations are representative, inclusive and procedurally fair. Private regulatory organizations that satisfy the legitimacy criteria articulated in these theories can claim legitimacy and expect greater compliance as a result.[49]

A variety of *enforcement* mechanisms exist with regard to private norms, such as arbitration, mediation, incorporation in court decisions as well as more sociologically informed methods (*i.e.* forms of peer pressure, market-based strategies using reputation and "naming and shaming" mechanisms). Enforcement is often the outcome of complementary strategies deploying judicial and non-judicial mechanisms across different jurisdictional levels.[50] Moreover, enforcement of private norms must be considered in relation to public regulation and public oversight. There is an increasing role of agencies in overseeing compliance with transnational standard setting: examples range from accounting standards to advertising, from payment to food safety, from employment to non discrimination standards. To what extent is or should the state be involved in enforcing private norms? How do norm conflicts between public and private norms affect the process of enforcement?

Finally, *effectiveness* can be defined as the consistency between means and goals and extent to which private regulation achieves its objectives. Effectiveness 'measures' *ex ante* the proportionality between means and ends and *ex post* the positive or negative impact of the regulatory measure over the different constituencies including regulated parties and beneficiaries. It concerns the entire regulatory process from standard setting to enforcement. Effectiveness can be predicated upon either private as well as public norms, or as it often happens a combination of both. Indeed, one of the cardinal issues raised in this paper is which type of norms, or which combination of norms and institutions (as well as under which circumstances), leads to the highest degree of effectiveness, *i.e.* the highest degree of compliance with the stated objectives. Often the correlation between norms and institutions is not sufficiently highlighted and effectiveness is measured in relation to norms regardless of the institutional framework. The OECD[51] approach suggests on the contrary that effectiveness should be evaluated in the light of an integrated analysis including rules and institutions.

As a matter of fact, these four dimensions are tightly interrelated, to the extent that disentangling them can prove very challenging. To be sure, there are significant interdependencies between them: legitimacy can foster compliance, which facilitates enforcement and ultimately increases effectiveness; effectiveness, in turn, contributes to legitimacy (so-called "output" legitimacy). However, this interrelation includes important conflicts and trade-offs: for example, improving legitimacy through representation, voice and accountability can in some cases undermine effectiveness by increasing transaction

44. See Cafaggi 2010.
45. A private norm may be particularly effective and of high quality, yet still conflict with existing regulatory regimes, *e.g.* other private or public regimes.
46. S. Bernstein, "Legitimacy in Intergovernmental and Non-State Global Governance, 18 *Review of International Political Economy* 1, 2011, pp. 17-51.
47. "Input legitimacy" focuses on the means by which constituents participate in a private regulatory scheme, *e.g.*, representation, inclusiveness or process. Output-legitimacy represents those paradigms that focus on substantive outcomes, *e.g.* trade liberalization, or fairness, and whether goals set by the private regulatory scheme are reached. In this respect, output legitimacy is very similar to effectiveness. See F. Scharpf, *Governing in Europe: effective and democratic?*, Oxford University Press, Oxford 1999 and <www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Paper-Elsig-Amalric.pdf>.
48. C.R. Kelly, "Institutional Alliances and Derivative Legitimacy", 29 *Michigan Journal of International Law* 2008, p. 605; Casey and Scott 2011.
49. Curtin & Senden 2011.
50. Cafaggi 2011.
51. OECD (2011/2012), "Making the most of public investment in a tight fiscal environment: Multi-level governance lessons from the crisis", OECD Working Paper, Paris, 2011, available at <www.oedc.org/documenten/36/1,3746_en2649_34413_48713444_1_1_1_1,00.html>.

and compliance costs, slowing down the regulatory process, diluting enforcement and ossifying private rules.[52] In other circumstances higher efficiency reducing externalities can improve legitimacy.

From the viewpoint of a participant to a private regulatory scheme, the key dimension is effectiveness, defined as the extent to which the organization achieves its own stated goals. This, in turn, can be obtained through high-quality norms that are strongly enforced, and through a high degree of legitimacy. Legitimacy, in turn, can increase the likelihood that other participants will respect the rules of the private organization: in this respect, legitimacy can transform private rules into "focal points", thence reducing transaction costs and making the success of an organization more likely.[53]

The effectiveness of private regulation can be described in analytical terms as a function of output, outcome and impact,[54] plus broader political and socio-economic effects.[55] More precisely, the output is the direct result of the activity carried out by the private regulatory scheme, such as a standard, a set of rules or a specific policy. The outcome refers to the overall regulatory objectives, including the behavioral changes of regulated and third parties that occur as a result of the activity undertaken. Finally, if one looks also at the broader social, economic and environmental consequences of the activity carried out by the private regulators, then the "impact" of private regulation emerges. These determinants of effectiveness can in turn be broken down based on their main drivers. Accordingly, output can be described along the dimensions of stringency and comprehensiveness;[56] outcome can be explained through the degree of compliance with the rules, the participation of stakeholders (inclusiveness, representativeness) and the existence of potential lock-in effects due, *e.g.*, to reliance on one specific standard in a context of quick technological development. Finally, the impact of a private regulatory scheme refers to its added value in achieving its objectives compared to the counterfactual, *i.e.* the next best alternative to that form of private regulatory scheme. Beyond the impact of private regulation in terms of "problem-solving", some authors[57] have further distinguished between measures of success such as: material and structural effects, cognitive effects, and normative effects.[58]

When looking at the interface between public and private regulation, however, these concepts are not sufficient to provide policymakers with a comprehensive theoretical framework.[59] In particular, public policymakers are normally interested in a different outcome, which certainly encompasses, but is not limited to legitimacy and effectiveness.[60] From a transaction cost politics perspective (see section 1.2 above), a public policymaker will opt for delegating the solution of a given policy problem to private regulation whenever this represents the most "effective" way to achieve that goal. However, this notion of effectiveness (defined as the extent to which private regulatory schemes achieve socially optimal or desirable outcomes[61]) may be different from the one sought by private actors involved in private regulatory schemes. Occasionally, these two notions of effectiveness can coincide; but in many instances they may diverge – hence the skepticism of many social scientists when it comes to evaluating private regulation.

