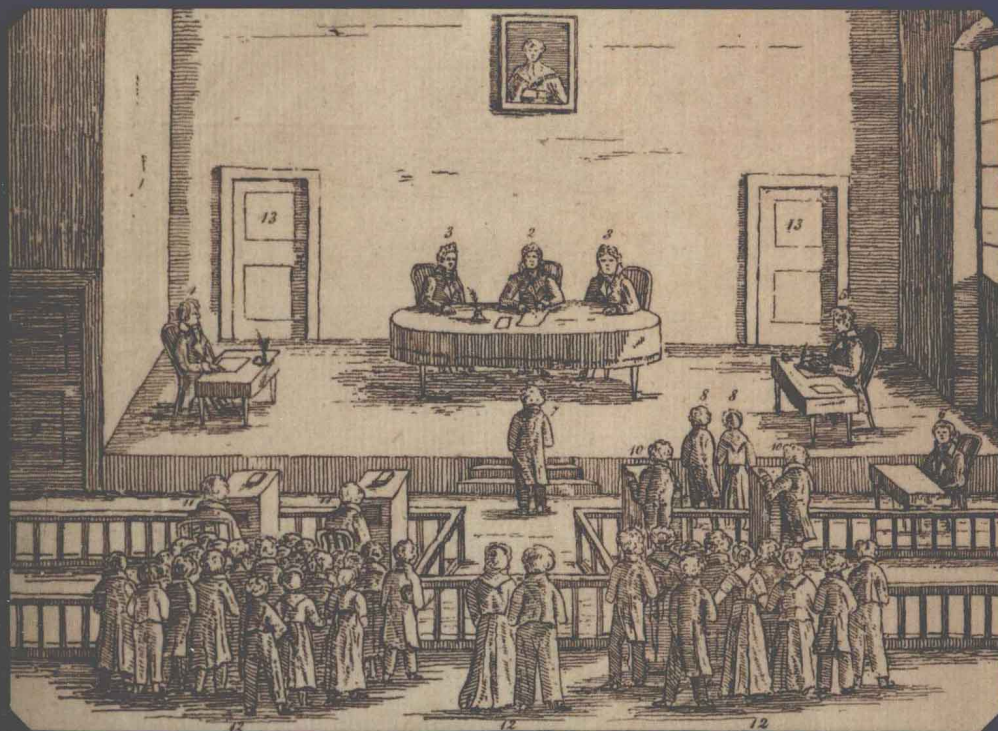


Edited by  
**Fabrizio Cafaggi**



# Enforcement of Transnational Regulation

Ensuring Compliance in a Global World



PRIVATE REGULATION

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Ensuring Compliance in a Global World

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*Edited by*

**Fabrizio Cafaggi**

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(on leave from the University of Trento)*



PRIVATE REGULATION

**Edward Elgar**

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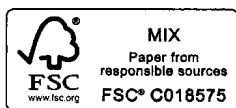
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# Preface

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## THE CONTENT OF THE BOOK AND THE WIDER PROJECT

This book focuses on the enforcement of transnational regulation. It is part of a broader research project concerning different aspects of transnational private regulation (for further information on the project please see <http://privateregulation.eu/>). It can be located within the debate on legal aspects of globalization.

Transnational private regulation is a new research project that wants to open up a new field focusing upon regulatory regimes that are not exclusively State based, but include private actors. Within the private sphere the research highlights the different roles of firms and NGOS in rule-making, monitoring compliance and enforcing transnational rules. These regimes have emerged for different reasons and pose serious challenges to State sovereignty. They have been criticized for lack of accountability, conflict with democratic principles and compliance with rules of law. An even more serious criticism is related to the enforceability of the rules. Often the commitments made by single firms or trade organizations are considered not legally enforceable and not binding, thereby reducing their effectiveness. Enforcement, thus, becomes a key question to examine the private–public divide.

### Transnational Private Regulation and *Lex Mercatoria*

Transnational private regulation (TPR) emerges as a different phenomenon from conventional transnational private regimes like *lex mercatoria* and commercial arbitration. The regulatory dimension assumes a preponderant role in the mission and activity of private regulators. They respond to market and governmental failures at the global level, manage systemic risks, and govern global commons. The new private regulatory regimes are often multiple, frequently competing, and sometimes overlapping in different regional areas. They reflect preferences of developed and developing countries and may imply different distributional consequences. The most

evident case is the one on food safety regimes, where retailers and distributors have designed different but overlapping regimes, imposing heavy compliance burdens on producers in developing countries.

### **Harmonization of Legal Rules at Global Level**

One of the main goals of transnational private regulation is to harmonize standards and principles and make them compliant with fundamental rights, as in the case of private securities companies, where putting a stop to human rights abuses is the main objective of transnational private regulatory regimes. Legislative divergences between developed and developing countries are profound, but often practices among developed countries differ significantly. Lack of political consensus prevents the enactment of international treaties or implementing them in a consistent manner. Often private regulatory regimes provide vehicles for harmonization or instruments to implement soft international law principles.

