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Evolutionary dynamics of transnational private regulation

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ABSTRACT

This article puts forward an approach to account for the evolution of transnational private rule-makers. Morphing of organisations, procedures, and rules is suggested as a key strength of various forms of private authority. Directing attention towards evolutionary dynamics, and their impact on the goals pursued by transnational private regulators, as well as on the implications for targets and beneficiaries of their rules, brings forward various implications of transnational private regulators. These implications include tensions between the complementary and competitive relations between public and private authority, and question the capacity of the former to effectively enrol, steer and influence the latter. The article discusses the role of regulatory and organisational crises as catalysts for the emergence and evolution of transnational private rule-makers, and how crises affect the relation between public and private regimes. Finally, we reflect on possible competitive challenges that emerge by employing a dynamic perspective to transnational private regulation.

KEYWORDS Transnational private regulation; evolution; public authority; regulatory crises; resilience

1. Introduction

Whereas private rules and self-regulation have always been constitutive of markets,¹ recent years witnessed a proliferation of transnational private rule-making in domains traditionally ‘public’ and as diverse as regulating financial markets, sustainability, and human rights. Private rules and standards are ubiquitous components especially in the regulation of product and financial markets. From food safety to rules for trade in derivative financial instruments, and from forestry and biofuel sustainability to occupational health and safety, no market or market-related domain is

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¹ ML Katz and C Shapiro, ‘Network Externalities, Competition and Compatibility’ (1985) 75(3) *American Economic Review* 424–40.

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immune to private rule-making and standard-setting. The emergence and consolidation of transnational private authority² and transnational private regulation³ has generated power and authority shifts towards private bodies.⁴ The traditional explanation is that competent private regulators dealing with complex and technical issues are essential for national public authorities due to their technical expertise⁵ and epistemic knowledge⁶ but also due to their relative cost-efficiency.⁷

This often atypical reallocation extends to the international level not only due to the fact that market-driven ideas about regulation are diffused globally but also because private-driven authority, along with the accumulated knowledge, promotes soft, bottom-up regulatory instruments (voluntary standards, codes of conduct, or guidelines) rather than coercive, top-down regulatory tools (which in any case are uncommon in international law).⁸ Transnational private regulatory regimes often emerge and grow through repeated interaction with domestic and international State-driven bodies.⁹ In transnational private regulation, public authority is not directly involved in setting the rules, although these rules may be linked to State-imposed requirements or public officials may participate in multistakeholder coalitions active at the transnational level.¹⁰ Rule-making functions are instead exercised by private actors such as non-governmental organisations, corporations, or business associations.¹¹

Literature on transnational private regulation abounds nowadays.¹² Contributions have focused on sectoral perspectives such as the financial

² AC Cutler, V Haufer, and T Porter (eds), *Private Authority and International Affairs* (SUNY Press, 1999).

³ F Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38(1) *Journal of Law and Society* 20–49.

⁴ J Nye, *The Future of Power* (Public Affairs, 2011) at 118ff.

⁵ S Brint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (Princeton University Press, 1994).

⁶ E Adler and S Bernstein, 'Knowledge in Power: The Epistemic Construction of Global Governance' in M Barnett and R Duvall (eds), *Power in Global Governance* (Cambridge University Press, 2004) 294–318.

⁷ KW Abbott and B Faude, 'Choosing Low-Cost Institutions in Global Governance' (2020) 13(3) *International Theory* 397–426.

⁸ D Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598(1) *Annals of the American Academy of Political and Social Science* 12–32; also P Delimatsis, 'The Resilience of Private Authority in Times of Crisis' in P Delimatsis, S Bijlmakers, and K Borowicz (eds), *The Evolution of Transnational Rulemakers Through Crises* (Cambridge University Press, 2023).

⁹ J Basedow, 'The State's Private Law and the Economy – Commercial Law as an Amalgam of Public and Private Rule-Making' (2008) 56 *American Journal of Comparative Law* 703.

¹⁰ B Cashore, JS Knudsen, and J Moon 'Private Authority and Public Policy Interactions in Global Context: Governance Spheres for Problem Solving' (2021) 15 *Regulation & Governance* 1166.

¹¹ G Auld, S Renckens, and B Cashore, 'Transnational Private Governance Between the Logics of Empowerment and Control' (2015) 9(1) *Regulation & Governance* 109.

¹² See, inter alia, B Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market Driven (NSDM) Governance Systems Gain Rule-Making Authority' (2002) 15 *Governance* 503–29; T Bartley, 'Institutional Emergence in an Era of Globalization: the Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 *American Journal of Sociology* 297–351; and S Renckens, *Private Governance and Public Authority: Regulating Sustainability in a Global Economy* (Cambridge University Press, 2021).

sector,¹³ environmental issues¹⁴ or labour-related matters,¹⁵ but also on horizontal matters such as public accountability,¹⁶ legitimacy or effectiveness.¹⁷ Scholars have also ventured into insightful comparative perspectives,¹⁸ suggesting that common patterns among transnational rulemakers emerge¹⁹ or, in contrast, that contestation, different path dependencies and institutional design choices generate a patchwork of contemporary transnational private governance.²⁰ Other work focused (albeit in a static manner) on organisational traits such as early institutionalisation to show how they insulate organisations from legitimacy demands.²¹ Recent scholarship also underlined the importance of risk and uncertainty for the exercise and evolution of power; more specifically, how the presence of power to act upon and adapt to low-probability events can improve our ability to understand the complexities (and resilience) of private regulation.²²

The relevant scholarship, however, appears to neglect to date that transnational private regulators are dynamic organisational constructs that evolve and learn over time. This article focuses on distinctive organisational features of transnational private regulators that are activated and leveraged around critical events such as regulatory and organisational crises and that confer resilience to an organisation and the interests therein. It argues for an increased engagement with evolutionary accounts around critical moments when studying transnational private rule-making. More specifically, we contribute to the existing literature on transnational business governance by highlighting the so far neglected role of crisis-related events in the evolution of transnational private regulation. Its vantage point is the

¹³ T Bütte and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011).

¹⁴ See JF Green, 'Private Standards in the Climate Regime: the Greenhouse Gas Protocol' (2010) 12(3) *Business and Politics* 1–37.

¹⁵ T Bartley, 'Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry' (2005) 13 *Research in Political Sociology* 211–44; J Reinecke and J Donaghey, 'After Rana Plaza: Building Coalitional Power for Labour Rights Between Unions and (Consumption-Based) Social Movement Organizations' (2015) 22(5) *Organization* 720–40.

¹⁶ D Curtin and L Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38(1) *Journal of Law and Society* 163–88.

¹⁷ P Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (2012) 13(12) *German Law Journal* 1269–81.

¹⁸ G Auld, *Constructing Private Governance: The Rise and Evolution of Forest, Coffee and Fisheries Certification* (Yale University Press, 2014); and S Wood, R Schmidt, E Meidinger, B Eberlein, and KW Abbott (eds), *Transnational Business Governance Interactions* (Edward Elgar Publishing, 2019).

¹⁹ K Dingwerth and P Pattberg, 'World Politics and Organizational Fields: The Case of Transnational Sustainability Governance' (2009) 15 *European Journal of International Relations* 707–44.

²⁰ L Fransen, J Schalk, and G Auld, 'Community Structure and the Behavior of Transnational Sustainability Governors: Toward a Multi-relational Approach' (2020) 14(1) *Regulation and Governance* 3–25.

²¹ D Casey, 'Interactions, Iteration and Early Institutionalization: Competing Lessons of GLOBALGAP's Legitimation' in S Wood, R Schmidt, E Meidinger, B Eberlein and KW Abbott (eds), *Transnational Business Governance Interactions: Advancing Marginalized Actors and Enhancing Regulatory Quality* (Edward Elgar, 2019) 183–206.

²² P Katzenstein and L Seybert, 'Protean Power and Uncertainty: Exploring the Unexpected in World Politics' (2018) 62(1) *International Studies Quarterly* 80–93.

acknowledgement that transnational rule-makers display considerable flexibility if compared to public institutions both in exercising their rule-making functions and in adapting and transforming in light of events calling for change.²³

The perspective of crises-driven evolution and dynamism in relation to the resilience of transnational private regulation, its effectiveness and legitimacy, sheds new light on the establishment and development of transnational private regulation, its consolidation as a key staple of global governance, and its impact. This article will provide an analytical framework that can be used to further empirically investigate transnational private regulators, and when applied in practice, enables a more comprehensive understanding of their evolution and resilience in relation to crises. This framework integrates aspects of theoretical perspectives on transnational private regulation and findings of previous empirical investigations. It directs attention to the dynamics of organisational evolution and change, and in particular their impact on the goals pursued by transnational private regulators, as well as on the implications for targets and beneficiaries of their rules.

Accounting for transnational private regulators' dynamism brings to the fore problematic implications for transnational private regulators, and especially for the complementary relation between public and private authority—that may change and be characterised by competitive tensions—and the capacity and limitations of the former to effectively enrol, steer and influence the latter. Rather, our contribution highlights how challenging it may be over time for State-driven authorities and organisations to keep transnational private regulators at bay, as private bodies may be exploiting every possible window of opportunity to emerge and increase their leverage and influence. An evolutionary account of transnational private regulation further allows for understanding better the dynamic process that characterises regulatory activity in the aftermath of regulatory disasters.²⁴ In view of the public policy implications of this evolutionary account of transnational private regulation, this article constitutes an alarming signal and a call for a closer, empirical look into public-private interactions.

This paper is structured as follows. Section 2 presents the interplay between public and private regulators, that can be characterised by degrees of complementarity and competition. It then locates the organisational resourcefulness and ecology of transnational private regulation as a distinct key of its resilience that allows private regulators to rapidly adapt, especially in the aftermath of critical events. These events may alter the

²³ KW Abbott, JF Green, and RO Keohane, 'Organisational Ecology and Institutional Change in Global Governance' (2016) 70 (spring) *International Organisation* 247–77.

²⁴ C Crouch, *The Strange Non-Death of Neo-Liberalism* (Polity Press, 2011).

complementarity and competitive relations between public and private authority. With reference to several examples, Section 3 discusses the role of critical junctures determined by crises as catalysts for the emergence and evolution of transnational private rule-makers, and possible effects on the relation between public and private regimes. It addresses regulatory crises as a frequent driver for the emergence of private regulators. Furthermore, it adopts an internal organisational perspective in understanding the effects of organisational crises and the factors that determine them in triggering evolution and change. Section 4 further reflects on the competitive tensions and repeated interaction between public and private regimes that can be exacerbated by the emergence and evolution of transnational private regulation, using management-based standards as an illustrative example that details our main argument. Additionally, we discuss in this Section the procedural aspects of private authority's evolution. Section 5 concludes.

2. Towards an evolutionary account of transnational private regulation

In studying private regulators from a legal angle, Section 2.1 discusses their relationship with public rules through a framework that refines the notion of complementarity in transnational private regulation scholarship. Section 2.2 introduces a dynamic lens that starts from resilience-inducing organisational features of private regulators, and their embedment in a broader ecology of other private regulators. These features are activated around critical junctures and contribute to determine a private regulator's resourcefulness.