52. See partly Kelly (2008). On the concept of ossification, see T.O. McGarity, "Regulatory Analysis and Regulatory Reform", 65 *Texas Law Review* 1243, 1987, and F. Cafaggi, "Private regulation in European private law", *in* A.S. Hartkamp *et al*., *Towards a European Civil Code* (4th ed.) Kluwer Law International 2011.
53. See A. Kalfagianni & P. Pattberg, "The Marine Stewardship Council", 2 *Journal of Environmental Studies and Sciences*, p. 2, quoting also C. Cutler, V. Haufler & T. Porter, *Private Authority and International Affairs*, State University of New York Press, Albany, 1999.
54. D. Easton, *A Systems Analysis of Political Life*, Wiley, New York 1965; D. Fuchs, "Transnational Corporations and Global Governance: The Effectiveness of Private Governance", *in* Stefan Schirm (ed.), *Globalization. State of the Art of Research and Perspectives*, Routledge, London 2006.
55. K. Dingwerth & P. Pattberg, "Global Governance as a Perspective on World Politics", 12 *Global Governance* 2006, pp. 185-203.
56. Stringency, as reported in Kalfagianni (2010), refers to the degree to which a given private governance scheme requires actors to implement behavioural changes (G. Auld, L.H. Gulbrandsen & C.L. McDermott, "Certification Schemes and the Impacts on Forests and Forestry", 33 *Annual Review of Environment and Resources* 2008, pp. 187-211). At the same time, stringency differs according to whether management-system-based or performance standards are adopted, and the ambition of performance standards (D. Fuchs, "Transnational Corporations and Global Governance: The Effectiveness of Private Governance", *in* S. Schirm (ed.), *Globalization. State of the Art of Research and Perspectives*, Routledge, London 2006).
57. Dingwerth & Pattberg 2006; Kalfagianni & Pattberg 2010.
58. Kalfagianni & Pattberg (2010) refer to first-order and second-order effects to distinguish between impacts and material, cognitive and normative effects.
59. It is important to observe that different private governance schemes can define effectiveness in different ways: for example, emerging definitions given by ISEAL and the GFSI differ noticeably from the ones given by multi-national corporations for the purposes of their own CSR activity. But generally, one can say that effectiveness is always defined as the ability of a given private governance scheme to achieved its own statutory goal.
60. Effectiveness is not commonly used in *ex ante* RIA, although recently the European Commission has started using effectiveness as a criterion against which to rank and discard options before a more in-depth analysis. In this context, effectiveness is used in combination with other two criteria ("efficiency" and "coherence"). To the contrary, the notion of "effectiveness" in public policy appraisal is mostly used in *ex post* evaluation, where the quality and performance of a given piece of legislation is appraised in terms of "relevance" (*i.e.* the extent to which the objectives of public intervention proved appropriate with respect to the funds available, the needs perceived and the specific problems the intervention was meant to solve); "efficiency" (*i.e.* "cost-effectiveness", or how economically have the various inputs been converted into outputs and results and whether the expected effects have been obtained at a reasonable cost); "usefulness" (*i.e.* whether the impacts achieved by an intervention correspond to the needs and problems identified at the outset); and finally "effectiveness" (*i.e.* the extent to which the effects of a given programme have contributed to the achievement of the specific objectives of the intervention).
61. This is why effectiveness is normally linked to explicitly stated general, specific and operational objectives in the *ex ante* IAs of the European Commission. The specification of objectives has become much more common in Commission IAs over the past few years, and the Communication on smart regulation of October 2010 placed even more emphasis on the need to define "SMART" objectives in ex ante policy appraisal documents, so that achievement of those objectives can be monitored over time, including in *ex post* evaluation.

Cases in which "private" and "social" effectiveness diverge can be of many different types. For example, collective action in private regulatory bodies can aim at socially sub-optimal outcomes. For example, a cartel can be very effective in achieving its stated goal but externalize costs on third parties.[62] Participants would join the cartel to the extent that they think the cartel is likely to be successful, *i.e.* would achieve its goal of increasing participants' profits without being uncovered by antitrust authorities. However, from a public policy perspective a cartel is undesirable since it leads to restrictions of output and/or increases in price levels, to the detriment of consumers and often also other actors along the value chain.

A more general case is that of negative externalities, *i.e.* cases in which the coordination of activities between members of a private regulatory scheme leads to non-internalized negative effects on non-members, even if such effects are unintentional. This is even more likely to be the case whenever the governance of private regulatory organizations is not inclusive of all potentially affected stakeholders – as we explain in section 3 below, GlobalGap is an example of under-representation of developing countries, which end up being negatively affected by the activity of the private regulatory body.

Another problem may emerge whenever the scope of the private regulatory scheme is narrower than the impacts generated by the activity of its participants: for example private regulation aimed at compliance with safety standards might have, say, unintended environmental consequences; private regulation of Internet security standards might affect the users' freedom of expression or their right to privacy.[63]

Finally, there might be cases in which the private regulatory scheme is aimed at achieving socially desirable outcomes, but either adverse selection problems or lack of monitoring and compliance lead to the emerge of socially undesirable outcomes. An example is provided by Lennox and Nash,[64] who describe the Responsible Care initiative launched by the Chemical Manufacturer's Association (CMA) in 1989 in response to growing public criticism of the industry: the fact that the CMA did not require third party review or certification of firm performance and did not adopt explicit sanctions for non-compliance led to a perverse situation in which participants in Responsible Care were more polluting on average than other chemical firms in the United States.[65] Similarly, Morgenstern and Pizer[66] in reviewing a number of voluntary programs in the environmental field express concern on the self-selection of participants into those schemes.

