The Appropriate Level of Enforcement in Multilevel Regulation

Mapping Issues in Avoidance of Regulatory Overstretch

Michiel A. Heldeweg[1] & Ramses A. Wessel[2]

[1] Professor of Law, Governance & Technology, University of Twente, Enschede, the Netherlands

[2] Professor of International and European Law and Governance, University of Twente, Enschede, the Netherlands

Correspondence: Ramses A. Wessel, Professor of International and European Law and Governance, University of Twente, PO Box 217 7500 AE Enschede, the Netherlands. E-mail: ramses.wessel@utwente.nl

Abstract

In modern day 'multilevel' regulation, legal enforcement of transnational standards usually takes place at another level than where the norm was created in the first place. The quest for smart regulation begs the question which level is most appropriate to proper legal enactment and enforcement. Not only as a matter of location (e.g. inter- or supranational, or domestic), but also concerning the level of strength (i.e. intensity of prescription and/or coercion). How can 'regulatory overstretch' be avoided – given smart regulatory principles of subsidiarity and responsiveness? A general description is provided of regulatory enforcement, from a regulatory and an enforcement perspective, followed by a discussion of appropriateness of enforcement from the dimensions of location-level and of strength-level. Finally, a simple model is presented for a 'remediableness analysis' of appropriate matching of strength and location level scenarios of enforcement – as guidance for enactment and enforcement of transnational standards without regulatory overstretch.

Keywords: enforcement, informal law, multilevel-regulation, regulatory-overstretch, transnational-standards

1. Introduction

With standard-setting decisions increasingly being taken in a 'multilevel' regulatory context, it has become unclear at which 'location-level' enforcement of those decisions can or should be enacted best. At the same time it is increasingly unclear which enforcement 'strength-level' is most appropriate given the perhaps changing legal nature of a norm in different levels of governance. Compliance of norms is often sought at another (lower) level than where the norm was created in the first place.

The notion of 'multilevel regulation' was coined, *inter alia*, to add a legal/regulatory dimension to the vast range of studies on multilevel governance (Chowdhury & Wessel, 2012). This article will build on earlier work related to the increasing interconnectedness of norms in the global, EU and domestic legal orders by Føllesdal, Wessel & Wouters (2008), and the different legal designs of these norms (Heldeweg, 2013). In this 'normative web' (Wessel, 2016) a new question relates to a topic that is so far understudied: the appropriate 'level' of enforcement (Kica & Wessel, 2015). *Enforcement* is understood here as ensuring compliance with (transnational) norms, by legal means,[1] especially by monitoring and sanctioning (e.g. by a domestic regulatory agency), and involving adjudication (e.g. by a court decision on a violation of a transnational environmental standard), but also implementation in as much as putting norms into practice calls for their elaboration (e.g. of EU-directives in Member State legislation). Indeed, also 'transnational law' is a key concept in our analysis. The scope of the present paper does not allow us to dwell too much on the manifold dimensions of this concept. We merely follow the descriptions used in the present legal discourse (Noortmann, 2015), which builds on Philip Jessup's (1956) *Transnational Law*. Basically, the introduction of the term transnational law aimed to create a category for rules that do fit neither the public nor the private realm of law (Jessup, 1956; Noortmann 2015). Central in the idea is

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[1]   We acknowledge the importance of non-legal instruments of enforcement, but focus here on legal instruments: the performance of legal acts (e.g. legislative, administrative, civil) and taking legal actions (e.g. criminal prosecution, law suits).

that states are not the only actors and problems are often not confined to states.[2]

Appropriateness of enforcement is measured along two dimensions: the 'strength-level' and the 'location-level'. In the first dimension the term 'level' would relate to the appropriate 'strength' or 'intensity' of the enforcement. This concerns the extent of prescriptiveness and coercion with which norms can or should be enforced, given that norms are often enacted in a different legal order than the one in which they need to be complied with, and may take on a different (legal) form. Apart from the complexities flowing from this setting, recent studies have revealed that enforcement (if at all appropriate to improve compliance) may need to take a different shape. One example is formed by the many norms falling under the heading of '*informal* international law', indicating that they are not made by traditional governmental actors through legal procedures and that their legal nature is less obvious, whereas their enforcement may take on an explicit prescriptive-legal and indeed coercive form (Pauwelyn, Wessel & Wouters, 2012).

The second dimension relates the term 'level' to the appropriate legal order and would assess the criteria to establish whether enforcement is best guaranteed at either the global, the EU or the domestic legal order – or that we should perhaps consider 'transnational enforcement' (Stewart, 2012). Factors will include the actors involved, the decision-making process and the (legal) nature of the norms. An element in this assessment will be the question of whether the (EU) notion of 'subsidiarity' could form a guiding principle in establishing the appropriate level of enforcement.

Another way of looking at this would be to view the two dimensions of enforcement in terms of 'smart regulation' (Heldeweg, 2011). Smartness in 'strength-level' links to theories such as of Ayers & Braithwaite (1992) and of Gunningham & Graboski (1998) on starting with (preferably combinations of the) least interventionist instruments (and then escalating-up the 'pyramid' – if necessary). Smartness in 'location-level' links to theories on subsidiarity (Schilling, 1995). Meanwhile we also find that both issues relate as regulatory relations, manifest as dynamic 'actor-strength-location combinations'. Taken together, we propose a smart regulatory approach in avoidance of 'regulatory overstretch': not enacting and enforcing legal standards at higher location and more intense strength levels than necessary.

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

2. The Notion of Regulatory Enforcement

2.1 The Relation between Regulation…

In limiting our scope to enforcement of 'public regulation' we merely intend to exclude forms of pure private regulation. We focus on those forms of regulation that, as a matter of standard-setting, come with active participation by public authorities (including agencies and representatives). We include also public authority enforcement by legal acts or legal action, when their legal effects affect the scope or nature of public interests, either as a matter of a government task/responsibility (e.g. environment and public safety) or as a form of (*de facto*) public utility (of certain goods or services – e.g. health care, telecommunication and internet) (Scott, Cafaggi & Senden, 2011).[3] Meanwhile, many studies have revealed private actor impact on public regulation, either through a participation of private stakeholders in the norm-setting process, or because of an incorporation of 'private' standards in public law regimes.[4] So, whereas extraterritorial enforcement procedures have typically

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[2]   While good definitions are hard to find, the description provided by Noortmann (2015 at 68) may be helpful: "Transnational law (TL) constitutes an independent legal realm, separated from, but partially overlapping with national law, public international law, and private international law. It neither includes all these legal realms as a kind of all-encompassing legal system, nor does it concur with an exclusive *lex mercatoria*. […] Transnational law is the legal realm where all actors meet, but not necessarily all of the time, i.e. some (like states) can move in an out other legal realms, others are confined to legally engage other transnational actors in this specific realm."