2.1. Transnational private regulation and public authority

Complementarity identifies a possibility for private regimes to support and enhance public action in (one or more) distinct phases of rule-making such as standard-setting, monitoring and enforcement.²⁵ The complementarity of transnational private regulation is visible at the standard-setting stage where private regimes transpose public requirements and policy objectives into directly applicable provisions. Complementarity at the monitoring and enforcement stage takes place where private regulators bring in rule-monitoring and enforcement capacity.²⁶ This occurs in particular where uniform rules are needed in light of conflicting or inexistent legal requirements, or in transnational spaces that would otherwise be difficult for unilateral public measures to reach, such as global value chains spanning across

²⁵ Cafaggi (n 3) 41–2.

²⁶ F Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, *Jura Mercatorum* and Global Private Regulation' (2014) 36(4) *University of Pennsylvania Journal of International Economic Law* 875–938.

various jurisdictions. Several variations of complementarity in each moment in time are observable. For example, private authority may operate at the standard-setting stage, with the other levels dealt with by public rules.

Within these vertical and horizontal complementarity relations, various interplays can be observed between public and private authority.²⁷ Such interplays reveal dynamic, synergetic relationships with a mutual reinforcement of public and private interventions over time.²⁸ Through varying degrees of formality, public authority may allocate regulatory competences to private regulation or coordinate their regulatory effects, either via their formal recognition or by establishing legal regimes where private regulation is needed to operationalise public requirements.²⁹ Private regulation can emerge as a response to signals from public authority that industry-based regimes could complement legislation. As seen below with the European Union (EU) Renewable Energy Directive (RED), several industry-led schemes were created to implement sustainability requirements. Allocation of competences also takes place informally or by omission where public authority fails, or decides not to intervene, and allows a regulatory domain to be occupied by private regulators.

Viewed from a bottom-up perspective, transnational private regimes have emerged, inter alia, out of the industry's need to ensure coordination, to eliminate inefficiencies and externalities, as well out of the industry's interests such, for instance, to maintain its reputation or avoid legislation and liability.³⁰ One such regime that emerged in a domain where limited public rules were present is the International Swap and Derivatives Association (ISDA), the global trade organisation of market participants trading over-the-counter derivatives.³¹ Among ISDA's activities, a key function is providing standard contractual terms for trading derivative products and guarantee safe, efficient markets.³²

In certain instances, private regulators were explicitly formed by the industry because of the threat of legislation. For example, when

²⁷ B Cashore, JS Knudsen, J Moon, and H van der Ven, 'Private Authority and Public Policy in Global Context: Governance Spheres for Problem Solving' (2021) 15(4) *Regulation & Governance* 1166–82; in line with Cafaggi (n 3).

²⁸ C Knill and D Lehmkühl, 'Private Actors and the State: Internationalization and Changing Patterns of Governance' (2002) 5(1) *Governance* 41–64.

²⁹ See, for example, the domain of due diligence. Regulation (EU) No. 995/2010 of the European Parliament and the Council of 11 May 2009 laying down the obligations of operators who place timber and timber products on the market. OJ L 295/13.

³⁰ M Potoski and A Prakash, 'Covenants with Weak Swords: ISO 14001 and Facilities' Environmental Performance' (2005) 24(4) *Journal of Policy Analysis and Management* 745–69.

³¹ On ISDA's standard-setting functions, see K Borowicz, 'Contracts as Regulation: The ISDA Master Agreement' (2021) 16(1) *Capital Markets Law Journal* 72–94.

³² <http://www2.isda.org/about-isda/mission-statement>. ISDA's Master Agreement (MA) provides 'close-out netting' rules which privilege derivatives products in bankruptcy events. ISDA holds that such provisions in the MA protect both derivative markets' participants from insolvency of one of the parties involved. D Awrey, 'The Mechanisms of Derivatives Market Efficiency' (2016) 91(5) *New York University Law Review* 1104–82.

investigations in the early 2000s brought to light the presence of child labour in cocoa plantations in Western Africa, from which many Western brands were sourcing, US legislators were considering regulatory intervention. However, the chocolate industry held (and lobbied) that mandatory legislation was not needed. Instead of passing legislation, regulators directly engaged with the companies involved and supported the creation of various private initiatives among which the International Cocoa Initiative (ICI).³³

Private regulators may emerge and evolve upon the initiative of other private regulators, also often based on efficiency and legitimacy-related considerations. Private regulators, especially those competing with other standard-setters, enact complex strategies to legitimise their regulatory functions before their stakeholders and strengthen their position on a market for a standard.³⁴ These strategies also actively rely on the establishment of private meta-regulators setting rules determining procedural legitimacy, effectiveness, and impact of the underpinning private regimes.³⁵

Private and public rules thus can also independently affect each other's features and substance. Administrative law principles and contractual forms typical of private regulation migrate respectively to private and public regimes. For example, certain private meta-regulators have embraced the World Trade Organisation's (WTO) Technical Barriers to Trade (TBT) good governance principles, a code of good practice relating to standard setting, adoption, and application.³⁶ In the opposite direction, due diligence, audit and risk-based approaches now permeate public rulemaking, an issue also discussed in Section 4.

Less desirably,³⁷ the relation between public and private rule-makers can also be of competition with public regimes. For instance, the driver behind the emergence of ICI as described above, visibly put private regulation in a competitive relation with the public rules it actively aimed to substitute. Competition arises where private and public regimes fight for legitimacy, uptake, support, the authority to set rules and key terms thereof, or the acceptance of a regulatory regime over the other.³⁸ This may result in

³³ MSI Integrity, 'Not Fit-For-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance' (2020) 34.

³⁴ P Schleifer, 'Varieties of Multi-Stakeholder Governance: Selecting Legitimation Strategies in Transnational Sustainability Politics' (2019) 16(1) *Globalisations* 50–66.

³⁵ See ISEAL and Its Code of Good Practice for Assessing the Impacts of Social and Environmental Standards. Version 2.0 (2014). Available at www.isealalliance.org/online-community/resources/iseal-impacts-code-of-good-practice.

³⁶ E Partiti, 'What Use Is an Unloaded Gun? The Substantive Disciplines of the WTO TBT Code of Good Practice and Its Application to Private Standards Pursuing Public Objectives' (2017) 20(4) *Journal of International Economic Law* 838.

³⁷ Cafaggi (n 3) 48.

³⁸ B Eberlein, KW Abbott, J Black, E Meidinger, and S Wood, 'Transnational Business Governance Interactions: Conceptualisation and Framework for Analysis' (2014) 8(1) *Regulation & Governance* 11.

formally more stringent private requirements than those that would be applicable under public rules.³⁹ Competition may however also result in substitution, where public rules are challenged by, or replaced with, private regimes that are less stringent than public regimes or limit their effectiveness, pursue business interests to a larger extent than public goals, or that are ineffective and 'symbolic'. Competitive relations may eventually result in co-optation where public regulation manages to take over private regimes, either by turning elements of private regulation into a (mandatory) public regime, or by narrowing the space for private governance.⁴⁰

The relation with public authority can be further unpacked at any moment in time with reference to the function that private rules play *vis-à-vis* public requirements, where present. Firstly, private regulators may determine the entire, or main, substance of a regime. Private regulators may be active in domains where there are no clear public rules and, for various reasons, a regulatory regime is necessary for the industry. In such a domain, most—if not all—rule making originates from private authority. In other areas, general public requirements are formally (ie, under proper delegation) or informally implemented by transnational private regulation. Here, private regulation operates in conjunction with public rules determining board principles such as product health and safety or food safety. As private rules implement public requirements, private requirements are at least based on general public norms.⁴¹ Finally, private rules can operationalise already rather detailed public principles so that firms can embed them in their operations.

This distinction also identifies various degrees of autonomy from public authority. Regimes operating in domains where limited rules are present are arguably more insulated from public action given the lack of a direct connection with public requirements. Regimes that operationalise public rules are instead more exposed and responsive to public authority's intervention. If they are to support firms towards compliance with mandatory requirements and limit liability, these transnational private regimes are receptive to public demands—especially when operating in a regime of competition.⁴² Arguably, certain domains of private rule-making such as technical standardisation⁴³ and private ordering in the financial field

³⁹ Cafaggi (n 3) 45.

⁴⁰ Cashore, Knudsen, Moon, and van der Ven (n 27).

⁴¹ H Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 20(4) *Maastricht Journal of European and Comparative Law* 521–33.

⁴² E Partiti, 'Private Processes and Public Values. Disciplining Trade in Forest and Ecosystem Risk Commodities via Non-financial Due Diligence' (2022) 11(1) *Transnational Environmental Law* 141–72.

⁴³ See, KT Hallström, *Organizing International Standardization, ISO and the IASC in Quest of Authority* (Edward Elgar, 2004) 180. Technical regulation; also P Delimatsis, O Kanevskaia, and Z Verghese, 'Strategic Behaviour in Standards Development Organizations in Times of Crisis' (2021) 29 *Texas Intellectual Property Law Journal* 127–91. Yet, technical regulation in the EU has become more responsive to demands from public authority over the years. For instance, after the EU's adoption of the New

have evolved more insulated from the demands and influence of public authority. Other regulators such as sustainability schemes and, arguably less, food safety schemes⁴⁴ that are at varying degrees connected to international and national requirements, are instead more closely intertwined with, and possibly even dependent on, public rules and policies. Private regimes are thus to varying degrees receptive to (prospective) changes in regulatory environments, enforcement practices of regulatory authorities and court rulings.

Changes in the interactions between private and public regulators over time and across the different functions that private regulators exercise are possible; public intervention may increase and limit the margin of action of private regimes, or private regimes over time may emerge or expand their activity. Complementarity and competitive relations can take place and evolve also with respect to distinct components in the regulatory process. For example, private regulators may enlarge their standard-setting and implementing functions at the expense of public authorities, which may however retain, or even assume, stronger monitoring and adjudicating functions. Private regulators may also extend the application of their rules to more activities, contractual relations, or regulatory domains previously uncovered—thereby extending their breadth of activity and regulatory prerogatives. Conversely, public institutions such as legislatures and courts tip the balance in favour of public rules where they manage to better align private rules to public requirements. Regulatory intervention can also directly or indirectly constrain the margin of operation and limit the regulatory options for private regulators.

The implications of change in particular for the relative allocation in rule-making power between public and private components should not be neglected. Private regulators are not internally ossified; quite the contrary, they are usually responsive to a broad range of demands for change. They can adapt with varying levels of ability their governance structures, operational procedures, and standards to respond to critical events, signals from public authority⁴⁵ or requests from various stakeholders. New (competing) regimes have been rapidly established as a response to crises; as signals

Approach in 1985, ISO and CEN entered into an agreement on technical cooperation in the development of standards (the Vienna Agreement). ISO and CEN inter alia agree to adopt existing international standards as European standards, and commit to values, such as transparency, openness, coherence, impartiality and relevance. ISO/CEN, Agreement on Technical Co-operation between ISO and CEN (Vienna Agreement).

⁴⁴ P Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety* (Edward Elgar, 2014).