The potential misalignment between private benefits and social welfare can be addressed by designing appropriate indicators that would make ex ante clear when regulatory choices pursue one or the other strategy. Some sectoral experiences (advertising, environment) and some general guidelines (GRI, ISEAL) suggest that two families of indicators can provide guidance to align private benefits and social welfare: governance and performance indicators. For example governance indicators may refer to the separation of functions between standard setting, monitoring and enforcement. Private regulators that concentrate the functions in one single body tend to maximize private benefits exacerbating conflicts of interest between regulators and the regulated; those which separate them by creating independent monitors and enforcers increase the chances of internal conflict but open themselves to external voice ensuring higher level of transparency. Evidence shows that separation can also help regulatory dialogue when private enforcers send signals to standard setters about problems concerning compliance rather than focus on punishment of the infringers.[67]

Regulatory objectives can be complex and sometimes conflicting. Conflicts may arise between private benefits and social welfare and even within social welfare when different distributional outcomes may be generated by alternative regulatory strategies. Performance indicators can contribute to define *ex ante* distributional effects singling out winners and losers or benefits and costs of a specific regulatory measure. By highlighting these con-

62. See Maher 2011.
63. F. Cafaggi, "New foundations of transnational private regulation", 38 *Journal of Law and Society* 1, 2011, p. 20 *et seq*.
64. M. Lennox & J. Nash, "Industry Self-Regulation and Adverse Selection", 12 *Business Strategy and the Environment* 2003, pp. 1-14.
65. Lennox & Nash 2003. Responsible Care has operated up to now without explicit sanctions for malfeasance. As a result, it has reportedly fallen victim to enough opportunism that it includes a disproportionate number of poor performers, and its members do not improve faster than non-members. Thus, the institutional pressure that Responsible Care exerts on its members appears to have inadequately counteracted opportunism. Since Responsible Care represents a leading example of self-regulation in the world, our findings highlight the difficulty of creating self-regulation without explicit sanctions.
66. R.D. Morgenstern & W.A. Pizer (eds.), *Reality Check: The Nature and Performance of Voluntary Environmental Programs in the United States, Europe, and Japan*, RFF Press, Washington, D.C. 2007.
67. See F. Cafaggi (ed.), *The Enforcement of Transnational Regulation*, Edward Elgar, 2012.

sequences they empower the regulator with information to make informed choices about conflicting objectives.[68] Besides these "genetic problems", which depend on statutory goals, the selection of participants and the multi-stakeholder nature of the initiative, a number of other effects can undermine the alignment between private benefits and social goals during the life of a private regulatory body. Below, we briefly list them:

- ***Lock-in effects and collective action problems*** can occur when members remain locked into suboptimal agreements and "focal points", with no incentive to change;
- ***Path dependency, status quo bias, anchoring and framing effects*** may lead to shifting focus towards measurable and immediate benefits rather than long-term social welfare;
- ***Hard-to-detect changes*** over time might be induced by the prevalence of some interests over others during the life of the private regulatory body (*e.g.*, MSC, see below)
- ***Divergence of interests*** between the regulators and the regulated, which lead the former to prefer short-term actions that maximize their likelihood of being re-appointed;
- ***Self-indulgence in the evaluation*** of private regulatory bodies, when governance arrangements entail self-evaluation, or lack of legitimacy of third parties in charge of evaluation.

All these problems deserve careful scrutiny before one can actually conclude that a given policy issue is a good candidate for efficient and socially effective private regulation.[69]

3. Towards a Theoretical Framework for the Appraisal of Private Governance Schemes

The fact that private governance schemes can feature limited alignment with public policy goals raises the issue of how to evaluate them, when, and how. Again, from our "transaction cost politics" approach, the evaluation phase of policymaking can be performed centrally by government, or delegated to specific agencies, or even externalized to private governance schemes themselves, or private meta-regulators. In all these hypotheses, independence is a key factor to ensure effectiveness. As a matter of fact, there seems to be a lot more self-evaluation by private regulators today, than external evaluation by public policymakers. This creates concern, since there is evidence that private regulators, in many circumstances, can have limited incentives to fully self-evaluate their effectiveness from a social welfare perspective. At the same time, concerns become even bigger since the use of RIA and *ex post* evaluation tools to assess the effectiveness of private governance schemes appears very limited and unsophisticated.

Examples are found in a number of fields. For example, *corporate social responsibility* (CSR) reporting is today an enormous success as well as a profitable business for intermediaries and assurance consultants that help companies comply with internationally established standards.[70] Business codes such as the Business Charter for Sustainable Development developed by the International Chamber of Commerce (ICC) are followed by thousands of companies.[71] Against this background, the Global Reporting Initiative (GRI) sustainability reporting is perhaps the most comprehensive attempt to establish complex and meaningful international standards for the respect of sustainable development principles.[72] However, even if it appears as the prototype of an open, inclusive organization whose mandate and statutory objectives are aligned with public policy goals, its performance exhibited so far remarkable problems that are

68. David Vogel (2010) has recently looked at this notion of effectiveness in the field of CSR, by arguing that "When compared to most government regulations in developed countries, civil regulation is clearly less effective. In fact, civil regulations exhibit many of the well-documented shortcomings of industry self-regulation at the national level, with whom they share many important characteristics (Lennox & Nash 2003; Morgenstern & Pizer 2007; OECD 1999). Both remain weaker than well-enforced command and control regulations in forcing corporations to change their behavior … But the effectiveness of civil regulations is roughly comparable to that of many intergovernmental treaties and agreements, whose effectiveness in addressing environmental protection, labor practices, and human rights is also mixed and uneven … [and] civil regulations are undoubtedly more effective than the labor, human rights, and environmental regulations of many developing countries".
69. For example, Ashby *et al.* (*Industry Self-Regulation: A Game-Theoretic Typology of Strategic Voluntary Compliance*, Working paper. Financial Services Authority, London 2004) distinguished a number of voluntary regulatory schemes in the UK based on the different context in which they emerge, which in turn determines a different mode of strategic interaction between private players. Accordingly, they define the UK advertising Code as an Assurance Game, the UK Press as a Chicken game and the UK Life Insurance as a Prisoner's Dilemma.
70. As reported by Vogel (2010), "more than 3,000 global firms now regularly issue reports on the social and environmental practices and many of these firms have developed their own codes and/or subscribe to one or more industry or cross-industry codes". See S. Wood, "Voluntary Environmental Codes and Sustainability", in B.J. Richardson & S. Wood, (eds.), *Environmental Law for Sustainability*, Hart, Oxford 2006, pp. 276-277 for a detailed description of the emergence of environmental reporting.
71. For interesting accounts of the emergence of voluntary codes in the field of corporate social responsibility, see *i.e.* Wood 2006.
72. The GRI is a private transnational body that has produced the leading standard for sustainability reporting, used by more than three-quarters of the Global Fortune 250 companies. Its guidelines include 79 indicators for corporations to report on their social, environmental, and economic performance.

relevant from a public policy perspective.[73] In addition, the formalistic nature of indicators has reportedly led to the emergence of box-ticking behaviours on the side of companies participating to the reporting scheme; in the case of key aspects of sustainability, such as human rights, this has so far created enormous problems.[74] Even more worryingly, the concerns expressed by stakeholders as regards the inclusiveness and external effectiveness of the current GRI-G3 set of indicators do not seem to have been the focus of a real reflection inside GRI, if not limited to the organization's generic commitment towards constant improvement. The consequence of this rising discontent seems to be the creation of an additional organization, the International Integrated Reporting Committee, with the aim to create a globally accepted reporting framework that enables organizations to combine financial and non-financial disclosures.