[3]   Here our definition exceeds the scope of (prescribed, if only in very general terms, of) government involvement – a fully privately arranged utility, (by and large) open to use by all members of the public, is also considered as the type of 'object' that colours its regulation 'public'. Compare also the notion of 'public authority' in Von Bogdandy, Wolfrum, Von Bernsdorff, Dann & Goldmann (2010). These authors define the 'Exercise of international public authority' as "any kind of governance activity by international institutions [which] *determines* individuals, private associations, enterprises, states or other public institutions."

[4]   Either as tacit inspiration (the public norm itself does not reveal its private law pedigree) or by static or dynamic reference to a private norm (i.e. as it stands at a given time or as it may change within private law). See for instance Scott, Cafaggi & Senden (2011).

been studied in international and transnational private law,[5] and not so much in public law, these days the public law dimension of many of these arrangements has also become visible (Buxbaum, 2001).[6]

At the same time, for the purpose of this article, we aim to look at regulation as involving enforcement of conduct mechanisms, or at least requirements – thereby taking a more 'narrow' view of regulation. This follows from our focus on norms which by their legal nature call for enforcement, or do so on other grounds but in a manner which, as stated in the above, calls for legal means of enforcement (Walker, 2006). As we will see, this does not exclude 'informal' norms (that are – *prima facie* – not covered by international law), as even these norms may come with legal means (i.e. acts or actions) to enhance or secure compliance (Pauwelyn, 2012).[7]

Given this variety of regulators and regulatory motives, it also makes sense that nowadays we find a broader variety of regulatory *strategies* applied in a variety of regulatory relations – aside from the 'orthodox' government regulation by 'command and control'. Next to the latter strategy of *hierarchical* control, there are well-established forms of *community-based* control (underpinned by personal motivation, private cooperation and public criticism), *competition-based* control (underpinned by efficiency and profit, typical to markets, but possibly also between regulators), and *design-based* control (also known as architecture or code; underpinned by functional, often physical requirements) (Lessig, 1999a & 1999b; Murray & Scott, 2012). The current trend of B2B private regulation through technical standards in supply chains, enforced through certification schemes and supported by transnational informal rule making, provides an excellent example of a hybrid combination of all of the afore types of regulatory control: e.g. a general hierarchical safety norm, elaborated through community-based informal cooperative rule-making in notified bodies, adopted in competition-based certification-schemes, leading to products with regional accessibility only – as in DVD's.

Hierarchical control typically seems to fit a relation between a superordinate regulator and a subordinate regulatee; as a two-party, 'one on one' regulatory relationship. Relations may however be more complex, certainly if we take into account alternative strategies and cumulative or hybrid strategies. Thus in reality we find various types of *relations*, with different specializations of (professional) regulatory role-play (of pure and of hybrid kinds) (Levi Faur, 2011) and within these types of relations various actor *positions* (of a government, market or civil society nature), with various possible strategies used (again in pure and hybrid form) (Heldeweg, 2013).

2.2 ...and Enforcement

While the relation between regulation and legal enforcement may be somewhat underresearched, this is not the case for the relation between the (validity of) legal norms and their enforcement. In classic Austinean approaches to law the enforcement of a norm is part of its (legal) nature (Austin, 1995).

This element seems to be accepted in the regulation literature as well. Thus it has been noted that in its simplest and narrowest sense, regulation refers to a set of authoritative rules accompanied by a mechanism, usually a public agency, for monitoring and promoting compliance with those rules (Baldwin, Scott & Hood, 1998; Johnstone & Sarre, 2004). And as argued by Stewart (2012): "*The objectives of transnational regulation, including harmonization and enhanced protection, will not be achieved unless the regulatory norms adopted [...] are effectively implemented and enforced against market actors operating in and across different jurisdictions.*" (at 47). Despite its focus on 'transnational' regulation, this statement seems valid across the board. In any case, the forms of regulation addressed in the present article could largely be qualified as 'transnational' as they include public regulation by different actors to be found in areas such as environmental health and safety ('EHS'), consumer protection, investment, financial products and services, intellectual property and competition (Stewart, 2012; at 41).

As announced in the introduction to this article, we view enforcement as ensuring compliance with legal norms, by legal means. Compliance, in turn, is understood as "… *conformity between behavior and a legal rule or standard.*" (Raustalia, 2000; at 388). Raustiala furthermore reminded us that this should be seen in distinction from the effectiveness of a norm, "… *understood as the degree to which a legal rule or standard induces desired*

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

[6]   Hannah Buxbaum observes that the functioning of administrative networks involves "a choice by state agencies to cede exclusive power over territory in order to gain instrumental power over forms of conduct subject to regulation" (at 308). See also Verbruggen (2013) on the background presence of state regulatory capacity in relation to the enforcement of transnational private regulation.

[7]   Pauwelyn also points to the relevance of private actors and arrangement, but excludes cooperation that only involves private actors (at 21). See on this point also Schepel (2012). In the end 'the exercise of public authority' (see above) seems to be the key. Levi-Faur (2012) has succinctly put it as follows: "*We are all immersed in the regulatory game*" (at 7).

changes in behavior." In that context a focus on compliance is often misplaced and may even be counterproductive (Chayes & Chayes, 1995).[8] Indeed, in our attempt to make a sensible link between regulation and legal enforcement we should remain aware of that pitfall. Enforcement is meant to ensure compliance, but compliance is not necessarily the best indicator of the effectiveness of the norm in the sense of it 'becoming real'.

Following Stewart (2012 at 42), we then view regulatory enforcement as involving "… *enforcement actions brought by public authorities or private plaintiffs against actors subject to public regulatory requirements. These include administrative orders requiring or prohibiting specified conduct, administrative imposition of penalties, criminal prosecutions, and civil actions brought by governmental officials for specific relief or civil penalties – in all cases backed by the coercive power of the state. In the era of the regulatory welfare state, enforcement can also include governmental activities or denial or revocation of permits or licenses to carry on productive activities or withdrawal of state-provided grants and other forms of financial assistance for failure to meet specified requirements or conditions.*" This is not to say that we fully exclude softer ways to enhance compliance (such as reputational incentives), as these are often part of complex enforcement regimes. The bottom line – again following Stewart (2012 at 43) – is that "… *the legal system is capable of distinguishing whether a regulated actor is or is not in compliance with regulatory requirements, which in turn implies applicable regulatory norms have a suitable hard-edged character that will support such distinctions.*" Yet, compliance research in political science and political economy studies often puts the value of (enforcement) instruments to enhance compliance into perspective (arguing that there are often other reasons to explain the generally complying behavior of actors) (for references: Von Staden, 2012). Accepting these lines of reasoning – as lawyers – we maintain the need for legal systems to be able to distinguish between compliance and non-compliance with a norm, but also to contain 'secondary' norms governing arrangements and procedures for implementation and (thus) enforcement. These secondary rules form the basis of legal enforcement, as they facilitate either (elaborated) standard setting (at another level than that of the enactment of an informal norm) or supervision and, if need be, sanctioning. Legal acts and legal actions are possible only, if secondary norms (of legal power and of adjudication) provide a basis. These acts and actions may be of a public law nature (as of criminal and administrative law) but also of a private law nature (as through contracting and tort). As we clarified in the above, our focus is on public regulation and so we discuss private law enforcement only if there is some 'public dimension' to it (i.e. a public interest as a matter of government responsibility, or as a matter of a public utility good or service).