⁴⁵ R Wurzel, A Zito, and A Jordan, 'Smart (and Not-so-Smart) Mixes of New Environmental Policy Instruments' in J van Erp, M Faure, A Nollkaemper, and N Philipsten (eds), *Smart Mixes for Transboundary Environmental Harm* (Cambridge University Press, 2019) 69–94.

from public authority that private rules are welcome, or when doing so was advantageous to business interests.

Organisations' behaviour and change are triggered and shaped both by their environment and by rational calculation in connection to organisational goals.⁴⁶ Scholarship studying the interplay between public and private authority should not neglect this capacity of private regulators to adapt procedures, outcomes and organisational structures.⁴⁷ Organisations that change and adapt possess high capacity to achieve their goals.⁴⁸ Transnational private regulators' capacity to adapt and evolve in response to various drivers and requests from their stakeholders, including public authority, arguably is a considerable component of their success and consolidation as a key feature of global governance.⁴⁹

Nor should the power of private authority to increase in legitimacy and subsequently gain significant rulemaking influence in the public arena be underestimated. Such legitimacy may result from an active, intentional pursuit of public features, including transparency and consultation, a *passage obligé* for gaining more influence.⁵⁰ As the legitimacy of private authority grows, so grows its ability to generate norms that help redefine states' preferences, and thus State behaviour. Thereby, the content and intensity of public rules may often be dependent on the perceived legitimacy of the relevant private regulator.⁵¹ Taken to an extreme, the capacity of transnational private regulators to change can also lead to outcomes where public rules are hollowed out, ie, where private regimes replace or deter the emergence of public regimes, or where they pursue organisational and business interests at odds with public goals.⁵² It should not be forgotten that private regulators do not necessarily only pursue regulatory goals in a given domain. On the contrary, they may also pursue institutional interests such as the possibility to enjoy increased financial returns generated by uptake of their standards, and exercise organisational influence in a regulatory domain.⁵³ Private regulators might also be motivated by a need to maintain their operations and

⁴⁶ MC Suchman and LB Edelman, 'Legal Rational Myths. The New Institutionalism and the Law and Society Tradition' (1996) 21(4) *Law and Social Inquiry* 918.

⁴⁷ Abbott, Green, and Keohane (n 23).

⁴⁸ R Greenwood and CR Hinings, 'Understanding Radical Organisational Change: Bringing Together the Old and New Institutionalism' (1996) 21(4) *Academy of Management Review* 1040–1.

⁴⁹ P Delimatsis, 'The Resilience of Private Authority in Times of Crisis' in P Delimatsis, S Bijlmakers, and K Borowicz (eds), *The Evolution of Transnational Rulemakers Through Crises* (Cambridge University Press, 2023).

⁵⁰ D Avant, M Finnemore, and S Sell, 'Conclusion: Authority, Legitimacy, and Accountability in Global Politics' in D Avant, M Finnemore, and S Sell (eds), *Who Governs the Globe?* (Cambridge University Press, 2010) 356–70, at 362.

⁵¹ J Green, 'From Green to REDD: Private Regulation and the Politics of Carbon Sinks' (2014), available at: <http://iilj.org/wp-content/uploads/2016/09/GreenIILJColloq2014.pdf>.

⁵² D Kinderman, 'Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?' (2016) 35(1) *Policy and Society* 29–42.

⁵³ KW Abbott, D Levi-Faur, and D Snidal, 'Theorising Regulatory Intermediaries. The RIT Model' (2017) 660 *Annals of the American Academy of Political and Social Science* 14–31.

protect the interests of their members or a sub-set of their membership, such as firms. Sociological institutionalism posits that organisations striving for legitimacy and continuing their operations adopt features such as inclusiveness and proceduralisation to gain legitimacy, but that such adoption is frequently shallow or ‘ceremonial’.⁵⁴ This resonates with claims that change in organisations is also dictated more by the need to retain relevance than a real interest for problem solving.⁵⁵

There are too few empirical case studies and broadly historical accounts of change and evolution in transnational private regulators in legal and political science literature to truly understand how and why they grow in strength and influence through crisis, also in relation to public regulators. In particular, a dynamic and evolutionary perspective is lacking in literature from several disciplines concerned with standardisation and, generally, private regulation.⁵⁶ This article presents an analytical framework for future empirical research that could provide a more holistic understanding of crises-driven evolution and dynamism in relation to the resilience of transnational private regulation, its effectiveness and legitimacy. Future empirical studies could focus on the choices made at crucial junctures in their history, their rapid establishment in connection to specific events, as well as adjustments in their goals, functioning and output. Such enquiries can deepen our understanding of what confers strength on to private regulators, the extent to which private rules complement or compete with public regimes, and consequently the possibility to leverage, enrol, and assign certain regulatory functions to private regimes.

2.2. Change and resilience enabled by organisational resourcefulness

While incremental change constitutes a crucial process for organisational evolution,⁵⁷ this contribution focuses on the establishment and evolution of transnational private regulators in connection to critical junctures determined and triggered by their exogenous and endogenous environment.⁵⁸

⁵⁴ JW Meyer and B Rowan, ‘Institutionalised Organisations: Formal Structure as Myth and Ceremony’ (1977) 83(2) *American Journal of Sociology* 340–63.

⁵⁵ P Selznick, ‘Institutionalism “Old” and “New”’ (1996) 41(2) *Administrative Science Quarterly* 273.

⁵⁶ Supporting this claim with a literature review: N Brunsson, A Rasche, and D Seidl, ‘The Dynamics of Standardisation: Three Perspectives on Standards in Organisation Studies’ (2012) 33(5–6) *Organisation Studies* 613–32.

⁵⁷ W Streeck and K Thelen, ‘Introduction: Institutional Change in Advanced Political Economies’ in W Streeck and K Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, 2005) 1–39.

⁵⁸ MJ Roe, ‘Chaos and Evolution in Law and Economics’ (1996) 109(3) *Harvard Law Review* 641–68. From an institutionalist perspective: Greenwood and Hinings (n 48); AJ Hoffman, ‘Institutional Evolution and Change: Environmentalism and the US Chemical Industry’ (1999) 42(4) *Academy of Management Journal* 351–71.

Ecology highlights the function of sudden change and disturbance in determining the direction and evolution of institutions.⁵⁹ Critical junctures, such as the regulatory and organisational crises discussed below, are characterised by uncertainty about the future. In these moments, the probability is heightened substantially that organisational emergence and change would occur, and that the choices made would impact on the configuration of the various interests at stake.⁶⁰ Critical junctures set an institution's development in a direction that ensures the institution's own reproduction over time.⁶¹ A transnational private regulator may be established, or if an organisation already exists, it may begin a process of change. The outcome can reverberate on the private regulator's relation with public authority and its rules, and generally on the regulatory functions it exercises. Change, however, may not only result in successful adaptation and transformation.⁶² Institutions may change only incrementally in the face of a crisis or not change enough, become more and more fragile, and possibly even dissolve or reappear under a novel organisation.⁶³

Actor constellations and institutional dynamics that characterise and shape an institutional field influence how institutions emerge, consolidate, and change.⁶⁴ Private regulators' dynamism and capacity to adapt vary in degree and are connected to their considerable built-in organisational flexibility and resourcefulness. Transnational private regulators possess several comparative advantages over public organisations. Because of the possibility to enter or leave private regimes, coupled with unbound organisational structures, private regulators can and have been established more rapidly if compared to public institutions.⁶⁵ They can restructure their organisations and rules to avoid excessive burden and accommodate a range of interests. Private authority is typically also less legalised. Such autonomy becomes visible through flexibility of both institutional structures and responses to specific challenges.⁶⁶

Private regulators have experimented with creative institutional settings and enforcement mechanisms that—further testifying to their success—are

⁵⁹ LH Gunderson, 'Ecological Resilience – In Theory and Application' (2000) 31(1) *Annual Review of Ecology and Systematics* 425–43.

⁶⁰ G Capocchia, and R Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59(3) *World Politics* 341–69.

⁶¹ P Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' (2000) 94(2) *American Political Science Review* 251–67.

⁶² C Folke, S Carpenter, B Walker, M Scheffer, T Chapin, and J Rockström, 'Resilience Thinking: Integrating Resilience, Adaptability and Transformability' (2010) 15(4) *Ecology and Society* 20.

⁶³ E Herrfahrdt-Pähle and C Pahl-Wostl, 'Continuity and Change in Social-ecological Systems: The Role of Institutional Resilience' (2012) 17(2) *Ecology and Society* 10–11.

⁶⁴ JG March and JP Olsen, 'Elaborating the "New Institutionalism"' in RE Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 167.

⁶⁵ Abbott, Green, and Keohane (n 23).

⁶⁶ JF Green and G Auld, 'Unbundling the Regime Complex: The Effects of Private Authority' (2017) 6(2) *Transnational Environmental Law* 268–70.

at a later stage institutionalised and incorporated in public measures. They have demonstrated an ability to design and adapt rules and procedures to meet demands for legitimacy and accountability from both public authority at various regulatory levels and different stakeholders.⁶⁷ They can instrumentally mobilise organisational structures and procedures to convey an image of trustworthiness and effectiveness.⁶⁸ Regulators operating in a position of monopoly or quasi-monopoly are typically less exposed to the need to assert their validity to ensure their sustained existence⁶⁹ but are empowered from their structural power stemming from offering essential regulatory competencies.⁷⁰

The flexibility and resourcefulness of private bodies is conducive to adaptivity, rapid response, and resilience. Resilience is the ability to return to a stable state after a (potential) disruption.⁷¹ Resilient organisations reorganise in the face of change affecting the pursuit of their objectives and withstand discontinuity while adapting to new environments.⁷² Resilience is an indispensable feature if organisations are to remain relevant and effective.⁷³ Resilient organisations are also characterised by continuous learning, which is translated into institutional, policy and regulatory change and experimentation.⁷⁴ Thanks to their flexibility, private regulators are able to reformulate goals, targets and/or internal procedures to best fit relevant circumstances under an iterative approach of review and revision where goals, regulatory instruments and assumptions are questioned.⁷⁵ Heterogeneity of interests represented within an organisation, and especially in rule-setting, plays a special role and presents an

⁶⁷ See, J Pauwelyn, RA Wessel, and J Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(2) *The European Journal of International Law* 749–51. There have been several studies showing that ISO, which occupies a dominant position in standard setting, has demonstrated a degree of flexibility and adaptiveness to account for global and regional trends, changes and evolution. See, inter alia, R Schmidt, 'ISO 26000: Regulatory Cooperation in a Fragmented Field' in R Schmidt, *Regulatory Integration Across Borders, Public-Private Cooperation in Transnational Regulation* (Cambridge University Press, 2018); S Bijlmakers, 'The International Organization for Standardization – A Seventy-Five-Year Journey Toward Organizational Resilience' in P Delimatsis, MK Borowicz, and S Bijlmakers (eds), *The Evolution of Transnational Rule-Makers Through Crises* (Cambridge University Press, 2023).

⁶⁸ Schleifer (n 34).

⁶⁹ T Slobodan and R Schmidt, 'The Accountability Response of the Global Anti-Doping Regime to the Russian Doping Scandal' in P Delimatsis, MK Borowicz, and S Bijlmakers (eds), *The Evolution of Transnational Rule-Makers Through Crises* (Cambridge University Press, 2023).