### **The Public–Private Divide**

Private regulatory regimes emerge to fill gaps created by weaknesses of the public sphere at the global level. However, they consolidate not as an alternative to public regulation, but as a complement that needs to rely on strong public institutions, especially at the domestic level. The advertising sector, for instance, has a layered system where international private regulations are administered and enforced by national self-regulatory organizations; however, in the accounting sector, global private governance relies on domestic public authorities. Also, from the point of view of enforcement, there is often a combination of domestic courts and global private enforcers, including arbitrators. The case of online trading platforms provides another illustration, as the enforcement systems are differentiated in relation to the type of actors involved in the conflicts, for instance in regulator versus regulatees or regulatees versus third parties.

### **Enforcement of TPR**

How different are the enforcement mechanisms in private regimes in comparison with those adopted by international organizations and inter-governmental organizations? What happens when hybrids including public and private organizations collaborate to define rules and enforcement?

These regimes are often multilevel, involving different types of dispute resolution systems, ranging from internal mediation, where the solution to the conflict can be achieved through mere collaboration of the interested

parties, to arbitration, where third parties, previously selected by the regulator, provide the solution to the conflict, applying either general principles of law (e.g. in the case of ICANN) or specific rules defined in the TPR (e.g. in food safety regimes such as GlobalGap). Rule making takes place globally, while enforcement occurs locally, either by way of judicial intervention or the use of private enforcers including arbitration. This can be seen in the case of ICANN, where *ex ante* approved arbitrators and domestic courts can solve the disputes between domain name users and third parties, depending on the choice left to the latter.

This dynamic makes domestic courts key players of the enforcement mechanisms. However, domestic courts act upon their domestic principles and may reach very different results concerning both the enforceability of transnational private regulation and the available remedies in case of violations. Divergences pose problems of coordination and governance of the effects of judicial review on the regimes. Furthermore, often enforceability is granted by private enforcers which operate either within the overall regime or as independent enforcers. In particular, this can be perceivable in the already mentioned case of advertising, where national self-regulatory organizations apply international rules through the lenses of national consumers' expectations, but are at the same time trying to converge in their interpretation, at least at European level, through participation in the European Advertising Standards Alliance.

The aim of the book is to bring together different disciplinary perspectives on the enforcement of transnational regulation. The goal is, on the one hand, to open up the field of transnational private regulation, with the contribution of private lawyers whose expertise is related to contract and tort, and, on the other hand, to engage with current research projects on legal globalization associated with public international law and global administrative law.

*Fabrizio Cafaggi*

## Acknowledgments

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This book was designed within the HiiL project on the role of private actors. It is part of a wider research project that addresses legitimacy, quality, effectiveness and enforcement of transnational private regulation. It is the first book in the private regulation series, which will host contributions coming from different disciplines including law, economics, political science and sociology.

I am deeply grateful to Rebecca Schmidt and Federica Casarosa for their extremely valuable contributions to the editorial work and coordination. Without their commitment and ability, the book could not have been published. I am also very grateful to Rebecca Hastie, Kate Pearce and Laura Seward for their very effective editorial assistance to the manuscript. Finally, my deep gratitude to those who have travelled with me through the difficult period I have been living in.

*To my EUI students, 2002–2012, with gratitude.*

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# Introduction: The transformation of transnational private regulation: enforcement gaps and governance design<sup>1</sup>

**Fabrizio Cafaggi**

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Transnational private regulation (TPR) is growing, giving rise to numerous regimes at the global level which interplay with public, international and domestic regimes. TPR encompasses regimes that primarily, but not exclusively, regulate firms operating in markets that extend beyond States' boundaries. The scope ranges from trade (electronic platforms to trade goods, services and shares) to human rights, from food safety to financial and banking, from professional (accounting, legal, medical) to technical (telecom, aviation, electricity) standards, from environmental to employment standards, and from advertising to data protection. Within each sector, global supply chains have become relevant global regulators, developing contractual regulatory tools which are applied to some or all participants.<sup>2</sup> TPRs are frequently embedded within independent private orders, often pursuing conflicting policies; their normative foundations are primarily based on private autonomy, freedom of contract and association limited by constitutional and international laws. Thence, they are primarily regulated by their relevant constitutional contracts and/or organizational charters; gaps are filled by reference to domestic private law regimes, whereby

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<sup>1</sup> This introduction has strongly benefited from deep and rich discussions with the EUI Casebook working group. My thanks go also to Rebecca Schmidt and Federica Casarosa for editorial and research assistance. Responsibility for the text is mine.

<sup>2</sup> See on the relationship between private regulation and supply chains, S. Henson and J. Humphrey, 'The impact of private food safety standards on the food chain and on public standard setting processes', paper prepared for FAO/WHO, May 2009, available at [www.fao.org](http://www.fao.org) (last visited April 2011). (Hereafter, 'The impact of private food safety standards'.) For a taxonomy of global value chains in relation to different power relationships see G. Gereffi, J. Humphrey and T. Sturgeon, 'The governance of global value chain', *Review of International Political Economy*, 2005, 78–104.