Part of the challenge of compliance is to ensure legitimate and effective ways of regulatory *enforcement*, as a prerequisite matter of regulatory significance – a *conditio sine qua non* to actual uptake or adherence by regulatees ('on the ground').[9] Without neglect of matters of (political) acceptability and equity, this issue is mainly how regulation can effectively and efficiently achieve its objectives.

3. The Appropriate Level of Enforcement

Having established how we define regulatory enforcement, we now turn to the key question raised in this contribution: what is the appropriate level of enforcement in a setting of multilevel regulation in which norms are often enacted at a different level than where their effects are to take place? As announced, we will deal with the 'appropriate level' question in two ways. The following sub-section will look at the 'location-level' (global, regional, domestic). This will be followed by an analysis of the 'strength-level' (strong, soft).

3.1 Location: Global, Regional or Domestic?

The most obvious argument driving the choice for a particular regulatory level seems to be the extent to which regulation can effectively take place at the domestic level. Free trade in goods and services and capital mobility have called for what is sometimes labeled 'harmonization up': opening up domestic markets calls for regulation beyond the state. Research projects on for instance the development of Global Administrative Law (GAL) have pointed to the negative consequences of moving up regulation in terms of for instance a loss of remedies (Kingsbury, Krisch & Stewart, 2005).[10] At the same time it has been noted that certain types of enforcement can

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[8]   Against the 'enforcement model' of compliance, Chayes and Chayes presented their famous 'managerial model', "relying primarily on a cooperative, problem-solving approach instead of a coercive one" (at 3).

[9]   Again this could be framed as the pursuit of 'smart(er) regulation': regulation with leads to regulatees' (such as businesses) improved performance, at a price acceptable to them and to the community. This definition leans on Gunningham and Graboski's (1998) definition, which is intended for environmental policies (at 10): "… 'smarter regulation', which, for our purposes, means that which promises improved environmental performance, but at a price acceptable to business and the community.".

[10]   This publication heralded the start of a new stream of research on GAL

only be implemented at the domestic level, where (for instance in the environmental area) regulations are sanctioned through criminal law or through administrative penalties (Macrory, 2008).

The present article raises the question to which extent these ('subsidiarity') arguments make sense in relation to legal regulatory enforcement. It is often the case that compliance of norms is sought at another (lower) level than where the norm was created in the first place. The UN Security Council saga on anti-terrorism measures (painfully) reminded us of norms enacted at the global level of which enforcement was delegated to the EU and the domestic levels (Wessel, 2010). At the same time, enforcement of norms jointly agreed on by national regulators may benefit from a consistent and harmonized way of enforcement to prevent discrepancies from occurring (and undermining the whole idea of regulation in a certain area). In that sense Stewart pointed to four reasons why decentralized domestic implementation and enforcement may fail (Stewart, 2012; at 48):

1. governments and agencies may fail to agree on specific *primary or secondary norms*, either because of disagreement or uncertainty over norms, bargaining failures, or the need for flexibility to deal with future changes;

2. governments or agencies may decide for a variety of *political and policy reasons* not to carry out their undertakings;

3. states or agencies may lack legal and *administrative capacity* to effectively implement the agreed norms; and

4. the agreed regulatory *instruments and strategies* may have intrinsic efficacy limitations.

While these may indeed form reasons to 'move up' systems to ensure or enhance compliance (e.g. though the creation of transnational regulatory administrative bodies adopting incentives such as sanctions or subsidies) (Raustalia, 2000), it is more difficult to explain the choice for, let's say, the UN or the EU or the OECD. One reason is formed by the availability of institutionalized (legal) enforcement. This would for instance explain why some norms can only effectively be enforced once they have been adopted by the EU or in domestic legislation (consider for instance the norms on food safety initiated by the Codex Alimentarius Commission or the financial rules of the Basel Committee). The availability of supervisory mechanisms at a certain level, may not only form a reason to locate the enforcement at that level, but also not to create alternative or additional mechanisms at a higher level.

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

3.2 Strength: Strong or Soft?

Apart from the appropriate location level of governance for regulatory enforcement we also address the appropriate level of intensity or strength. (A final question will be to which extent the two dimensions interact: is softer regulatory enforcement better suited at a level beyond the state and does stronger enforcement find its natural place in a domestic legal setting?) As indicated above, we do not equate formal law with hard law and informal law with soft law. In relation to 'informality', the debate in political science and political economy largely concentrated on the pros and cons of the use of soft law. As indicated by, for instance, Guzman and Meyer (2011), soft law would work well for mere *coordination*, but will be less easy to use to establish *cooperation*; and Kanbur (2009) pointed to the relation between the "intensity of enforcement" and "the nature and character of formality and informality". However, the legal scholarly debates have clearly moved beyond the soft law debate. Drawing on a two-year research project involving over forty scholars and thirty case studies, the argument can be made that the international legal order has radically transformed in the past, on all three axes of actors, processes and outputs. Recently, it was noted that there even seems to be a stagnation of formal international law-making, in favor of more informal international law-making (Pauwelyn, Wessel & Wouters, 2014). The term 'informal' international law-making is used in contrast and opposition to 'traditional' international law-making. Informal law is 'informal' in the sense that it dispenses with certain formalities traditionally linked to international law. These formalities may have to do with *output*, *process* or the *actors*

involved (Pauwelyn, 2012). It is exactly this 'circumvention' of formalities under international and/or domestic procedures that generated the claim that informal law is not sufficiently accountable (Benvenisti, 2007; Kingsbury & Stewart, 2008).[11]

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

Stewart (2012; at 50-58) has listed different types of regulatory instruments used for securing compliance with regulatory requirements:[12]

– *command and control* instruments (prohibiting or mandating specified conduct by regulated actors);

– *market-based* and information-based regulatory instruments (to steer the conduct of regulated firms in the desired direction by directly imposing a price on disfavored conduct or mobilizing consumers, investors, and the public general, to reward firms and products with superior regulatory performance and shun those with inferior records);

– *network* regulatory strategies (making use of private and hybrid public-private institutions, including arrangements for co-regulation; these arrangements seek to economize on the role of enforcement);

– *collateral* compliance mechanisms mobilized by public regulation (a range of mechanisms triggered by the fact that public regulation is enforced beyond the state, ranging from adoption by different domestic courts to demands by third party certifiers, or the simple fact that (technical) standards when adopted may have an 'inherent' compliance mechanism).