⁷⁰ D Fuchs and M Lederer, 'The Power of Business' (2007) 9(3) *Business and Politics* 1–17.

⁷¹ Gunderson (at 59).

⁷² CS Holling, 'Resilience and Stability of Ecological Systems' (1973) 4(1) *Annual Review of Ecology and Systematics* 1–23.

⁷³ G Hamel and L Välikangas, 'The Quest for Resilience' (2003) 81(9) *Harvard Business Law Review* 52–63.

⁷⁴ J Gupta, C Termeer, J Klostermann, S Meijerink, M van den Brink, P Jong, S Nooteboom, and E Bergsma, 'The Adaptive Capacity Wheel: A Method to Assess the Inherent Characteristics of Institutions to Enable the Adaptive Capacity of Society' (2010) 13(6) *Environmental Science and Policy* 459–71.

⁷⁵ MC Dorf and C Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2) *Columbia Law Review* 267–473.

ambivalent nature of being able to serve both a resource and a problem for organisations.⁷⁶

On the one hand, heterogeneity can drive input and output legitimacy,⁷⁷ mutual learning, innovation, and thus resilience. The availability of diverse sources of social capital permits the generation of practical knowledge and learning, as well as broader forms of organisational learning, collaboration, organisational flexibility and experimentation, trust, and social memory.⁷⁸ On the other hand, a breakdown of the learning process can threaten the resilience of an organisation. Learning can be a central source of resilience but also a key force for survival.⁷⁹ In particular the incorporation of multi-stakeholder structures accounting for different interests enhances resilience where the presence of different groups allows an organisation to tap into a broad spectrum of expertise as part of a socio-political learning process.⁸⁰ Stakeholder involvement can ensure the adoption of shared norms of good practices.⁸¹

Additionally, civil society actors monitoring and incentivizing business' compliance with rules that would otherwise not be applicable can lead to private regulators' diffusion and acceptance. On the other hand, heterogeneity can prompt economic interests to sideline others and strengthen their position up until it does not affect the credibility of the organisation. Private organisations and collectives (self-) regulate economic activity and other activities connected to the market. Private regimes constitute therefore institutionalised expressions of economic and market power.⁸² In connection to events detrimental to business, organisations can also be captured.⁸³ Path dependency has contributed to perpetuate imbalance of interests, and organisations have struggled to operate independently from key economic actors.⁸⁴

Processes conferring resilience go beyond the organisational boundaries of a private regulator, and span through the entire policy domain covered by competing private regimes. In the presence of other private regulators new opportunities for learning emerge. Organisations can learn about the

⁷⁶ ES Clemens and JM Cook, 'Politics and Institutionalism: Explaining Durability and Change' (1999) 25 *Annual Review of Sociology* 453.

⁷⁷ X Rueda, RD Garrett, and EF Lambin, 'Corporate Investments in Supply Chain Sustainability: Selecting Instruments in the Agri-food Industry' (2017) 142(4) *Journal of Cleaner Production* 2480–92.

⁷⁸ C Folke, T Hahn, P Olsson, and J Norberg, 'Adaptive Governance of Social-Ecological Systems' (2005) 30 (3) *Annual Review of Environmental Resources* 441–73.

⁷⁹ C Kayes, *Organizational Resilience – How Learning Sustains Organizations in Crisis, Disaster and Breakdown* (Oxford University Press, 2015).

⁸⁰ *Ibid.*

⁸¹ Auld, Renckens, and Cashore (n 11).

⁸² RB Hall and TJ Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002).

⁸³ JT Checkel, 'Social Construction and Integration' (1999) 6(4) *Journal of European Public Policy* 546, 548–9.

⁸⁴ S Renckens and G Auld, 'Structure, Path Dependence, and Adaptation: North-South Imbalance in Transnational Private Fisheries Governance' (2019) *Ecological Economics* 166.

practices of other regulators, including specific features of their rules, and adopt them.⁸⁵ It has occurred that elements that are perceived as positive for an organisation—such as procedural inclusiveness—are embraced to enhance a claim to regulate and expand the market for their services.⁸⁶ Such learning from other organisations where private regulators compete enhances resilience. Learning also unfolds through the establishment of new meta-regulatory bodies that serve as platforms for exchange of best practices. In addition, meta-regulators can also coordinate lobbying activities. While lobbying activities of transnational private regulators have not yet been systematically studied, different from other lobbying groups, transnational private regulators seem to not only have an interest in supporting or opposing specific policies. A study finds that they also lobby to defend their own regulatory turf and support public regulatory forms that necessitate their rules.⁸⁷

3. Crises as catalysts for emergence and evolution

Changes in complementarity or competitive relationships between public and private authority are expected to be particularly visible in the aftermath of critical events such as regulatory and organisational crises. When confronted with these junctures, private regulators leverage their internal resourcefulness, and the prospects for change increase. Private regulators are strengthened by continuous learning, the possibility to tap into sources of practical and applied knowledge, the creation of flexible principles with a trial-and-error approach instead of more rigid rules, and the direct intervention of industry actors with large interests which limits agency problems. They often do not just react effectively from uncertainty, threats and crisis, but emerge reinforced in pursuing their goals.⁸⁸ Depending on the resulting regime and its effects, the pursuit of such goals may limit the extent of complementarity with public authority and instead bring to the fore competitive tensions between public and private regimes. Section 3.1 discusses examples of regulatory crises to illustrate critical junctures frequently linked to the emergence of transnational private regulators, and that alter their course of action. From the internal perspective of private regulators, Section 3.2 discusses examples of possible organisational crises as moments where existing organisations must take action to retain, at times even enlarge, the possibility to achieve their various goals.

⁸⁵ In the domain of forestry: C Overdevest and J Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector' (2014) 8(1) *Regulation & Governance* 22–48.

⁸⁶ L Fransen, 'Why Do Private Governance Organisations not Converge? A Political-Institutional Analysis of Transnational Labour Standards Regulation' (2011) 24(2) *Governance* 359–60.

⁸⁷ S Renckens, 'The Instrumental Power of Transnational Private Governance: Interest Representation and Lobbying by Private Rule-makers' (2020) 33(3) *Governance* 657–74.

⁸⁸ NM Taleb, *Antifragile* (Penguin/Random House, 2012).

3.1. Regulatory crises

Events such as regulatory crises are critical moment both for private regulators and business groups where a private body does not yet exist. Regulatory crises are events of varying scale and scope resulting from the often unintended or unforeseen consequences of the design or operation of a regulatory system and its interactions with other systems.⁸⁹ These crises are endogenous occurrences as they are linked, and often caused by, private regulators and/or the business interests they represent. A regulatory crisis may pressure the industry to self-regulate to protect reputation and avoid liability, but also to pre-empt more demanding regimes. Regardless of public support, private regimes have been triggered or modified by a regulatory crisis, and rapidly consolidated.

Regulatory crises are thus crucial moments for private authority to emerge or evolve to extend its regulatory prerogatives. Where a crisis is connected to a regulatory failure, it may reverberate on public authority as well, in particular on its capacity to influence private regulators. Public authority may be blamed for shortcomings in fact attributable to private actors and may be occupied in remedying the consequences of those events instead of devising strategies to influence and supervise private regulators. It may even expressly support the emergence of private regimes as a possible solution. Private regulators thereby seize the opportunity to increase their influence and pursue their own institutional goals. Some examples further illustrate these processes.

The role of food scares in establishing private food safety regimes has been studied extensively.⁹⁰ As public authorities were blamed for ignoring experts' advice and for the failure of risk-management models,⁹¹ food retailers had ample margin for manoeuvre, and even explicit political support, to create private regimes interlocking with and implementing general public requirements of food safety.⁹² In addition, the crisis allowed retailers to organise and pursue their own institutional goal to hollow out more stringent approaches to environmental and health issues in the food value chain. GlobalGAP was established also as an attempt from Northern agricultural products retailers to reduce economic risk from 'political consumers' interested in organic and environmentally responsible production. Overly represented in the

⁸⁹ J Black, 'Learning from Regulatory Disasters' (2014) 10(3) *Policy Quarterly* 3.

⁹⁰ D Casey, 'Three Puzzles of Private Governance: GlobalGAP and the Regulation of Food Safety and Quality' (2008) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No 22/2009.

⁹¹ E Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis' (2000) 23(3) *Journal of Consumer Policy* 227–55.

⁹² D Casey, 'Structuring Private Food Governance: GlobalGAP and the Legitimizing Role of the State and Rule Intermediaries' in T Havinga and P Verbruggen (eds), *Hybridization of Food Governance: Trends, Types and Results* (Edward Elgar, 2017).

governance structure of EurepGAP/GlobalGAP,⁹³ Western retailers managed to establish world-wide accepted standards fulfilling their own need to show sincere efforts towards consumers' requests.⁹⁴

GlobalGAP asserting itself as the focal regulator for food safety has generated considerable implications. GlobalGAP standards are notoriously difficult to implement by otherwise competitive developing countries' farmers, sort considerable trade barrier effects for otherwise highly price-competitive products, and may even hinder the right to food.⁹⁵ At the same time, their management- and risk-based form contributes marginally to the environmental goals GlobalGAP professes to pursue.⁹⁶ GlobalGAP standards and certifications have nonetheless become an essential requirement for selling agricultural products in Western markets. Simultaneously, they have asserted effectiveness, legitimacy, and sufficiency of private regulation, showing also some adaptability in local contexts.⁹⁷

Endogenous events such as regulatory crises and civil society campaigns to expose regulatory failures have not only brought private actors together in the establishment of a transnational private regime, but also mobilised considerable civil society support for *private* solutions instead of more profound public intervention. This establishes competitive dynamics through which private regimes hinder or delay the emergence of more profound and mandatory public ones. Interestingly, voluntary private regulation was almost always suggested as a possible solution by the very NGOs that brought up the scandal in the first place.⁹⁸ The first wave of biofuel certification (pre-dating EU regulatory intervention) was linked to the 2007/2008 food crisis and the need that biofuel production would not displace food crops.⁹⁹ Forestry, coffee, and other agricultural commodities' certifications were established respectively as a follow-up from the 1992 Rio Summit, the collapse of coffee prices, and the emergence of specific deforestation concerns associated to agricultural production.¹⁰⁰ Labour schemes such as Social Accountability International and the Fair Labour Association

⁹³ N Hachez and J Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GLOBALGAP' (2011) 14(3) *Journal of International Economic Law* 677–710.

⁹⁴ A Kalfagianni and D Fuchs, 'The GlobalGAP' in A Reed, D Reed, and P Utting (eds), *Business, Non-State Regulation and Development* (Routledge, 2012) 160–72.

⁹⁵ S Henson and J Humphrey, 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (2009) Paper Prepared for FAO/WHO Codex Alimentarius Commission.

⁹⁶ D Fuchs and A Kalfagianni, 'The Causes and Consequences of Private Food Governance' (2010) 12(3) *Business and Politics* 1–34.

⁹⁷ Y Naiki, 'The Dynamics of Private Food Safety Standards: A Case Study on the Regulatory Diffusion of GlobalG.A.P.' (2014) 63(1) *International and Comparative Law Quarterly* 137–66.