In the field of trade, the Base Code of the *Ethical Trading Initiative (ETI)* is today the globally accepted benchmark of many workplace labour standards: in 2009 it was applied to 9.4 million workers at 34,720 supplier sites. Its enforcement and evaluation proceeds through inspections at the workplace, and ETI members are required to monitor compliance at their supplier sites against each Base Code Provision. Despite being a successful initiative, also thanks to the official endorsement of the UK DFID,[75] ETI still features difficulties in the assessment of corporate behavior, problems of representation of stakeholder groups (especially with respect to the "North-South" divide and the representation of workers[76] unequal power structures between UK retailers and suppliers from developing countries;[77] and the persistence of imbalances of bargaining power between corporations, workers and trade unions.[78] In any case, it is difficult to assess whether ETI is being evaluated from the standpoint of its social impacts: internal governance appears very balanced but also inevitably loose, with no strong monitoring and sanction mechanisms linked to any measure of external effectiveness.

In *food retail*, since the 1990s (also due to scandals such as the BSE, or "mad cow disease") multi-national corporations and international organizations have intensified their dialogue to create global safety standards. Private regulatory schemes such as *i.e.* IFOAM, the Global Food Safety Initiative, the Sustainable Agriculture Network and the Global Partnership for Good Agricultural Practice (GlobalGAP); and sectoral initiatives such as the Forestry Stewardship Council, the Marine Stewardship Council, the Aquaculture Certification Council, etc. have increasingly permeated the supply chain. However, problems have emerged due to divergences between the private benefit of members, and the social impacts of these initiatives. For example, in evaluating GlobalGAP,[79] Kalfagianni and Fuchs (2009) and Kalfagianni (2010) have described a very Europe-dominated, business-dominated private regulatory scheme, with outstanding problems in terms of: (i) limited inclusiveness; (ii) a very limited participation of external stakeholders; (iii) a very geographically biased representation in decision-making bodies; (iv) a trade-off between stringency and uptake (GlobalGAP had to release certain requirements in order to elicit more participation); (v) a lack of detail, which makes a true evaluation of pro-

73. Vogel 2010; M. Beisheim & K. Dingwerth, *Procedural Legitimacy and Private Transnational Governance – Are the Good Ones Doing Better?*, SFB-Governance Working Paper, Nr. 14, 2008; H.S. Brown, M. de Jong & T. Lessidrenska, "The Rise of Global Reporting Initiative (GRI) as a Case of Institutional Entrepreneurship", 18 *Environmental Politics* 2, 2009, pp. 182-200; A. Fonseca, *Barriers to Strengthening the Global Reporting Initiative Framework: Exploring the Perceptions of Consultants, Practitioners, and Researchers* 2010, available online at <www.csin-rcid.ca/downloads/csin_conf_alberto_fonseca.pdf>; Wood 2006.
74. Fonseca (2010) has carried out an empirical analysis among stakeholders to collect feedback on their level of satisfaction with the GRI scheme, finding evidence of an excessive focus on internal organizational performance, rather than external impacts; a lack of integrated indicators; a "credibility gap" due to the discretion left to reporting firms as to whether to rely on internal or external assurance and verification; a worrying lack of guidance on stakeholder engagement, which ultimately results in limited participation and lack of real inclusiveness.
75. ETI was initially funded by the UK DFID. Although ETI aims at long-term financial independence, funding from DFID has increased in the past years, and accounted for 40.1% of the organization's income in 2009. DFID assesses the merit of its PPA with ETI also on the basis of specific indicators. This, however, takes place merely through a self-assessment document filed by ETI. It is important to reflect on the peculiar type of public-private interaction that takes place between DFID and ETI: the fact that a public body oversees (though through self-assessment) and significantly contributes financially to a private regulatory scheme makes the ETI a hybrid type of institution, and more similar to a public-private partnership than to a full-fledged private regulation. That said, the endorsement (*de facto* and through funding) of the DFID seems to have encouraged trust and participation by all types of stakeholders, including businesses, trade unions and international organizations. ETI now counts 64 companies, 9 trade unions, and 15 NGOs and specifically looks at respect for workers' rights and the maintenance of decent working conditions.
76. A. Hale, "What hope for 'ethical' trade in the globalised garment industry?", 32 *Antipode* 4, 2000, pp. 349-356; A. Hale & L.M. Shaw, "Women workers and the promise of ethical trade in the globalised garment industry: A serious beginning?", 33 *Antipode* 3, 2010, pp. 510-530.
77. A. Hughes, "Multi-stakeholder Approaches to Ethical Trade: Towards a reorganisation of UK retailer's global supply chains?", *Journal of Economic Geography* 1, 2001, pp. 421-437.
78. S. Schaller, *The Democratic Legitimacy of Private Governance: An Analysis of the Ethical Trading Initiative*, INEF Report 91/2007, Institute for Development and Peace, University of Duisburg-Essen 2007.
79. GlobalGap was developed in 1997 by a group of European retailers. Initially focused on fruits and vegetables, it now covers meat products and fish from aquaculture as well. Businesses wishing to acquire certification with GlobalGAP are required to comply with a detailed checklist of 254 questions, divided into 41 "major musts", 122 "minor musts" and 91 "should" (recommended criteria). In 2008, it had 94,000 certified producers, up from 18,000 in 2004, representing an increase of approximately 80 percent. More than 20 countries joined in 2008. In total, over 85 countries are represented. There is significant growth within European countries, particularly due to French and German supermarkets managing to reach out to more producers (GlobalGAP 2009, 21 September 2009). Significant growth is also seen within countries that hold a (major) global supply position in produce, mainly South Africa and Chile. Smaller growth is observed in Central and Eastern Europe, Central America and some African countries (*ibid.*).