A well-established (Australian) approach to this *enforcement* quest was presented by Ayres & Braithwaite (1992) and elaborated upon by Gunningham and Grabosky (1998). It builds upon the regulatory design principles that: (1.) *single instruments* seldom suffice to yield the desired effect (so regulators should consider combinations); (2.) it is preferred to use the *least interventionist* measures (so regulators should apply a mix of prescription and coercion that achieves results at least costs to the regulatees and, consequently, to the regulator); (3.) if necessary a responsive *escalation of enforcement* should be applied (ascending, as it where, a dynamic instrument pyramid, from low to high coercion).

Gunningham & Grabosky (1998) suggested a 2-dimensional pyramid for *government* regulation, from low coercion at the bottom level to high coercion at the top (see image below).[13] The basic idea behind this is that two types of *failure* may reveal in enforcement strategies: (1.) a strategy (i.e. an intervention) may be adhered to by most, but not all regulatees. Consequently a tailored *responsive* strategy may be needed, escalating strength only as regards those who are initially non-compliant; (2.) a strategy as such may initially, before introduction, seem broadly viable but then prove not to work in practice – pointing at a need for a *sequenced*, escalating approach for all norm subjects, with greater coercion.

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

Ad. 2 – To start with low coerciveness could be, from a government point of view, to first call for and/or facilitate voluntary self regulation by (a branch of) business(ess), on the proviso that a failure to meet objectives, mandatory regulation will be introduced. Thus regulatory interventions would escalate only in response of a clear need and will not come unannounced. A possible escalating sequence being to move from (enforced)

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[11]   Kingsbury and Stewart (at 5) framed this critique as follows: 'Even in the case of treaty-based international organizations, much norm creation and implementation is carried out by subsidiary bodies of an administrative character that operate informally with a considerable degree of autonomy. Other global regulatory bodies – including networks of domestic officials and private and hybrid bodies – operate wholly outside the traditional international law conception and are either not subject to domestic political and legal accountability mechanisms at all, or only to a very limited degree'.

[12]   These clearly resemble the abovementioned; more general regulatory strategies of hierarchy, competition, community and code, while the latter two of these seem to be taken together with the former into collateral mechanisms (which often involve the 3rd party regulatory relations as also mentioned in the above).

[13]   See on the pyramid also Mascini (2013).

self-regulation, to informational regulation (e.g. 'naming and shaming'), competition-based regulation (e.g. subsidies, taxes, tradable rights, stricter liability, certification), hierarchical regulation (e.g. prohibitions and orders and fitting sanctions – excluding discretion of norm-subjects, but also of norm-authorities in making exceptions or being lenient), and techno-regulation (e.g. excluding certain services or goods from practical use).

Given how not only governments regulate, but businesses and NGO's do so too, Gunningham and Graboski 1998) have expanded this 2-dimensional approach to a 3-dimensional one, whereby three faces of the pyramid represent the perspectives of three types of regulators, governments, businesses and 'third parties'(such as NGO's).[14] It thus becomes possible to escalate the pyramid from different sides, but also, while escalating, making a jump from one to the other face – e.g. when government responds with strict(er) enforcement upon the inability of business to yield the desired change in conduct by self regulation. Thus complementarity of instruments as deployed by different actors becomes a vital issue, whether or not as a co-regulatory effort. This also calls for a proper analysis of which instrument combinations are or are not viable, while carefully reflecting on relevant interests and values (e.g. companies may be rent seeking while being involved in co-regulation). Although clearly relevant to the enforcement issue, our focus on enforcement as a matter of public regulation leads us to not elaborate on the intricacies of such alignment.

4. Narratives of Appropriate Regulation/Enforcement Relations

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

4.1 Mapping Enforcement

Locationwise, we position informal standards as *de jure* beyond multi-levelledness (i.e. not (supra)national, nor international – but transnational), while *de facto* perhaps leaning either more to a domestic approach (of 'trans-governmental networks') or to a more international approach (of 'international agencies') (Berman & Wessel, 2012). In turn, however, their enforcement may involve a multi-level process of regulation through legal acts and legal actions taken at various jurisdictional levels.

Thus, to speak of enactment taking place at another institutional level than enforcement, makes sense in a *de facto* way (referencing at some localized system of law: international or (supra)national), but *de jure* places transnational norms outside any realm that may be understood as a localized legal system. This follows from their (actor, process, and output) informality and is indeed why we are confronted with the issue of their enforcement. When enacted outside any legal system, there are no immediately related secondary rules of enforcement. Consequently we may picture the relation between transnational standard-setting and (multilevel) enforcement as follows (Table 1.):

Table 1. Relating transnational norms to multilevel enforcement

Transnational Enactment	(Multilevel) Legal Enforcement			
International Agencies	→ a International Law	↓ 1	↓ 3	↑ 4
……	→ b Supranational Law	↓ 2		
Trans-Governmental Networks	→ c Domestic law			
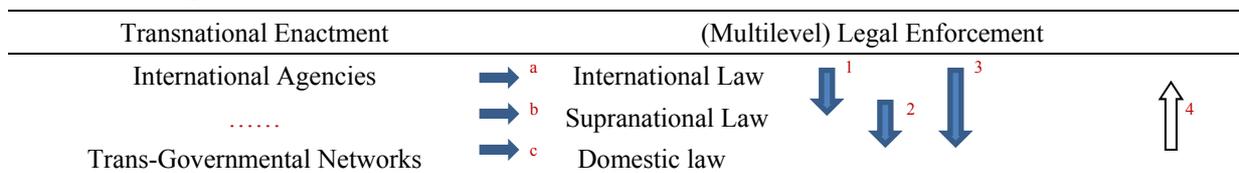
Note: upward arrow no. 4 is included to demonstrate that there is also the possibility of an upward multi-level enforcement of transnational norms (from domestic to supra- and international and from supra- to international), but for reasons of conciseness we will not discuss these here.

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

Arrows **a**, **b** and **c** are about single-step and single-level enforcement. They show how public or private actors on either the international, supranational (read 'European Union') or domestic level *adopt* a transnational norm. This can result from their participation (through representatives) in the standard-setting process, while having ex-

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[14]   Gunningham and Grabosky regard business regulation as a matter of self-regulation only. We believe that a broader perspective (also 2nd and 3rd party regulation) is well possible, albeit sometimes as a matter of factual dependency.

or implicitly bound themselves to enforcement through legal acts or legal action within their competence. Alternatively, when they are 'outsiders' to the standard-setting activity, they may autonomously decide that the norm fits a need that they are confronted with in terms of legal acts or legal action under consideration. In both cases we assume that actors are not legally bound to enforcement, since the given norms are informal (i.e. not obligatory),[15] but we also assume that these norms, by their prescriptive nature, lean themselves to be enforced – *inter alia* – by legal means. Such enforcement may, at the given location level of the particular legal order, take place either though public law or private law instrumentation and may be part of various (hybrid) regulatory strategies (hierarchic, competitive, informational, social, and code) and across various regulatory relations (1-2-3 party; involving two or more of government, market or civil society actors).