⁹⁸ MSI Integrity (n 33) 36–7.

⁹⁹ P McMichael, 'A Food Regime Analysis of the "World Food Crisis"' (2009) 26(4) *Agriculture and Human Values* 281–95.

¹⁰⁰ E Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry' (2006) 17(1) *European Journal of International Law* 47–87.

were set up in the follow up of extensive campaigns in the mid-1990s exposing sweatshop conditions in the garment industry.¹⁰¹ The Global Network Initiative was set up by the ICT industry as a response to criticisms about its role in aiding authoritarian governments to persecute political opponents.¹⁰²

Legitimacy problems faced by economic interests in light of their perceived responsibilities in a regulatory crisis also contribute to the establishment of private regimes in the domain of finance. The proliferation of ESG (environmental/social/governance) metrics and, generally, privately established standards for 'responsible finance' in the aftermath of the 2007–2008 crisis has been linked to the financial industry's need to restore social legitimacy and respond to accountability calls in light of their association to the financial crisis. This has been done by establishing private regimes centred on management standards.¹⁰³ Already existing private regulators also change their standards to devise solutions to tackle novel threats, or as a response to increased public awareness for specific issues. Schemes certifying sustainable production of crops such as soy and palm oil, frequently associated to deforestation, have in recent years established or strengthened their requirements concerning zero deforestation, as public pressure intensified around global deforestation, as well as the possibility for a public intervention.¹⁰⁴

Regulatory crises can also eventually result in (additional) regulatory intervention from public authority. This does not necessarily exclude or limit the role for private regimes. Public intervention impacts on the relation between public and private authority especially where public authority's regulatory activity is expanded. This may determine a consequent narrowing down of private regulators' functions and their alignment towards better complementarity with public regimes. For example, the establishment of a clear standard determining what is expected in non-financial value chains due diligence determined by public authority will have to be incorporated in private initiatives that support firms' legal compliance and protect them from liability. What actions constitute 'due diligence' will be defined by public instruments and not (anymore) by a private scheme. In a similar manner, the increasing attention of public regulators for responsible finance has over time limited the degree of freedom of private regulators in determining its substance and features. At least in the EU, private

¹⁰¹ MSI Integrity (n 33) 37.

¹⁰² *Ibid.*

¹⁰³ PJ Engelen and M van Essen, 'Reputational Penalties in Financial Markets: An Ethical Mechanism?' in W Vandekerckhove, J Leys, K Alm, B Scholtens, S Signori, and H Schäfer (eds), *Responsible Investment in Times of Turmoil* (Springer, 2011) 55–74.

¹⁰⁴ For the Roundtable on Responsible Soy: www.responsiblesoy.org/nueva-version-del-estandar-rtrs-de-produccion-de-soja-aprobada/?lang=en.

initiatives now operationalise the detailed requirements in the Taxonomy Regulation and its technical screening criteria.¹⁰⁵

Public authority's regulatory intervention in the aftermath of a regulatory crisis can also be more limited and/or actively require (the establishment of) private regulators to be effective. In the follow-up of a food price crisis in late-2000s caused by policies exacerbating biofuel crops pressure on food crops, the EU intervention establishing sustainability requirements for biofuels required private standards to certify production taking place outside the EU. By allowing private schemes to serve public goals, the Renewable Energy Directive (RED) of 2009¹⁰⁶ generated rapid emergence of new schemes, with varying associations to the industry and stringency of their requirements.¹⁰⁷ New biofuel standards were established exploiting the relaxed requirements for recognition or adjusted their higher standards to those in the Directive. These standards gained uptake at the expenses of pre-existing more stringent and inclusive multi-stakeholder regimes.¹⁰⁸

This contributed to reinforce the regulatory claims of industry schemes. The possibility of public endorsement of private regulation to complement public rules triggered the rapid emergence of novel industry-dominated regimes hollowing-out more stringent competitors. This strategy has been successful, as the more stringent regimes enjoyed much less uptake than novel, industry-dominated ones that just met the RED requirements. Especially where competing schemes already exist, regulatory intervention in the aftermath of a regulatory crisis can lead to reinforce regimes operating only limitedly in line with diverse interests and pursuing instead narrower business goals, or less ambitious objectives.¹⁰⁹

3.2. Organisational crises

From the internal perspective of private regulators, the perception of critical factors or a change in context as threats to the *status quo* link to the notion of organisational crisis. An organisational crisis represents a threat for an organisation that prevents it from attaining its goals or reduces its ability to do so. External and internal threats and shocks affect the salience of the organisation and its possibility to achieve its regulatory and organisational

¹⁰⁵ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment. OJ L 198/13.

¹⁰⁶ Directive (EC) 2009/28 of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources. OJ L 140/16 (now revised by Directive 2018/2001).

¹⁰⁷ P Schleifer, 'Orchestrating Sustainability: The Case of European Union Biofuel Governance' (2013) 7(4) *Regulation & Governance* 533–46.

¹⁰⁸ S Ponte and C Daugbjerg, 'Biofuel Sustainability and the Formation of Transnational Hybrid Governance' (2015) 24(1) *Environmental Politics* 96.

¹⁰⁹ A Arcuri, 'The Transformation of Organic Regulation: The Ambiguous Effects of Publicisation' (2015) 9(2) *Regulation & Governance* 144–59.

goals.¹¹⁰ Organisations and their members seek to resolve such crises also because they are an opportunity for organisations to achieve their goals even further, and beyond the specific issue in question.¹¹¹ As a response to these events, action is rapidly taken; organisations and their rules are adjusted where necessary.

It is possible to deductively conceive of some possible critical exogenous events such as challenges to reputation and market relevance of an established private regulator; potential conflicts with public rules and principles (including procedural principles) which would limit effectiveness, complementarity or public adoption of the regime; potential adoption of legislation, or the extension of public control. Threats can also be endogenous to the organisation and the interests therein. Internal criticism towards lack of inclusiveness may prompt an organisation to adjust its procedures. The presence of internal interest groups antithetical to the interests of other groups and which are pressing for change may require intervention to be ‘silenced’ or sidelined by adjusting procedures and *modus operandi* of an organisation, or by refining its goals.¹¹² For private regulators and the interests they represent, these triggering factors are moments where action allows to assume, retain or reinforce regulatory functions. The outcome may limit the complementarity with public rules where civil society interests are sidelined in favour of business interests, or where the rules enacted are less demanding or less enforced than their possible public equivalents.

Transnational private regulators adapt their standards to respond to change in (market) circumstances and, generally, because of the need to retain and possibly enlarge their regulatory competences. The Forest Stewardship Council (FSC) has a history of adapting certification requirements and even creating new certification categories to make it easier for operators to become FSC-certified. This approach in fact resulted in the creation of a less demanding certificate, which stands in contrast to the interests of social and environmental NGOs to establish a stringent regime for forest protection. It was instead linked to a changed climate within the organisation—in part due to pressures from competing schemes undermining market acceptance—and the emergence of the novel organisational goals to expand certification and increase supply of FSC-certified products.¹¹³ Timber schemes also mimetically adjusted their requirements over time learning from successful aspects of competitive programmes.¹¹⁴ The

¹¹⁰ Clemens and Cook (n 76) 453.

¹¹¹ TW Milburn, RS Schuler, and KH Watman, ‘Organisational Crisis. Definition and Conceptualisation’ (1983) 36(12) *Human Relations* 1144.

¹¹² A Loconto and E Fouilleux, ‘Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance’ (2014) 8(1) *Regulation & Governance* 166–85.

¹¹³ S Moog, A Spicer, and Böhm, ‘The Policies of Multi-stakeholder Initiatives: The Crisis of the Forestry Stewardship Council’ (2015) 128(3) *Journal of Business Ethics* 469–93.

¹¹⁴ Overdevest and Zeitlin (n 85).

Fairtrade Foundation embraced competition between standard-setters as an opportunity instead of a threat and started providing consultancy services to other schemes on how to establish and run certification programmes.¹¹⁵ This led the organisation to expand its activities and also exercise non-regulatory functions.

Organisational crises catalyse opportunities to cooperate in new or existing institutions, and experiment with alternatives that would not otherwise be considered, resulting in rethinking and reorganisation and generating new institutional settings.¹¹⁶ The transnational domain offers the possibility for private actors with strong economic interests to harness social capital and establish new organisations competing against existing ones. New bodies rapidly arise from the (perceived) inability of old ones to tackle certain problems or to protect specific interests.¹¹⁷ The Program for the Endorsement of Forest Certification (PEFC) emerged as an explicitly business-friendly response to the more stringent forest certification programme by the FSC.

Express demands to reform internal governance in order to be used by public authorities have also triggered rapid action from private regulators. The sustainable forestry certification PEFC rapidly adapted its governance structure to continue to qualify for employment under sustainable public procurement, where public authority exploits private standards' complementarity of implementing, monitoring and enforcement functions. When the UK forest procurement body concluded that PEFC did not meet the requirements for sustainable forest management, in light of its unbalanced governance structure, limited public participation in the certification process, and secrecy of auditing outcomes, PEFC overhauled its procedures in just six months. UK authorities were satisfied with the reforms, and PEFC could continue to enjoy the legitimating effects of its association to public authority (and the consequent economic benefits, since certification is granted upon a fee). PEFC's rapid internal reorganisation was however as rapid as much as cosmetic, concealing 'business-as-usual' within the organisation, and instrumental to the pursuit of narrower goals.¹¹⁸ Environmental groups remained critical of PEFC's shortcomings in protecting indigenous rights and endangered species, as well as the actual weight of non-economic interests in the organisation.¹¹⁹ It thus also had the effect of misleading indirect public control. Rapidity of adaptation at a critical juncture that could have led to an economic threat to the organisation, resulted instead in shallow

¹¹⁵ D Desai and A Lang, 'Global Un-governance' (2020) 11(3) *Transnational Legal Theory* 223.

¹¹⁶ PL Berger and T Luckmann, *The Social Construction of Reality* (Anchor Books, 1967) 107–8.

¹¹⁷ J Morse and R Keohane, 'Contested Multilateralism' (2014) 9(4) *Review of International Organisations* 385.

¹¹⁸ D Szablowski, *Transnational Law and Local Struggles. Mining, Communities and the World Bank* (Hart Publishing, 2007) 293.

¹¹⁹ L Gulbrandsen, 'Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-state Certification Programs' (2014) 8(1) *Regulation & Governance* 74–92.

adaptation, which was partially at odds with the public goals that the standards purported to pursue.

Public intervention can take place in many other different guises. Instances of benchmarking against a public instrument may assess both substantive and procedural features of organisations, and similarly generate adjustment to meet publicly set requirements.¹²⁰ In a similarly indirect manner, the emergence of legislation affecting private regimes impacts on their standards. Around a decade ago, regulators from the EU, the US, Australia and South Korea directed their policy focus towards timber legality as a condition for marketing. To ensure their continuous relevance as a certification tool across value chains, forestry certification strengthened their focus on ensuring the legality of origin and reinforced their information-gathering aspects to integrate in firms' due diligence systems.¹²¹ In this case, private regimes have been co-opted by public intervention that indirectly streamlined their requirements to better exploit their complementarity.