gress achieved impossible;[80] (vi) a lack of progress tracking in terms of the evaluation of "external" effectiveness; and (vii) a potentially negative impact on competition and local firms (in Africa, several companies reportedly had to close their business due to the impossibility to match GlobalGAP standards). The European Commission also found that GlobalGAP imposes disproportionate costs on operators in developing countries.[81]

Also more sectoral initiatives such as the FSC and the MSC have been heavily criticized in the past years. Despite their attempts to signal attention for external impacts, they have met with increasing skepticism on the side of stakeholders. The FSC, in particular, has been extensively reviewed in the academic literature, which showed that the initial thrust towards forest preservation has gradually shifted due to growing capture by business interests, geographic imbalances and reduced *de facto* representation of NGOs and other stakeholders.

3.1 The Rise of Private Meta-Regulators

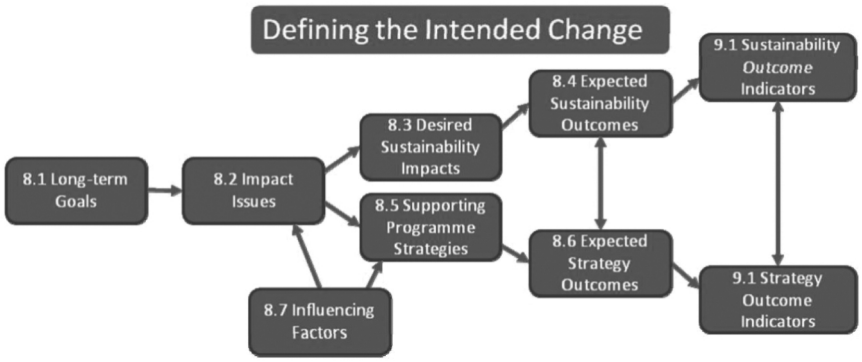
The growing importance of private regulation in fields such as sustainability and food quality and safety, coupled with the rising concerns that such organizations do not fully pursue public goals, recently led to the creation of meta-organizations and – even more recently – meta-standardization as a way to bridge the gap between private regulatory schemes and public policymakers. An important example in this respect is certainly the ISEAL Alliance, an international non-profit organization that codifies best practices for the design and implementation of social and environmental standards initiatives. This is a landmark example of what we call a "private meta-regulator".[82] In its activity as a "standard for standards", the ISEAL Alliance develops codes of good practice that seem to be reaching out to international organizations and important supranational institutions. Important recognitions have come recently from the European Commission in its Communication on Fair Trade (2009); from the UNCTAD Recommendations of the conference "Making Sustainability Standards Work for Small-scale Farmers"; from the European Parliament's resolution on "Corporate Social Responsibility: Implementing the Partnership for Growth and Jobs";[83] from the WWF/World Bank "Forest Certification Assessment Guide" published in 2006; and from FAO's Guidelines on Ecolabelling of Marine Fishery Products (2005). The European Environmental Bureau (2010) declared in 2010 that they "consider (ISEAL's Standard-Setting Code) a model of reference for multi-stakeholder processes, especially in the area of public policy implementation".

Besides a Standard-Setting code and an Assurance Code, recently the ISEAL Alliance launched an important tool that goes in the direction of an evaluation of the external impact of private regulatory bodies. The Code of Good Practice for Assessing the Impacts of Social and Environmental Standard ("Impacts Code") sets out the process by which standards systems can provide evidence of their contributions to social and environmental impacts as well as learning about and improving the effectiveness of their system. Interestingly, the Code appears strikingly similar to an Impact Assessment guidance developed by public policymakers.[84]

Figure 3 shows the theoretical framework for evaluation proposed by the ISEAL Impacts Code, which mirrors existing methods of *ex post* evaluation of projects, expenditure programmes and policies by public bodies. For example, the MSC has recently launched a consultation on the evaluation of its effectiveness and out-

80. This is the case for *i.e.* environmental well-being indicators such as the quality of irrigation water (except for sewage water which is a major must in all versions), recycling and re-use, impact of farming on the environment and wildlife and conservation policies, while constituted minor musts in 2001, are mere recommendations in 2004 and remain so today (see also van der Grijp *et al*. 2005). This has occurred in other private initiatives, such as the Forest Stewardship Council (FSC), where the participation of big retailers led to the introduction of varying levels of stringency in the FSC due to the inability to meet the market demand of their supply chains (van Waarden 2010).
81. See SEC(2009)670, 28 May 2009: "Costs and benefits of participating in the GlobalGAP assurance scheme to operators in developing countries have been estimated for Kenya, Zambia and Uganda. In general, the studies conclude that small-scale growers need external support (by donors or exporters) to be able to afford certification, costs of which in the case of Kenya are in the range of 636 GBP for establishment and 175 GBP per annum to maintain. In Zambia, establishment costs per grower even amounted to 4664 GBP for initial investment and 938 GBP per annum for maintenance costs. In Uganda, the study concludes that an export company would have to sell an additional 53 tonnes of horticultural products to break even (18% more for a company exporting 300 tonnes per annum). Farmers would have to increase their production by about 0.1 to 0.3 acres to compensate for additional costs through higher net income".
82. ISEAL Alliance members includes both the FSC and the MSC, who committed to compliance with the Code of ISEAL Good Practice. Other founding members include Fairtrade Labelling Organizations International (FLO), the International Federation of Organic Agriculture Movements (IFOAM), the International Organic Accreditation Service (IOAS); the Marine Aquarium Council (MAC); the Rainforest Alliance; Social Accountability International (SAI); Social Accountability Accreditation Services (SAAS), the Union for Ethical BioTrade (UEBT) and UTZ Certified. To become a full member of the ISEAL Alliance, members have to demonstrate full compliance with ISEAL Codes of Good Practice and other applicable ISO Guides (*e.g.*, ISO17011 for Accreditation Bodies). Organizations interested in membership will first apply for Associate Membership, and have to successfully complete a pre-assessment. ISEAL has historically relied upon three sources of funding – governmental agencies, foundations and membership fees. It works in partnership with AccountAbility and PwC Germany to improve its global outreach.
83. Resolution P6_TA(2007)0062, 2007.
84. Users can find definitions, glossaries, methodologies and tips for use of data sources and monitoring and evaluation arrangements. For example, the Code explains that the evaluation "could also be an assessment of the effectiveness of the standards system, either in respect of its internal structure (eg financial management) or of its ability to provide tangible benefits and incentives (eg fair prices) for its participants", thus to some extent mirroring our definition of "private benefit" v. "social welfare".