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

Arrows **1**, **2** and **3**, demonstrate how such 'decentralization' is especially likely in a multilevel constellation. First, an informal transnational norm is formally adopted by an actor at one level (along the lines as described in the above – as participatory self-binding or regulatory inspiration), with the intent of having this implementation (by legal act) enforced (by legal act) at a lower level. Next, the effectuation, by lower level enforcement will, of course, depend on responsiveness at this lower level. If the relation between levels is *hierarchical* (as a matter of inter- or supranational legal relations) then this is formally ensured – possibly with institutional means of monitoring and sanctioning – as in the EU against its Member States. If no hierarchical relation exists, it will depend on either:

– *competitive* incentives (public or private, when either states and or (associations of) businesses see a competitive advantage in legal implementation and enforcement of the 'upper level' standards),

– *social* incentives (when governments, (associations of) businesses or NGO's experience social or political pressure – whether or not by participating in the organizing this pressure – which creates willingness to adopt and enforce 'upper-level' standards),

– or *technological* incentives (as certain commodities or utilities will no longer be available if especially governments or businesses do not implement and/or enforce the 'upper-level' standards).[16]

Following the narratives, enforcement takes place along either public law or private law acts or actions, with actions being specifically relevant when enforcement takes place in terms of sanctioning or adjudication (as opposed to implementation by elaborated standard-setting). Although we focus on public law enforcement, again it is possible that private law organizations (whether business or transnational regulatory networks/bodies) operate on the various levels and either push for enforcement at lower levels or are compelled or invited to effectuate such enforcement – in as much as within the 'public regulation' scope.

4.2 Mapping Strength and Location

As stated in the above, it is a popular presumption that there is a correlation between high strength ('hard law' enforcement) and low location (e.g. domestic) enforcement, and reciprocally between low strength ('soft law' enforcement) and high location (e.g. international) enforcement. With slightly more refinement, we could distinguish a 'middle location level', being supranational, but also other forms of regional cooperation (between states); whilst a 'moderate strength level' may be placed between intense ('hard law') and gentle ('soft law') strength levels.

From a legal perspective the latter may be regarded a 'fuzzy concept', but cases of 'bright-line standards' with soft sanctioning or, conversely, 'balancing standards' with hard sanctioning, would provide a proper example of a legal fit with this strength level. Further, a supranational legal perspective with a more coordinative power allocating approach, where rules of conduct are veiled under power transfer, or follow from discretion granted to member states, would fit not only a middle location but also a moderate strength level. Ultimately, strength levels would follow from the regulatory strategies (hierarchy, competition, community, and code) or Stewart's compliance instrument types (command and control, market/information-based, and collateral compliance

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[15]   We exclude the possibility, relevant to adoption by participating to the making of standards, of an obligating private law commitment.

[16]   Alternatively one could refer here to the enforcement instrument types named by Stewart (2012).

mechanisms). For reasons of simplicity, we assume here that 3 strength-levels can be distinguished ranging from *intense* (Hierarchy & Code – *H*), via *moderate* (Network & Competition –*N*) to *gentle* (Community & Informational – *C*); as presented in the below Table 2.

Table 2. More nuanced mapping 'popular image' of matched strength and location levels

⇩ Strength ⇔	High	Middle	Low
Location⇨	(international/global)	(Supranational)	(Domestic)
Intense (*H*)	Exceptionally	Occasionally	Normally
Moderate (*N*)	Occasionally	Normally	Occasionally
Gentle (*C*)	Normally	Occasionally	Exceptionally

Of course, and as stated in the above, although this model allows for three degrees of *frequency* in types of location-strength matches, it remains very simplistic. Criticism, we believe, would rightfully target both possible (hybrid) varieties in enforcement acts and actions (which may well combine different regulatory strategies) and varieties in the transnational norm which is being enforced (which may originate at *de facto* lower or higher and across institutional location levels) – unfortunately, there is a limit to our room to elaborate.

4.3 Mapping Enforcement by Legal Means

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

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

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

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

Whatever applies, legal powers or action rights will be relevant for both supervision and sanctioning, but also for adoption/incorporation of the transnational norm. As to the latter the following four aspects should be considered carefully.

Firstly, adoption can be voluntary or mandatory. Within a given legal order a transnational norm can be adopted as it considers this the best possible norm to foster or secure an internal public interest. Mandatory adoption takes place when a hierarchically higher legal order so requires – by mere procedural command or by explicit reference to the norm, as one to be implemented (e.g. as a unifying (minimum) standard). EU-directives are a clear example of the latter.

Secondly, adoption of a transnational norm can be explicit or implicit. Implicit enactment holds no express reference to the transnational norm and merely cites its content (possibly with slight modifications). Perhaps an accompanying explanatory memorandum or a verbatim report of procedures in the making of the norm holds a reference to the transnational norm, but legally speaking this would be relevant only to possible future interpretive disputes. Conversely, in explicit adoption the standard-setting legal act does provide an immediate

reference to the transnational norm, possibly without citing the content of that norm but by mere reference to its 'label or number', or by not only referencing, but with a quote of the standard's content.

Thirdly, adoption can be static or dynamic. Explicit adoption by merely referencing to the label or number of a standard may be intended to allow changes to that standard under the same number/label, to directly become the standard under the adopted norm, perhaps with more restrictions to the norm-subjects behavior. This is also known as *dynamic* referencing.[17] When explicit adoption comes with explicit citation, this may taken to be indicative of a static reference, which means that when the transnational standard is changed, the adopted standard does *not* change with it. This is known as *static* referencing. It should be kept in mind, that implicit adoption may also come with a dynamic twist. When implicit adoption results from a commanding mandate by a higher legal order, changes to that mandate come with legal effects. Changes in an authoritative legislative, administrative or judicial interpretation of that mandate, especially of the substantive rule of conduct elements, or of conditions of the prescribed delegated legal powers, may lead to dynamic adaption of the norm. This applies especially in supranational legal configurations, such as the EU, but also in other legal orders that, by virtue of a constitutional or legislative provision in the lower legal order, come with direct effect (including interpretative authority from organizations at that level). Changes in a mandate to incorporate some transnational standard, also bring a dynamic dimension to an adopted standard. That does not come as a surprise, as generally lawmakers have the power not only to introduce but also to alter and terminate an existing legal act. It does, however, become interesting when there is a superior legal order, with superior legal authorities, that may hold lower order authorities responsible to timely mandated implementation and which may come with direct effect (and compensation of damages for failure to implement – the EU *Francovich* principle).[18]