Co-optation can also take place with more direct means, and direct private regulators' evolution in line with public goals. Criminal enforcement actions relating to financial benchmark manipulation and sanctions evasion, as well as subsequent reforms, disrupted the traditional system of collaborative rule-making and implementation between public bodies and private standard-setters in the financial domain. Enforcement actions shifted the balance towards greater public involvement,¹²² and even led to the demise of private regulators establishing financial benchmarks such as Libor.¹²³

Action to retain or proactively enlarge regulatory competences is not always taken through internal reform but can also take place via lobbying activities. Generally, lobbying by private regulators aims at eliminating rules that hinder private regulation, or achieving recognition of private regimes that will increase their legitimacy, uptake, effectiveness or regulatory space. In order to have the MA netting rules prevail over national bankruptcy laws, ISDA and its members lobbied extensively worldwide to have them amended with the specific objective to accommodate the MA provisions. ISDA's lobbying for legislative recognition of its own close-out netting rules did not result in proper legislative debate especially in the US, therefore

¹²⁰ For an example of adjustment of governance features and standards following benchmarking on schemes certifying responsible mining see: OECD (2018) Alignment assessment of industry programmes with the OECD Minerals Guidance. Available at <http://mneguidelines.oecd.org/Alignment-assessment-of-industry-programmes-with-the-OECD-mineral-guidance.pdf>.

¹²¹ T Bartley, 'Transnational Governance and the Re-centered State: Sustainability or Legality?' (2014) 8 (1) *Regulation & Governance* 93–109.

¹²² P-H Verdier, *Global Banks on Trial: U.S. Prosecutions and the Remaking of International Finance* (Oxford University Press, 2020).

¹²³ A Schrimpf and V Sushko, 'Beyond LIBOR: A Primer on the New Benchmark Rates' (2019) March 2019 *BIS Quarterly Review* 29–52.

depriving the accountability function associated to legislative recognition.¹²⁴

This abdication of public verification is problematic insofar the MA provisions redistribute market risks, not just from the buy-side to the sell-side of derivatives, but also between different categories of creditors in case of bankruptcy.¹²⁵ ISDA therefore proactively exploited its rule-making capacity to pressure public authority to ensure and enlarge its regulatory competences at the expenses of possible public regimes. Undeterred by ISDA's resistance in improving its internal governance, public regulators then delegated to ISDA additional regulatory competences carrying systemic and distributional implications, such as in the area of credit-event determination.¹²⁶ In a similar fashion, transnational private regulators certifying timber and sustainable forest management stepped up their lobbying claims of complementarity to public measures and requests for legitimacy-enhancing formal recognition at a juncture in which EU regulatory intervention could limit their margins of operation.¹²⁷

4. Outcomes of evolution stemming from crises

A dynamic perspective that accounts for the evolution of standard-setters, the resilience it generates to private rule-makers, and its implications for the relation with public authority raises novel questions about the ability to supervise, steer and enlist private regulators in the public interest. While legal and regulatory literature is generally optimistic about the possibility of steering and indirectly regulating private regulation, evolution continuously affects and potentially transforms complementary and competitive relations between public and private regimes. The study of the consequences of dynamism and how it emerges in the wake of crises deserves careful empirical scrutiny, as change is also connected to institutional goals that conceal instrumental and shallow approaches to both rule-making and organisational design and active competition with public regimes. Section 4.1 further reflects on the competitive tensions between public and private regimes that can be exacerbated by the emergence and evolution of transnational private regulation. To detail the main argument of this article, Section 4.2 touches upon the change in output of certain

¹²⁴ M Borowicz, 'Private Power and International Law: The International Swaps and Derivatives Association' (2015) 8(1) *European Journal of Legal Studies* 63.

¹²⁵ J Biggins and C Scott, 'Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform' (2012) 13(3) *European Business Organization Law Review* 331.

¹²⁶ J Biggins and C Scott, 'Private Governance, Public Implications and the Tightrope of Regulatory Reform: The ISDA Credit Derivatives Determinations Committees' (2013) Osgoode Hall Law School Research Paper No 57/2013.

¹²⁷ See FSC submission on their complementary to the EUTR and the FLEGT regime: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11630-Illegal-logging-evaluation-of-EU-rules-fitness-check-/F506597>.

private regimes towards management-based standards to better complement public rules, and its implications. Section 4.3 reflects on procedural aspects of private authority's evolution and the possibility for public authority to steer it.

4.1. Effects on the relation with public authority

In the examples discussed in Section 3, transnational private regulators rapidly emerged, responded, and at times even pre-emptively defused, attempts from public authority to establish both direct and indirect influence and regulation. As regulators competing with other regulators must persuade public actors, firms and other stakeholders about their validity, they are spurred to act and often change more than regimes in a position of regulatory monopoly. Private regulators in a position of regulatory monopoly are arguably relatively more insulated from these pressures and less exposed (albeit still not immune to) demands for change in reaction to public authority's intervention.¹²⁸ Private regulators competing amongst themselves rather evolve based on proactive strategies aiming at the consolidation and expansion of their competencies. Internal reorganisation has been implemented reactively and, on occasions, lobbying has been proactively deployed to strengthen their regulatory role. This approach proved successful for GlobalGAP¹²⁹ and ISDA¹³⁰ that established themselves as indispensable focal regulators in their domains; voluntary sustainability standards increased both their uptake on the market and use in legislation.

In a private regulator's relation of complementarity with public rules, which changes and evolves over time, the outcome of a particular evolution could be a transition in this relation towards competition, possibly also to the point where private regimes deter or substitute public regulation.¹³¹ Case studies in various sectors and covering different time periods can illuminate variations in complementarity and competition and how substitution comes about, also across the different components of rule-making, and associated drivers. Public intervention could reverse the extension of regulatory prerogatives and limit the operating margins of private

¹²⁸ Slobodan and Schmidt (n 69). Also see, F Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space' (2006) EUI Working Papers LAW No 2006/13.

¹²⁹ D Casey, 'Structuring Private Food Governance: GlobalGAP and the Legitimizing Role of the State and Rule Intermediaries' in T Havinga and P Verbruggen (eds), *Hybridization of Food Governance: Trends, Types and Results* (Edward Elgar, 2017); P Verbruggen, 'Understanding the "New Governance" of Food Safety: Regulatory Enrolment as a Response to Change in Public and Private Power' (2016) *Cambridge Journal of International and Comparative Law* 5; Casey (n 21).

¹³⁰ M Borowicz, 'Private Power and International Law: The International Swaps and Derivatives Association' (2015) 8(1) *European Journal of Legal Studies* 46–66.

¹³¹ Cf. D Baron, 'Self-Regulation in Private and Public Politics' (2014) 9(2) *Quarterly Journal of Political Science* 231–67.

regulators,¹³² but it seldom occurs. It has been demonstrated that voluntary self-regulatory efforts, however ineffective or lax, manage to convince different constituencies that more stringent legislation is not needed—thereby pre-empting citizens’ demand for public regulation and intervention.¹³³ Courts too have deferred to, and accepted, shallow operationalisation of private rules as evidence of compliance with public requirements.¹³⁴

It is also possible that, as in the biofuel case, industry-dominated schemes take over more inclusive and demanding multi-stakeholder initiatives. Additionally, this phenomenon limits the impact of private rules in pursuing public goals when used in public regimes. Competition between private schemes may favour the less demanding industry standards offering more limited ‘returns’ for the public at large, ie, for beneficiaries other than those setting and complying with the rules.¹³⁵ Markets for private standards have resulted in race-to-the-bottom dynamics¹³⁶ especially if public authority does not effectively intervene. Enrolment strategies may not reverse downward trends where either standards are lowered, or new less demanding regimes rapidly appear.¹³⁷ This perspective questions the idea that competition between private regimes can be exploited to advance public interests.¹³⁸ It also may render futile the suggestion in transnational private regulation scholarship that it is in the interest of transnational private regulators to try and solve issues such as democratic deficit, lack of legitimacy and accountability through peer-monitoring, market-driven and reputational mechanisms that would bring about change and reform.¹³⁹

Private regimes do not always possess the incentive to ‘publicise’ themselves. Pragmatic considerations lead to business compliance with private rules if it generates economic returns.¹⁴⁰ Similarly, sub-par standards are not necessarily rejected by the market. What would constitute an ineffective standard for society (ie a standard not sufficiently accounting for interests other than the industry’s or providing less than optimal outcomes in light

¹³² But see J Reinecke and J Donaghey, ‘The Politics of Collaborative Governance in Global Supply Chains: Power and Pushback in the Bangladesh Accord’ in P Delimatsis, S Bijlmakers, and MK Borowicz (eds), *The Evolution of Transnational Rule-Makers Through Crises* (Cambridge University Press, 2023).

¹³³ N Malhotra, B Monin, and M Tomz, ‘Does Private Regulation Preempt Public Regulation?’ (2019) 113 (1) *American Political Science Review* 19–37.

¹³⁴ LB Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (University of Chicago Press, 2016).

¹³⁵ E Partiti, ‘Orchestration as a Form of Public Action: The EU Engagement with Voluntary Sustainability Standards’ (2019) 25(1) *European Law Journal* 94–117.

¹³⁶ CM Radaelli, ‘The Puzzle of Regulatory Competition’ (2014) 24(1) *Journal of Public Policy* 1–23.

¹³⁷ L Fransen, ‘Multi-stakeholder Governance and Voluntary Programme Interactions: Legitimation Politics in the Institutional Design of Corporate Social Responsibility’ (2012) 10(1) *Socio-Economic Review* 163–92.

¹³⁸ C Overdevest, ‘Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector’ (2010) 8(1) *Socio-Economic Review* 47–76.

¹³⁹ Cafaggi (n 3).

¹⁴⁰ DH Schepers, ‘Challenges to Legitimacy at the Forest Stewardship Council’ (2010) 92(2) *Journal of Business Ethics* 279–90.

of its goal), may be very effective from the private regulator viewpoint because it successfully protects business interests and deflects societal demand for rules. Rather, transnational private regulators devise proactive strategies to retain their position and leading role for market actors in standard-setting. Regulatory space left to these regimes crystallises such dynamics and their competitive nature towards public rules.

Private rules are also introduced to claim that ‘something is being done’ thereby easing pressure from regulators and other stakeholders.¹⁴¹ Private regimes and self-regulatory attempts contribute to both restoring social legitimacy for the firms involved, as well as signalling that increased public intervention is unnecessary. Transnational private regulation goes thus beyond the function of essential ‘market lubricant’ associated with (technical) standards, and becomes a tool for firms to affirm their role as a ‘responsible’, rigorous and rational market actor concerned with public goals and compliance as much as with efficiency.¹⁴² The evolution of private regulators is more impactful when they take the role of regulators of first instance, an element that certainly boosts their growing legitimacy as suppliers of market rules.¹⁴³ This is particularly visible in the frequent establishment of private—and not public—regulation in the aftermath of a regulatory crisis. Private regulators thus manage to structure economic reality and shape a regulatory field in a manner consistent with self-regulation, efficiency, managerialism, measurability, internal risk management and technical rationality.¹⁴⁴

The evolution of private regulators, we argue, can only be viewed in tandem with the resilience they display in the wake of adversity, either within the environment they operate or due to internal contestation and opposition from within. It is this two-sided repeated interaction over time that determines the evolutionary dynamics of any organisation, including transnational private regulators. As adversity is heterogenous, it is conceived differently by those organisations affected, depending on their endowments, preparation, responses and learning capacity.¹⁴⁵ In addition, the institutional complexity of a given ecology where private and public actors interact is not static but in continual flux; the nature of that complexity depends on and is resolutely shaped by the common environment where these actors operate. For instance, responses to institutional demands will not be linear but will

¹⁴¹ PJ DiMaggio and WW Powell, ‘The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organisational Fields’ (1983) 48(2) *American Sociological Review* 147–60.