Figure 3. Methodology for the Evaluation Based on the ISEAL Code



comes based on the ISEAL Code.[85] There, the MSC has proposed to use the ISEAL Impacts Code, by identifying specific goals and issues for its own sector.

The development of an Impacts Code on the side of the ISEAL Alliance certainly fills a gap in the international policy and global governance debate, which culminates in the lack of a suitable definition of sustainability. In this respect, ISEAL has gone even further by engaging with the Food and Agriculture Organization (FAO) in the quest for a globally accepted definition of sustainability. As a matter of fact, while the ISEAL Impacts Code primarily looks at the stakeholder of a given private governance scheme (*e.g.*, the MSC), the *conceptual framework* definition provided by ISEAL aims to represent a "universally applicable definition of sustainability".[86] This development – termed within the ISEAL Alliance "scaling-up" of their current efforts – corresponds to a long-term plan to involve public and private organizations and trigger a common definition of core sustainability values, starting from the Brundtland Commission's report of 1987 "Our Common Future" and continuing with the incorporation of previous voluntary certification systems (FLO, MSC, UTZ Certified); tools generated by UN bodies (UN/ECOSOC, FAO, ILO, UNEP, etc.); corporations (*e.g.*, WalMart Sustainability Index); NGOs (*e.g.*, Transparency International, the Bellagio STAMP); and academia (*e.g.*, the Stiglitz-Sen-Fitoussi Report by the Commission on the Measurement of Economic Performance and Social Progress).

Within this context, a definition of sustainability has emerged, which can be considered at the moment among the most sophisticated and widely acknowledged definition to be used for public policy purposes. More in detail, sustainability has been articulated along four key dimensions/preconditions: good governance; social development; environmental integrity and economic resilience. Good governance includes both "active participation" indicators – *i.e.* reflecting the degree of active participation by interested parties in local management and decision-making – and "transparency" indicators, including indicators on the three core dimensions of "Assessment", "Prevention of Corruption" and "Compliance".[87] The "economic resilience" indicators, on the other hand, incorporate dimensions of "secure livelihoods" (including poverty alleviation and measured as on average per capita income of the farm, forestry, or fishery enterprise); resilience to economic risk (measured as degree of diversification of funding sources); inclusivity of the value chain and various social capital indicators. "Social development" encompasses a wide array of sub-indicators, from right to food and use of resources to labour rights, non-discrimination and equity (including gender equality), access to education and knowledge, health and access to sanitation and respect for cultural identity. Finally, the "environmental integrity" dimension looks at impacts on air, water, land and soil, biodiversity, climate change and eco-efficiency.

The joint FAO-ISEAL definition of sustainability indicators is certainly still an ongoing exercise, as testified by the many definitions that are still pending. However, it represents at once a promising avenue for public-private cooperation in global governance, and also the implicit recognition that private governance can significantly contribute to the design, implementation and enforcement of tools that aim at pursuing public policy objectives. The spider graph developed by FAO and ISEAL (Figure 4) shows the relative strengths of NGOs, government and businesses on the various indicators of sustainability described above. The figure shows, in particular, that key governance indicators such as participation, transparency and ongoing assessment are more likely to fall in the remit of governments, rather than NGOs and businesses.

3.2 Towards a Theoretical Evaluation Model

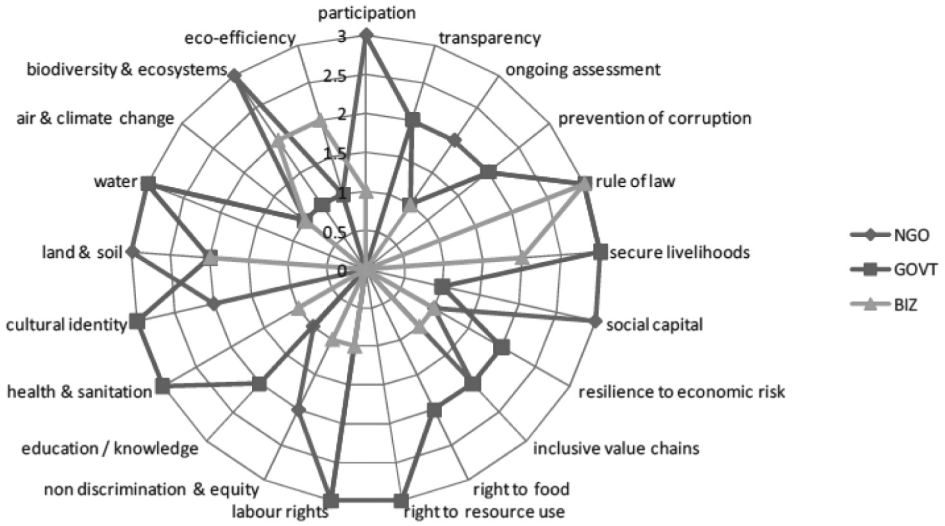
The previous sections have described the rise of transnational private regulation as a dominant paradigm in several policy domains; the absence of a real framework for the evaluation of these governance schemes by pub-

85. <www.msc.org/about-us/consultations/current-consultations/monitoring-and-evalua-ting-the-impacts-of-the-msc-certification-programme/Consultation%20document%20Monitoring%20-%20evaluation%20consultation%20document.pdf>.

86. FAO-ISEAL (2010), *A conceptual framework for progressing towards sustainability in the agriculture and food sector*, authored by E. Guttenstein, N. El-Hage Scialabba, J. Loh & S. Courville, available online at <www.fao.org/docrep/012/al322e/al322e00.pdf>.