Finally, on a comparative but relevant note, there may and often will be *open* norms within a given legal order, such as under private *tort(s)* law, or under public law provisions of *due care* (e.g. in a general environmental standard or in a provision of an environmental permit)[19] which may have been introduced before a relevant transnational norm was enacted, or which was introduced without knowledge of an existing relevant transnational norm. The content of that open norm has to be specifically determined to the case(s) at hand, considering *inter alia* the particular nature of the activity in case, other facts of the case, the objective(s) of the norm (e.g. public or occupational safety or protection of health), the interests of the norm-subject, and usual practices in the relevant area (e.g. industry). This is where transnational standards may enter stage as 'filling in', or most aptly interpreting the open norm-object – to the ultimate interpretation of the relevant public office, or court. This type of dynamic usage by 'tacit adoption' often takes place under labels such as 'state of the art defense', broadly (through 'thick stakeholder consensus' – Pauwelyn, Wessel & Wouters, 2014) accepted practicable or technical means, or following claims of acceptance of a transnational norm as customary law.

And, of course, for adopted or incorporated transnational standards to be enforced to – hopefully – full compliance, secondary rules will be needed as well.

Apart from the choices pointed out in the afore paragraphs 4.1 and 4.2, the immediately above mapping of legal acts and legal actions brings a further variety in options. These include the choice, regarding one and the same transnational norm or adoption thereof, between (vertical/public) government supervision and sanctioning, and (horizontal/private law) monitoring and legal action between citizens (including, possibly, class actions). Clearly, these choices also relate to the chosen regulatory strategy. We will, however, leave these options aside in the remainder of this discussion (in par. 4.4 and, Concluding, 5.).

4.4 Matching Strength and Location

When we regard transnational norms as presenting standards with a prescriptive architecture[20] and endowed with stakeholder pressure towards legal enactment, then the choice of the most appropriate location and strength level will, given the trajectories broadly suggested in the above par. 4.1, be guided by several empirical and normative considerations.

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[17]   A mere example: under Italian law dynamic reference is called *rinvio 'mobile'* as opposed to *rinvio 'fisso'* or 'recenttizio' (which, in turn, is known also as 'incorporation by reference'). See De Bellis (2010).

[18]   A subject that would deserve more elaboration, but which is also broadly discussed elsewhere. See, *inter alia*, Stewart (2012).

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

[20]   Building upon one of four possible basic 'normative positions': prohibition, command, permission and dispensation.

As regards normative design considerations, to secure enforcement with optimal effectiveness and efficiency,[21] we assume that the theoretically optimal default mix of location- and strength-levels of enforcement is that of the lowest possible location matched by the lowest legally relevant strength. This assumption rests upon the promise of the principle of *subsidiarity* (enforcing as close as possible to the 'ultimate' regulatees; avoiding more unnecessary 'distant' intermediary regulators/enforcers), and upon the promise of *virtuousness* of regulatees (enforcing through the least interventionist means of enforcement; in the hopes of swift and almost spontaneous regulatee engagement, without unnecessary prescription and coercion) (Gunningham & Graboski, 1998). Optimizing subsidiarity and virtuousness, one may say, is ultimately about avoiding 'regulatory overstretch': enforcing at a needlessly high location and with needlessly intense strength. However, while trying to establish the default optimum in practice, regulators may encounter *enforcement failure* along two lines:

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

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

As a consequence to either or both, the default optimum may not depict the most effective and efficient legal means of enforcement, and so not provide the desired contribution to compliance. If so, an alternative location-strength match has to be established, which provides a (remedial) facility, without such failure (or with some degree of *remediableness* – Williamson, 1996).[22] So, we look for 'regulatory positions' as an alternative (remediable) 'regulatory placing', which stands away from our default optimal mix, as it alternatively matches location and strength of enforcement with greater effectiveness and efficiency… looking at different positions along a virtual location and strength axis, and perhaps at both – as presented in Table 3.

Table 3. Two-dimensional search for remediableness in enforcement level failure

⇧Location	Low /Gentle	Moderate	High/Intense
⇔	Community/Information	Networks&Market	Hierarchy & Code
Strength⇒			

R1-4 are possible alternatives to the default optimum **R0**

Circumventing esp. subsidiarity failures (R1+R2) or esp. virtuousness failures (R3+R4)

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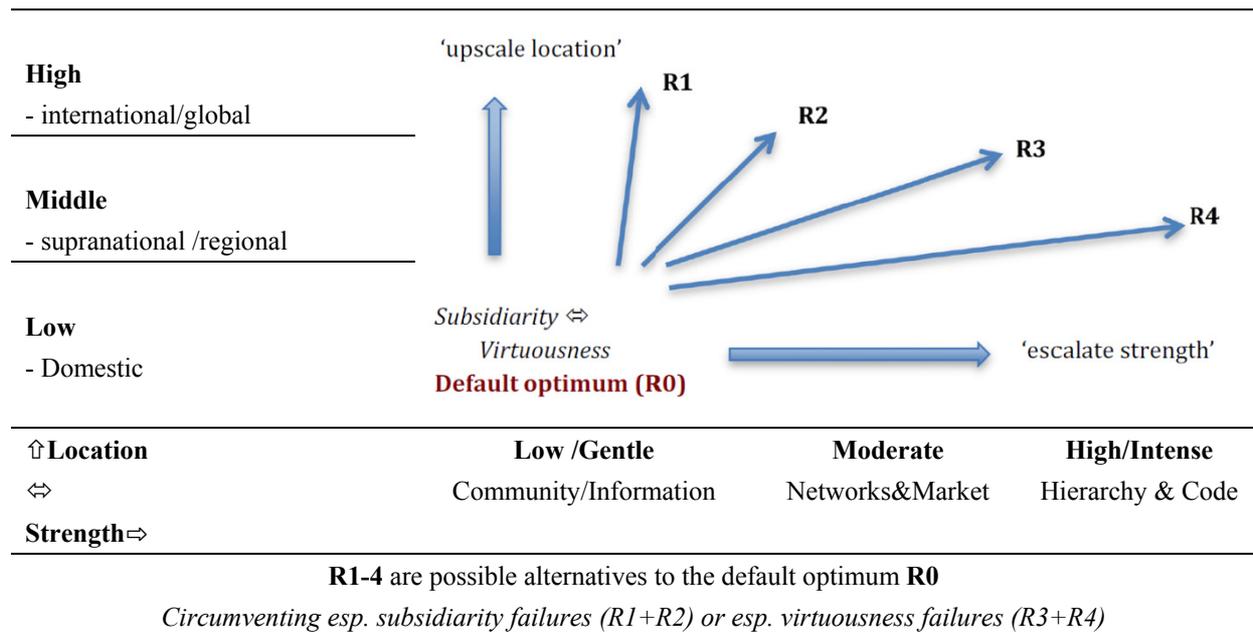
[21]   Without suggesting a necessary causal relation between legal enforcement (as manipulable independent variable) and compliance (as dependent variable), but focusing especially on ensuring that applied legal acts and legal actions are targeted (not under-, nor overinclusive, and ergonomically fitting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

[22]   Williamson (1996; at 210): "..*comparisons of actual forms of organizations with ideals. As observed earlier, hypothetical ideals are operationally irrelevant. Within the feasible subset, the relevant test is whether (1) an alternative can be described that (2) can be implemented with (3) expected net gains. This is the remediableness criterion.*" We suggest here that this concept or criterion can also apply to describing an alternative (to default optimality) that can lead to (legal) enforcement with greater effectiveness (and efficiency) (than the default optimum) – as it circumvents failure factors relating to matched choices of location and strength.