¹⁴² V Higgins and W Larner, ‘From Standardization to Standardizing Work’ in V Higgins and W Larner (eds), *Calculating the Social: Standards and the Reconfiguration of Governing* (Palgrave MacMillan, 2010) 205–18.

¹⁴³ V Higgins and K Tam Hallström, ‘Standardisation, Globalisation and Rationalities of Government’ (2007) 14(5) *Organisation* 686.

¹⁴⁴ M Power, *The Audit Society: Rituals of Verification* (Oxford University Press, 1999).

¹⁴⁵ T Williams, D Gruber, K Sutcliffe, D Shepherd, and E Yanfei Zhao, ‘Organizational Response to Adversity: Fusing Crisis Management and Resilience Research Streams’ (2017) 11(2) *Academy of Management Annals* 733–69.

vary over time, which means that alteration and variability of organisational strategies testifies to their resilience and shapes their evolution over time.¹⁴⁶ At every instance, a process of variation, selection and retention seems to be in place, in line with evolutionary accounts of organisation studies.¹⁴⁷ Public actors do not remain unaffected by these evolutionary dynamics; on the contrary, strategies implemented by private regulators will also affect how public overseers behave in their regulatory activity, an intermingling that intensifies as the legitimacy of private authority grows.¹⁴⁸

4.2. The example of management standards

The dynamism which characterises standard-setting organisations is reflected also in their output, whose form and substance changes to accommodate variation in, inter alia, the demands of certain interests in the organisation and regulatory techniques from public authority. A growing body of transnational private regulation nowadays takes the form of management standards. These requirements prescribe organisational functions, policies and procedures within firms and organisations which are supposed to bring about increased product quality, improve environmental performance, or financial stability. Management standards do not necessarily bring about substantive change in output or production, nor in the production processes, as they depend on the targets and policies set by the firm which comply with them. They instead direct organisations to establish processes for flexibly achieving goals via self-reflections through risk assessments and auditing,¹⁴⁹ internal planning, information-collection and internal rule-making.¹⁵⁰

The appearance of management standards is recent if compared to the centuries-old history of product standardisation through the prescription of substantive product features,¹⁵¹ and it is associated with the emergence of ISO 9001 standards for product quality in 1987. Their adoption has increased dramatically with the success of new governance techniques relying on risk management and process-based regulation that expanded the complementarity possibilities of private regulation. Many issue areas

¹⁴⁶ R Greenwood, M Raynard, F Kodeih, ER Micelotta, and M Lounsbury, 'Institutional Complexity and Organizational Responses' (2011) 5(1) *The Academy of Management Annals* 317–71.

¹⁴⁷ I McCarthy, M Collard, and M Johnson, 'Adaptive Organizational Resilience: An Evolutionary Perspective' (2017) *Current Opinion in Environmental Sustainability* 28, 33–40.

¹⁴⁸ Green (n 51).

¹⁴⁹ C Coglianese and Lazer, 'Management-Based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) *Law & Society Review* 691–730.

¹⁵⁰ E Bardach and R Kagan, *Going by the Book. The Problem of Regulatory Unreasonableness* (Temple University Press, 1982) 224.

¹⁵¹ HJ De Vries, 'Standardisation: A Developing Field of Research' in P Delimatsis (ed), *The Law, Economics, and Politics of International Standardisation* (Cambridge University Press, 2015) 19–41.

are now characterised by management standards elaborated by private bodies, ranging from foodstuff health and safety to social accountability,¹⁵² from occupational risks¹⁵³ to human rights due diligence in project financing,¹⁵⁴ and data protection.¹⁵⁵

Management standards allocate regulatory competences where essential information and capacity are located. The responsibility to regulate is delegated to firms and organisations complying with the standards, which set the stringency to which to pursue their goals. The emanation of management standards can be a proactive strategy to more effectively dovetail with a regulatory architecture characterised by originally private regulatory techniques such as risk-based and management-based regulation, also at the global level.¹⁵⁶ The adoption of management standards can serve as a strategy to further reinforce private rule-making as complement of public rules, that operationalise them for firms' compliance.¹⁵⁷ Certain pre-existing schemes originally characterised by substantive standards setting a higher bar than applicable provisions have evolved over time into developers of management standards demonstrating compliance and due diligence.¹⁵⁸

The open-ended character of management standards and their 'constructive ambiguity'¹⁵⁹ offer flexible possibilities to operationalise their objectives, especially in contested domains such as sustainable production and finance where disagreement exists about what practices are, in fact, suitable. Management standards offer the opportunity to accommodate multiple—at times even conflicting—political, ideological and technical *desiderata*. Divergence of views between groups within the standard-setting organisation on how to pursue regulatory objectives can be papered over by the promulgation of standards that do not prescribe generally adequate and inadequate conduct,¹⁶⁰ but are open-ended and leave to the entity that implements

¹⁵² Social Accountability's SA8000.

¹⁵³ See ISO 45001 standard on occupational health and safety.

¹⁵⁴ For example the Equator Principles.

¹⁵⁵ C Quelle, 'Enhancing Compliance Under the General Data Protection Regulation: The Risky Upshot of the Accountability- and Risk-Based Approach' (2018) 9(4) *European Journal of Risk Regulation* 502–26.

¹⁵⁶ See the global consensus around the UN Guiding Principles on Business and Human Rights, whose 'second pillar' transposes to the human rights domain tools of management-based and risk-based regulation.

¹⁵⁷ Cafaggi (n 3).

¹⁵⁸ Bartley (n 121). Changes in the content of voluntary sustainability standards (VSS) are visible most recently as private schemes seek to account for (prospective) human rights due diligence (HRDD) legislation, aligning their standards to HRDD and its requirements. HRDD can be seen as an organisational crisis, which could be both an opportunity for VSS to consolidate their regulatory prerogatives, and a potential threat in light of the establishment of other risk management tools and initiatives. E Partiti, 'Human Rights Due Diligence and Evolution of Voluntary Sustainability Standards' in P Delimatsis, MK Borowicz, and S Bijlmakers (eds), *The Evolution of Transnational Rule-Makers Through Crises* (Cambridge University Press, 2023).

¹⁵⁹ J-C Graz, *The Power of Standards. Hybrid Authority and the Globalisation of Services* (Cambridge University Press, 2019) at 25, 43 and 220.

¹⁶⁰ D Van Den Meerseche and G Gordon, 'A New Normative Architecture' – Risk and Resilience as Routines of Un-governance' (2020) 11(3) *Transnational Legal Theory* 270.

them their practical operationalisation including choice of stringency. The presence of private rules nonetheless conveys the notion that a matter is being regulated.

When enacting management standards, transnational private regulators promote the privatisation of law-making, devolving further problem-solving responsibilities to private actors, and potentially resulting in narrower public rules.¹⁶¹ Management standards structure the organisation of economic activity in line with business preferences for light-touch self-regulation instead of more profound norms prescribing precise outcomes. In this process, private regulators find several allies. Professional service firms such as audit and consultancy firms lobby for industry-driven governance in emerging regulatory domains.¹⁶² Similarly, third-party certifiers pressure public regulators to adopt measures which are nimble, auditable, and take the form of management-based standards as adopted by private rule-makers. Auditors pressure for measures which would benefit both the provision of the services they offer, as well as the industry's preference for lighter private rules.¹⁶³ As private regulators become part of regulatory arrangements, their direct and indirect influence expands even more. They also lobby proactively for further privatisation of regulation, including monitoring and certification, as well as for the creation of new, more complex and frequently amended rules—primarily to expand their markets and the related services they offer.¹⁶⁴

4.3. Input legitimacy and indirect public control

As suggested by literature on polycentricity and de-centred regulation, transnational private regulators are out of direct reach for public authority.¹⁶⁵ Public authority however can, and should, exploit synergies and address problems of private regulation when they arise.¹⁶⁶ Influence is transmitted to private regulators through indirect modalities steering actors throughout various levels of the regulatory process.¹⁶⁷ Similar to those identified at the national stage towards self-regulation, these techniques include

¹⁶¹ V Higgins, J Dibden, and C Cocklin, 'Neoliberalism and Natural Resource Management: Agri-environmental Standards and the Governing of Farming Practices' (2018) 39(5) *Geoforum* 1776–85.

¹⁶² L Fransen and G LeBaron, 'Big Audit Firms as Regulatory Intermediaries in Transnational Labor Governance' (2019) 13(2) *Regulation & Governance* 260–79.

¹⁶³ J-P Galland, 'Big Third-party Certifiers and the Construction of Transnational Regulation' (2017) 670 *The Annals of the American Academy of Political and Social Sciences* 275.

¹⁶⁴ J Van der Heijden, 'Brighter and Darker Sides of Intermediation: Target-Oriented and Self-interested Intermediaries in the Regulatory Governance of Buildings' (2017) 670 *The Annals of the American Academy of Political and Social Sciences* 207–24.

¹⁶⁵ J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation and Governance* 137–64.

¹⁶⁶ Eberlein, Abbot, Black, Meidinger, and Wood (n 38) 1–21.

¹⁶⁷ J Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40(2) *British Journal of Criminology* 222.

proceduralisation, initiation and facilitation of private regimes, provisions of incentives for private actors to self-regulate, and establishing targets and capacity building. IR and political economy literature has been optimistic about the possibility that the interplay between public and private regulators would be mutually beneficial.¹⁶⁸ Legal literature in particular insisted on the desirability to ‘proceduralise’ transnational governance and private rule-making.¹⁶⁹ Proceduralisation would successfully replace State control with internal, indirect control.¹⁷⁰ These ideas have been incorporated in legal provisions aiming at bridging accountability and other gaps between public and private authority.¹⁷¹ Attempts for indirect control also stem from international law. The adoption of the WTO TBT Agreement mobilised internal forces for reform in private regulators to incorporate its procedural requirements.¹⁷²

However, evolution of transnational private regulators may occur at the expense of deliberation, and participation of non-economic interests—the traditional mechanisms through which indirect public control is exercised. Evolution driven by endogenous causes may aim at defusing internal opposition, favouring specific interest groups to the detriment of others. Heterogeneity becomes a trigger for reforms aimed at sidelining certain interests, which have been relegated to a marginal position or forced to leave the organisation.¹⁷³ Proactively defusing opposition and strategically supporting specific interests allows a regulator to act faster, and in the interest of its core business constituencies on which it dearly depends. This ensures responsiveness to the business interests represented in the organisation and enhances the external effectiveness of the organisation in pursuing interests of its key business constituencies and market acceptance.¹⁷⁴

Private regulators do not necessarily fully embrace good governance principles. Legitimation strategies through stakeholder involvement and proceduralisation may conceal the dominance of business interests and the continuation of practices that are antithetical to the stated goals of the

¹⁶⁸ F Mayer and G Gereffi, ‘Regulation and Economic Globalisation: Prospects and Limits of Private Governance’ (2010) 12(3) *Business and Politics* 17–8.