87. The latter indicators are tentatively based on the availability of social-economic and environmental information relating to the business, enterprise or policy intervention, including monitoring data, management plans, and financial accounts. See FAO-ISEAL (2010).

Figure 4. Relative Commitment and Strength for Sustainability



Source: FAO-ISEAL (2010)

lic policymakers; and the ongoing "gap-filling" by meta-regulators that help private organizations set their own goals and converge towards public policy objectives. In all this, the informational asymmetries that remain between private players and public policymakers suggest that it would not be efficient, on the side of public policy, to abdicate the task of monitoring and evaluation and to delegate it entirely to private meta-regulators. Evidence from past experience (*e.g.*, the FSC, GlobalGAP) suggests that the role of public policymakers should remain crucial in the context of global governance of key areas such as the ones mentioned in this paper (food, sustainability, fundamental rights, financial markets, IT, etc.).

The evaluation of private governance schemes in public regulation can take place in different phases of the policy cycle. When self- or co-regulatory schemes are proposed in response to action by public policymakers, of course they will form part of the available regulatory options to be compared in an *ex ante* RIA. However, as already clarified, this is not always the case: many private governance schemes are created independently of public regulation, and this leads commentators to often exclude the possibility that a systematic monitoring of private governance by public regulators could ever take place. At the same time, there might be cases in which scrutiny by a regional or national policymaker is not very helpful, due to the global nature of private governance arrangements.

Both these arguments, however, are not conclusive. Monitoring does not coincide with oversight. Incentives to monitor existing private schemes may serve the purpose of deciding if and what kind of public intervention is needed. More in detail, the evolution of the smart regulation agenda, especially in the EU, increasingly points at "closing the policy cycle", and thus at engaging in constant monitoring of the effects of existing regulatory schemes – whether public or private – through the use of indicators and a sequential, logically consistent use of *ex ante*, interim and *ex post* evaluation.[88] Moreover, the fact that private governance arrangements tend to be global certainly implies that the best possible response would in many cases be an appraisal by international bodies or through public regulatory cooperation; however, nothing prevents a national or regional policymaker from assessing whether certain international rules are sufficient or desirable with respect to its own public policy goals.

That said, we conceived our overall evaluation framework along a number of sequential steps.

Step 1 *Origin and type of private governance.* As explained in the previous sections, most private schemes are not generated by policy decisions; at the same time, there is a variety of schemes dealing with one, a sub-set, or all phases of the policy cycle (described using the ANIME framework as in Figure 2 above). This determines the depth and scope of the evaluation to be performed. At the same time, the description of the type of initiative could take into account the reasons for the creation of the private governance scheme (signaling, controlling the value chain, complementing public regulation, replacing/pre-empting public regulation, inter-firm coordination and co-opetition, collusion/mutual benefit, etc.), which in turn orients the direction of the assessment.

Step 2 *Governance preconditions.* The analysis of existing experiences in the literature suggests that a number of governance features can positively affect the performance of private governance schemes. This phase implies the assessment of the preconditions for the effectiveness of a private governance scheme from a public policy standpoint. As such, it includes the use of indi-

88. See the European Commission Communication on Smart Regulation in the EU, COM(2010) 543 (8 October 2010).

cators such as participation, materiality, completeness, diversity of funding, specific governance arrangements, internal use of indicators and existence of self-evaluation or external evaluation arrangements.[89]

Step 3 *Quality, legitimacy, enforcement.* This step of the framework entails the analysis of how the arrangements identified in step 2 possibly affect these three key dimensions of private governance.[90]

Step 4 *Effectiveness.* Three different types of indicators seem relevant for an evaluation of the effectiveness of private governance: (i) *activity and governance indicators.* Indicators that correlate governance features and regulatory activities of the private governance scheme; (ii) *compliance indicators, i.e.* indicators used as means of reporting and signaling compliance with statutory goals helping verifying consistency between means and goals; and (iii) impact indicators, which include criteria and indicators used to evaluate the performance of private regulatory schemes and their impact on different constituencies – *e.g.*, whether the expected distributional consequences have occurred or wealth transfers are needed to correct unexpected effects. These latter "meta-indicators", in particular, are useful for public policymakers to understand whether private regulators evaluate themselves on the basis of "private" effectiveness.

Step 5 *Incorporation in public policy appraisal.* The evaluation of the effectiveness of private governance arrangements becomes an important input to the forms of public evaluation of policy options that are available, for example at the EU level. Depending on the results of previous steps, the most appropriate tools that will host the evaluation will be an ex ante analysis, an interim or *ex post* evaluation. In addition, it is important that a number of additional filters are applied to private governance. These include a number of screens, normally available (although not yet fully developed) in the European Commission's impact assessment practice:

- *Competition assessment:* the interaction of competitors within private governance schemes can lead to forms of collusion and anticompetitive outcomes; at the same time, vertical agreements that are aimed at securing private benefit might not always converge towards a virtuous outcome – take the example of GlobalGAP, or private agreements between ISPs and content providers for copyright enforcement in cyberspace. Competition assessment tools have been developed by the OECD over the past few years, and are still insufficiently used in *ex ante* policy appraisal.[91] They could be put to use with the aim to assess whether the private governance scheme at hand are likely to hamper the competitive process by raising non-participants' costs, worsen barriers to entry of expansion, raise prices above competitive levels, etc. These tools can be designed in a way that mirrors current knowledge in competition law enforcement, such as for example the assessment of the existence of basic preconditions for stable collusion (transparency, symmetry, enforcement/retaliation, homogeneity of products, etc.).
- *SIA.* The sustainability impact assessment methodology has been developed and applied at the EU level mostly along with the negotiation of free trade agreements.[92] This toolkit is conceived to assess a variety of sustainability-related consequences starting from negotiations pure related to trade. As such, it has developed in a way that accounts for private governance schemes, as well as constant consultation and involvement of public and private partners. The European Commission has used the tools in a number of occasions, including in the development of its new strategy on tourism and horticulture, as well as in international trade negotiations with several partners.[93]
- *Crime-proofing.* A methodology for testing proposed legislation against the likelihood of criminal behavior has been developed by the TRANSCRIME project.[94] For example, one of the applications led the authors to find that the eAccessibility communication of the European Commission left the regulation of online payment systems to self-regulation, without fully assessing the impact that this policy option would exert on security and crime.
- *Fundamental rights test.* A specific methodology to assess impacts of proposed policy options on fundamental rights is available since May 2011 on the Commission's website. This methodology includes a fundamental rights check-list, which – although not very detailed – could guide the assess-