In the determination of alternative positions we need to identify various *failure factors*, while addressing both strength and location.

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

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

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

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

In the above, par. 3.1, we cited Stewart (2012) in pointing at four empirically ascertainable reasons why decentralized domestic implementation and enforcement may fail – ranging from legal (e.g. no existing proper primary or secondary rules), political (e.g. insufficient consensus), administrative (e.g. insufficient capacity or resources), to regulatory (intrinsic efficacy problems). It is not that these readily translate into the notion of subsidiarity failure, but that this notion is applied by taking score on these points while looking from the lowest (practicable/*de facto* transnational) location level up. Generally, domestic and supranational levels of legal orders/jurisdictions will do better at having secondary rules, than international levels. The 'score card' will have to show, while departing from the (practical) default optimum, if all relevant failure (or reversely success) factors show a similar score and if not, trade-offs will have to be considered also in the light of the aspired strength of the instrument and the capacity for escalating strength.

In Gunningham and Graboski's (1998) view on, let us say, 'smart strength', two failure/success factors are at play: prescription en coercion. Prescription concerns the extent to which the norm-authority channels more aspects of and significant change in norm-subjects' behavior, while coercion concerns the measure of extrinsic control (as 'negative pressure') exercised onto norm-subjects to adjust to the prescribed standard. Self-regulation is certainly low on coercion but probably high on prescription; tax-instruments usually have a reciprocal interventionist profile.

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

In conjunction between levels of location and of strength, away from the default theoretical optimality, a remediable alternative must be determined on the basis of trade-offs between the above failure/success factors. For instance:

- the first three factors named by Stewart seem less important when strength levels are low, but become more important (and at some point *a conditio sine qua non*) at high strength levels;

- when a location level's jurisdiction does not encompass the 'relational scope' of transactions, then its effectiveness will be low or absent – for example domestic regimes falling short in addressing global market certificates; regardless of strength levels.

The relevance of failure/success factors will, of course, vary not only with the relational configuration (1st-2nd-3rd party, plus actor types) (Levi-Faur, 2011), but also to contingent background factors. Here we have deliberately chosen to provide a building block through normative modeling, setting aside contingencies; the application (and validation of relevance) to empirical cases is a next step.

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

Our focus was on how to link multilevel to multi-actor regulation, when it concerns enforcement of *de facto* transnational in *de jure* international, supranational, and domestic regulation. In avoidance of regulatory overstretch, we suggest a remediable approach on upscaling location and escalating strength, in which interventions 'move' from a default optimum mix to higher strength and location levels, when effectiveness and/or efficiency so demand. From the legal enforcement side of things, this approach presents us with range of possibilities which combine a particular location level (from domestic to international) and a particular strength level (from community-based to hierarchical and code-based) – ultimately involving a configuration of regulators and regulatees (governments, businesses (associations), civil society organizations ((I)NGO's) and citizens). Table 4. Presents an overview of this concept.

Table 4. Overview remediable enforcement in regulatory strategy context

Transnat norm	Enforcement strength levels		Enforcement location levels		
International Agencies	A. Hierarchy & Code	constitutive code crime command prohibition	**RX**	Government* **RY**	
↕	B. Networks & Competition	Taxes certificates Tradable rights Torts subsidies Property Contracts			
Trans-Government (Administrative) Networks	D. Community & informational	enf. self-regulation Regulative code Naming & shaming self-regulation	Business* ⟷ NGO* **RZ** R0 Default optimum ⟶		
↑ Transnational norms&authorities	↑Strategy types	↑Strength ⇔ Location ➔	1. Domestic	2. Supranational	3. International

* Ultimately enforcement does not only concern governments, but also businesses and civil society actors (as regulators and regulatees); a point reflected by the (regulatory) governance triangle

While applying regulatory strategies and instruments as discussed, normative wisdom to be effective and efficient, without neglect of empirical failure/success factors, we believe is fostered when departing from a *de facto* default optimum of subsidiarity and virtuousness and looking for a 'remediable optimum.

On the transnational standard setting side of things, to speak of *de facto* norms may underplay the potential relevance of normative guidelines such as subsidiarity and virtuousness in the orchestration (Abbott and Snidal, 2009) of such processes. We believe that our model may also be relevant to processes of transnational standard setting initiatives, forum choice, formation of coalitions, as well as in the prescriptive approach that transnational standard setting organizations pursue. On both counts we believe effectiveness and efficiency, but also accountability and legitimacy stand to gain, also in their uptake in inter-, supra- and national legal systems.

References

Abbott, K. W., & Snidal, D. (2009). Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit. *Vanderbilt Journal of Transnational Law*, 501-578.

Austin, J. (1995). *The Province of Jurisprudence Determined* (edited by W. Rumble). Cambridge: Cambridge

University Press. http://dx.doi.org/10.1017/CBO9780511521546

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

Baldwin, R., Scott, C., & Hood, C. (1998). *Introduction*. In R. Baldwin, C. Scott, & C. Hood (Eds.), *A Reader on Regulations* (pp. 3-4). Oxford: Oxford University Press. http://dx.doi.org/10.1093/acprof:oso/9780198765295.003.0001

Benvenisti, E. (2007). Coalitions of the Willing' and the Evolution of Informal International Law. In C. Calliess, G. Nolte, & P.-T. Stoll (Eds.), *Coalitions of the Willing: Avantgarde or Threat?* Berlin: Carl Heymanns Verlag.

Berman, A., & Wessel, R. A. (2012). The International Legal Form and Status of Informal International Lawmaking Bodies, In Pauwelyn, Wessel & Wouters (2012), pp. 35-62.

Buxbaum, H. (2001). The Private Attorney General in a Global Age: Public Interests in Private International Litigation. *Yale J. Int'l L. 219*, 308.

Chayes, A., & Chayes, A. H. (1995). *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press.