¹⁶⁹ B Kingsbury, N Krisch, and R Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68(3) *Law and Contemporary Problems* 15–61; J Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a “Post-Regulatory” World’ (2001) 54(1) *Current Legal Problems* 126–7.

¹⁷⁰ G Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17(2) *Law and Society Review* 239–86.

¹⁷¹ RB Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108(2) *American Journal of International Law* 211–70.

¹⁷² See the reference to WTO TBT requirements, and the Principles elaborated by the WTO TBT Committee in documents of standardising and meta-standardising organisations. For ISO: www.iso.org/foreword-supplementary-information.html; ISEAL (2014) Setting social and environmental standards. ISEAL Code of Good Practice Version 6.0, p. 5.

¹⁷³ Loconto and Fouilleux (n 112).

¹⁷⁴ S-H Hong and J You, ‘Limits of Regulatory Responsiveness: Democratic Credentials of Responsive Regulation’ (2018) 12(4) *Regulation & Governance* 413–27.

organisation.¹⁷⁵ Demonstrating procedural fairness and good governance has become a key component of the vigorous legitimising strategies carried out by transnational private regulators, especially from those that need to assert their legitimacy and authority.¹⁷⁶ By strategically introducing deliberative and participatory multi-stakeholder procedures, transnational private regulators signal their trustworthiness and advance their claim of being competent and legitimate rule-makers in the eyes of their many stakeholders. Organisational structures are rapidly changed as a response to criticism, or in light of specific challenges, to enhance a body's perception and legitimacy, to increase market uptake and rule acceptance.¹⁷⁷

Multi-stakeholder features initially appeared in the social and environmental domains, but nowadays characterise many regimes. Multi-stakeholder mechanisms permit non-business actors to be watchdogs and the generation of broad consensus improving effectiveness, transparency and accountability.¹⁷⁸ While the appraisal of multi-stakeholderism has been positive in some legal literature, case studies and empirical accounts from political science are less sanguine. Multi-stakeholder structures are very diverse and in fact conceal limited inclusion of diverse interests.¹⁷⁹ In spite of seemingly inclusive procedures, some bodies are characterised by hidden barriers to deliberation, unequal weight in decision-making and a prevalence of business interests.¹⁸⁰ Socio-legal and political science scholarship demonstrated how collective action of economic interests of Western market players dominates standard-setting even in those schemes with sophisticated procedures mediating between economic and non-economic interests.¹⁸¹

In light of private regulators' strategic mobilisation of governance procedures and structures, the usual proxies to assess good governance within private regulators must be considered carefully, and on a case-by-case empirical assessment looking at actual organisational dynamics over time. Where private regulators possess an organisational structure accounting for different interests, the presence of multiple stakeholders, each with specific demands, creates strategic opportunities for an organisation to dynamically re-orient the pursuit of its goals. Internal political contestation as to how to accomplish regulatory objectives empowers the organisation (the agent) to deliberately address the concerns of certain principals over others, for example by sidelining non-business interests if this does not

¹⁷⁵ P Dauvergne and J Lister, *Eco-business: A Big-brand Takeover of Sustainability* (The MIT Press, 2013).

¹⁷⁶ R Diprose, NI Kurniawan, and K Macdonald, 'Transnational Policy Influence and the Politics of Legitimation' (2019) 32(2) *Governance* 223–40.

¹⁷⁷ Schleifer (n 34).

¹⁷⁸ Meidinger (n 100).

¹⁷⁹ Fransen (n 137).

¹⁸⁰ S Mena and G Palazzo, 'Input and Output Legitimacy of Multi-stakeholder Initiatives' (2012) 22(3) *Business Ethics Quarterly* 527–56.

¹⁸¹ P Paiement, *Transnational Sustainability Laws* (Cambridge University Press, 2017).

compromise its reputation.¹⁸² Adjustments in internal procedures, organisational structures, and standard-setting, are thus associated with the need of private regulators to assert and project their trustworthiness, legitimacy and effectiveness.

The desire to retain and exercise regulatory competences triggers change and evolution to respond to legitimacy demands and precise requests for enrolment by public authority that, if met, ensure legitimisation before its stakeholders, as well as increased complementarity to public rules.¹⁸³ While procedural evolution may positively affect market acceptance and regulatory functions, it may also be shallow as highlighted above in the case of PEFC. Organisations can act to meet external demands only superficially and continue to operate as usual, or exclude certain interests from decision making.

Traditionally, the engagement of public authority with private regulators' procedural mechanisms has been limited. Public authority refrains from directly influencing the substance and procedures of transnational private regulation even where it could be in the position to do so—for example where private standards are used in public measures,¹⁸⁴ or via the possibility of using competition enforcement.¹⁸⁵ Public authority also was satisfied with private regulators' efforts in complying with meta-regulating principles, as it superficially monitors compliance with them, or does not monitor at all. There is no structured form of verification and enforcement of compliance by standardising bodies with the meta-regulatory principles provided in the WTO TBT Agreement. Indirect public control can therefore be easily defused where procedural mechanisms are implemented cosmetically or hijacked by market interests.

Public regulators find themselves in a weak position to impose conditions to private rule-makers exercising regulatory functions that they cannot exercise and that are subject to different, and at times conflicting, requests from their own key stakeholders.¹⁸⁶ Cognitive biases as a result of supervisor-supervisee interaction, path dependencies and cultural capture can all justify the lack of timely reaction by the public regulators.¹⁸⁷ Formal or informal enlistment contributes to further transferring regulatory leadership and

¹⁸² LH Gulbrandsen and G Auld, 'Contested Accountability Logics in Evolving Non-state Certification for Fisheries Sustainability' (2016) 16(2) *Global Environmental Politics* 42–60.

¹⁸³ Overdevest and Zeitlin (n 85) 44.

¹⁸⁴ E Partiti, 'Trust in Global Governance. Ensuring Trustworthiness of Transnational Private Regulation' (2020) 52(2) *NYU Journal of International Law and Politics* 466–8.

¹⁸⁵ At the EU and national levels, despite competition law's safe harbour provisions for standardisation agreements that are non-mandatory, open and transparent, verification of these requirements through enforcement remains minimal.

¹⁸⁶ Black (n 165) 156.

¹⁸⁷ C Needham, 'Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action' (2010) 78 *Fordham Law Review* 2329–55; and J Kwak, 'Cultural Capture and the Financial Crisis' in D Carpenter and D Moss (eds), *Preventing Regulatory Capture – Special Interest Influence and How to Limit It* (Cambridge University Press, 2014).

power to operate unconstrained where private regulators act in a position of monopoly because of their expertise.¹⁸⁸ Private bodies may thus remain only partially affected by forms of political and legal accountability. Some even argued that the ‘publicisation’ of private actors remains bound to fail altogether as states lacking technical and practical capacity to regulate contemporary phenomena simply cannot do without private regulators. In this view, tolerating transnational private regulators’ unbounded rule-making may just be the price to pay for regulating complexity.¹⁸⁹

5. Conclusion

Organisational forms, procedural rules, decision-making processes of transnational private rule-maker as well as rule-making outcomes and forms appeared and evolved over time as a response to pressures and demands from within and outside these organisations. This evolution, in turn, cements their trustworthiness before public authority, which perceives them as reliable complement of rule-making. Public endorsement further reinforces and legitimises private rule-making as a regulatory tool. Empirically-grounded accounts foregrounding the emergence, evolution and the associated resilience of transnational private regulators remain however scant in legal and regulatory scholarship. The structures, characteristics, internal mechanics, rules and behaviour of rule-making participants and the overarching ecology of private regulation remains also systematically underdeveloped.

This article sought to contribute an analytical lens to enable further empirical investigation of transnational private regulators. When applied in practice, this lens can enable a more nuanced understanding of their dynamic evolution and interactions with public regulators, in the face of crises.¹⁹⁰ An analytical lens accounting for the dynamism of transnational private regulators casts new light over the variety of organisational goals, functioning, reasons for success and proliferation of transnational private regulators. Analysing the evolution of private regulators in connection to critical events such as regulatory and organisational crises allows us to appreciate not just their resilience but also the possible expansion of their regulatory functions at the expense of public authority.

Regulatory crises may lead to the emergence or further consolidation of private regulators only marginally concerned with public interest goals.

¹⁸⁸ W Mattli and J Seddon, ‘New Organisational Leadership: Non-state Actors in Global Economic Governance’ (2015) 6(3) *Global Policy* 266–76.

¹⁸⁹ FL Stewart, ‘The Corporation, New Governance, and the Power of the Publicisation Narrative’ (2014) 21(2) *Indiana Journal of Global Legal Studies* 513–51.

¹⁹⁰ This framework cannot be confirmed on the basis of existing empirical studies alone, of which there are too few, but is meant to be further developed and refined in its future application to empirical case studies.

Organisational change spurred by different considerations also alters the complementarity between public and private rules, and brings to the fore competitive relations where private regimes are more relaxed, ineffectual and symbolic. Public regulatory intervention can reduce the margin of autonomy for private rules, but competitive relations may still emerge. A dynamic perspective also matters for the possibility to supervise and publicise transnational private regulators, most obviously when the usual procedural proxies through which to appraise ‘good governance’ are affected.

The perspective suggested here calls for dynamic case study-based future research. Tracking responses to critical junctures by various private regulators would determine a taxonomy of evolutionary responses and outcomes—with the awareness that each regulatory domain may be characterised by different drivers, constraints and strategies. What type of regulatory solutions do private regulators design under the pressure of various stakeholders and crises? How do private regulators respond to public authorities’ interventions that affect their operations, as well as legitimacy and accountability demands from different constituencies? Do crises and regulatory failures bring back rule-making competences to public authority and, if so, to what extent and under which conditions? Or do crises inevitably expand the competences of private regulators? What variations between these bodies, the interests represented, their relationship with public authority and other contextual elements can support different outcomes? Regulatory crises that led to the establishment of private regulators may foreground legitimising functions of private bodies, but also conceal the successful assertion of ‘light’ forms of rule-making while a major disaster may demand stronger forms of intervention. Why then public regimes do not emerge?

Procedures and functioning of organisations are mapped and evaluated normatively, but in legal studies are not always explained in light of power and political relations. Carefully discerning the *modus operandi* and the output of private regulators, and identifying interests benefitting from specific configurations and forms, could empower public authority to better design conditions and mechanisms to identify private regulators worthy of structured association with public authority and the consequent growth in regulatory space. This would ultimately also allow understanding potential shortcomings that affect collective action of non-business interests in private bodies and assisting legal and regulatory scholars in designing and prescribing mechanisms for better inclusion of beneficiaries and under-represented interests.

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