89. An example of a paper that uses indicators to assess the existence of such preconditions is Fuchs and Kalfagianni 2010.
90. See above, beginning of section 2 for a definition of these three dimensions.
91. See the OECD Competition Assessment Toolkit 2007 (revised in 2010).
92. C. George & C. Kirkpatrick, *Sustainability Impact Assessment of Trade Agreements: From Public Dialogue to International Governance*, Impact Assessment Research Centre Working Paper Series No 22/2007, University of Manchester.
93. <http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf>. See PWC study on horticulture. <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130129.pdf>.
94. See <http://transcrime.cs.unitn.it/tc/fso/pubblicazioni/AP/Final_Report-A_study_on_Crime_Proofing.pdf >.

ment of various policy options with respect to certain, "non-negotiable" issues.[95]

- *Specific risk assessment*. This test could be designed as focusing on "what can go wrong" with private governance. As we described in section 2 above, depending on the circumstances lock-in effects and collective action problems, path dependency, *status quo bias*, anchoring and framing effects, hard-to-detect changes, divergence of interests and self-indulgence in the evaluation can emergep, thus undermining the effectiveness of a private governance scheme.
- *Sectoral competitiveness proofing*. This test was recently added by the European Commission to the toolkit to be used within an *ex ante* impact assessment of a new policy initiative.[96] However, the European Commission clarified in its recent working paper that "[i]n the case of policy interventions of a self-regulatory nature (such as codes of conduct, or voluntary standards), the case for an in-depth analysis of impacts on sectoral competitiveness is likely to be limited since the sector itself plays a key role in determining the content of the initiative. However, more detailed scrutiny may be required with regard to impacts on competition within the sector and on the competitiveness of upstream or downstream sectors". Given our approach to private regulation, this "non-interference" approach appears unfortunate: to the contrary, the competitiveness impact of a given private regulation scheme must be carefully appraised.
- *Overall policy coherence test*. Most important of all, from the standpoint of public policy it is essential to assess whether private governance schemes have set operational and specific objectives, which are consistent with the long-term goal set by public policymakers. For example, the EU has set important long-term goals related to competitiveness, innovation, poverty and sustainability within its Europe 2020 strategy and the seven flagship initiatives that compose it. Even if fully effective, private governance schemes might not be fully aligned with the public goals set within given jurisdictions, which set targets that might require additional policy intervention. The use of policy appraisal tools, be they ex ante or ex post, is essential to test this form of alignment between private gain, social benefits and policy targets.

This theoretical framework can easily accommodate the use of at least three different types of indicators, which have been advocated in the literature. First, governance indicators can be used at step 3 of our proposed analytical framework to enable an analysis of whether the basic preconditions for effective private regulation exist. Performance indicators can be used at step 4 of the analysis to assess effectiveness directly. Finally, distributional impact indicators are essential in step 5 of the analysis, when the overall impact of the private governance scheme is assessed.[97]

4. Conclusion

Private regulation is emerging as a viable solution for a number of problems faced by contemporary societies, and can be superior to traditional command and control regulation due to informational asymmetries, superior coordination, the need for trans-national cooperation and standardization, and also the superior flexibility and adaptability of de-ossified, privately implemented, designed and enforced rules. This development is, however, still largely ignored by guidance documents on *ex ante* policy appraisal for public policymakers; meanwhile, private regulators themselves are developing their own guidance documents, even in the form of meta-private regulation offered by emerging conglomerates such as the ISEAL Alliance. In this paper, we try to propose a theoretical framework that could guide public policymakers in assessing whether, and in what form, private regulation can prove the most appropriate form of policy intervention. A key role in this respect is to be attributed to the assessment of the effectiveness of private regulation as an alternative or more likely as a complement to public regulation. We propose a six-step theoretical framework and argue that IA techniques should:

a) *Define an integrated framework including both the possibility that private regulation can be used as an alternative or as a complement to public legislation.* This, in turn, calls for a taxonomy of the many ways in which public and private regulation can coexist along a continuum, from extreme cases in which private regulators take care of most of the policy process (from agenda-setting to the setting of basic principles, implementation criteria, enforcement practices and compliance monitoring); to more hybrid (and also more recurrent) cases in which public policymakers set the ultimate objectives and principles, and private governance complements them by setting modes of implementation and compliance (as in the case of standardization policy at the EU level).
b) *Involve private parties in public IAs.* When the use of private regulation is contemplated by public policy-

95. <http://ec.europa.eu/governance/impact/key_docs/docs/sec_2011_0567_en.pdf>.
96. See European Commission Staff Working Document, Operational Guidance For Assessing Impacts On Sectoral Competitiveness Within The Commission Impact Assessment System, A "Competitiveness Proofing" Toolkit for use in Impact Assessments, SEC(2012)91 final, 27 January 2012.
97. F. Cafaggi & K. Pistor, *The Distributional Consequences of Transnational Regulation* 2012 (unpublished, on file with the authors).

makers, private regulators should be asked to contribute to the IA exercise in order to define the best strategy or strategies that would ensure achievement of the regulatory objectives. This of course can happen only when public regulators intentionally leave at least part of the policy space to action by private regulators, and not in all those cases in which private governance emerges in the absence of the law.

c) *Contemplate the deployment of indicators related to governance and activities of the regulators and their ability to coordinate and solve disputes with other regulators.* Although indicators are widespread in private governance, we contend that there might be significant differences between the effectiveness perceived by a private governance scheme (in the form of "private payoff" of the members) and the ability of the same scheme to achieve publicly set regulatory objectives (the "social benefits" of private regulation). Using indicators oriented towards the private benefit to measure progress towards the achievement of public goals would inevitably prove misleading: Adam Smith's "invisible hand" does not always work that smoothly. Accordingly, various types of indicators (governance, impacts, distributional effects) must be used to assess compliance with overall regulatory objectives.