Chowdhury, N., & Wessel, R. A. (2012). Conceptualizing Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance? *European Law Journal*, *3*, 335–357. http://dx.doi.org/10.1111/j.1468-0386.2012.00603.x

De Bellis, M. (2001). The New Public Law in a Global (Dis)Order. A Perspective From Italy. *Jean Monnet Working Paper* 17/10 (Public Law and Private Regulators in the Global Legal Space - series).

Føllesdal, A., Wessel, R. A., & Wouters, J. (Eds.). (2008). *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*. Leiden, Boston: Martinus Nijhoff Publishers. http://dx.doi.org/10.1163/ej.9789004164383.i-426

Gunningham, N., & Graboski, P. (1998). *Smart Regulation. Designing Environmental Policy*. Oxford: Oxford University Press.

Guzman, A., & Meyer, T. (2011). International Soft Law. *Legal Analysis*, 2.

Heldeweg, M. A. (2012). Legal Design of Smart Rules and Regimes: Regulating Innovation. In M. A. Heldeweg, & E. Kica (Eds.), *Regulating Technological Innovation, A Multidisciplinary Approach* (pp. 52-76). Basingstoke: Palgrave Macmillan.

Heldeweg, M. A. (2013). Legal Design & Hybrid Regulation. In A. Colombi Ciacchi, M. Heldeweg, B. van der Meulen, & R. Neerhof (Eds.), *Law and Governance: Beyond the Public-Private Law Divide* (pp. 107-139). The Hague: Eleven International Publishing.

Jessup, Ph. (1956). *Transnational Law*. New Haven CT: Yale University Press.

Johnstone, I., & Sarre, R. (Eds.). (2004). Introduction. In I. Johnstone, & R. Sarre (Eds.), *Regulation: Enforcement and Compliance* (pp. 4-7). Australian Institute of Criminology: Research and Public Policy Series, No. 57.

Kanbur, R. (2009). *Conceptualising informality: regulation and enforcement*. IZA discussion papers, No. 4186. Retrieved from http://nbn-resolving.de/urn:nbn:de:101:1-20090612107

Kica, E., & Wessel, R. A. (2015, forthcoming). Transnational Arrangements in the Governance of Emerging Technologies: The Case of Nanotechnology. In E. Stokes, D. Bowman, & A. Rip (Eds.), *Embedding and Governing New Technologies: A Regulatory, Ethical & Societal Perspective*. Singapore: Pan Stanford Publishing.

Kingsbury, B., & Stewart, R. (2008). Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations. In S. Flogaitis (Ed.). *International Administrative Tribunals in a Changing World*. London: Esperia, 1-20.

Kingsbury, B., Krisch, N., & Stewart, R. B. (2005). The Emergence Of Global Administrative Law. *Law & Contemporary Problems*, 15-61. http://dx.doi.org/10.2139/ssrn.692628

Lessig, L. (1999a). *Code and other Laws of Cyberspace*. New York, Basic Books.

Lessig, L. (1999b). The Law of the Horse: What Cyberlaw Might Teach. *Harvard Law Review, 2*, 501-546. http://dx.doi.org/10.2307/1342331

Levi-Faur, D. (Ed.). (2011). *Handbook on the Politics of Regulation*. Celtenham: Edward Elgar. http://dx.doi.org/10.4337/9780857936110

Macrory, R. (2008). *Regulation, Enforcement and Governance of Environmental Law*. London: Cameron.

Mascini, P. (2013, March). Why was the enforcement pyramid so influential? And what price was paid?. *Regulation & Governance*, 48–60. http://dx.doi.org/10.1111/rego.12003

Murray, A., & Scott, C. (2002). Controlling the New Media: Hybrid responses to new Forms of Power. *The Modern Law Review*, *4,* 491-516. http://dx.doi.org/10.1111/1468-2230.00392

Noortmann, M. (2015). Transnational Law: Philip Jessup's Legacy and Beyond. In M. Noortmann, A. Reinisch, & C. Ryngaert (Eds.), *Non-State Actors in International Law* (pp. 57-74). Oxford and Portland, Oregon: Hart Publishing.

Pauwelyn, J. (2012). Informal International Law-making: Framing the Concept and Research Questions. In Pauwelyn, Wessel and Wouters (2012), pp. 13-33.

Pauwelyn, J., Wessel, R. A. & Wouters, J. (Eds.). (n.d.). *Informal International Lawmaking*. Oxford: Oxford University Press. http://dx.doi.org/10.1093/acprof:oso/9780199658589.001.0001

Pauwelyn, J., Wessel, R. A., & Wouters, J. (2014). When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking. *European Journal of International Law*, *3*, 733-763. http://dx.doi.org/10.1093/ejil/chu051

Raustiala, K. (2000). Compliance & Effectiveness in International Regulatory Cooperation. *Case Western Reserve Journal of International Law*, 388.

Schepel, H. (2012). Private Regulators in Law. In Pauwelyn, Wessel and Wouters, 356-367.

Schilling, Th. (1995). Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously. *Jean Monnet Center for International and Regional Economic Law & Justice Papers*.

Scott, C., Cafaggi, F., & Senden, L. (Eds.). (2011). *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates*. New York: Wiley-Blackwell.

Stewart, R. (2012). Enforcement of Transnational Public Regulation. In F. Cafaggi (Ed.), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (pp. 41-74). Cheltenham, UK/Northampton, MA, USA: Edward Elgar. http://dx.doi.org/10.4337/9781781003732.00010

Verbruggen, P. (2013, December). Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation. *Regulation & Governance*, 512–532. http://dx.doi.org/10.1111/rego.12026

Von Bogdandy, A., Wolfrum, R., Von Bernsdorff, J., Dann, Ph., & Goldmann, M. (Eds.). (2010). *The Excercise of Public Authority by International Institutions: Advancing International Institutional Law*. Heidelberg, etc.: Springer. http://dx.doi.org/10.1007/978-3-642-04531-8

Von Staden, A. (2012). Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights. unpublished paper, available on SSRN. http://dx.doi.org/10.2139/ssrn.2000024

Walker, N. (2006). On Regulating the Regulation of Regulation. In F. Caffaggi (Ed.), *Reframing Self-regulation in European Private Law* (pp. 347-357). The Hague: Kluwer.

Wessel, R. A. (2008). The Kadi-case: Towards a More Substantive Hierarchy in International Law?. *International Organizations Law Review*, *2*, 323-327. http://dx.doi.org/10.1163/157237408X412925

Wessel, R. A. (2016, forthcoming). Institutional Law-Making: The Development of a Global Normative Web. In C. Bröllman & Y. Radi (Eds.), *Research Handbook on the Theory and Practice of International Law-Making*. Cheltenham/Northhampton: Edward Elgar Publishing.

Williamson, O. E. (1996). *The Mechanisms of Governance*. Oxford: Oxford University Press.

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