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*“Introduction –
Regulating Private Regulators: Understanding
the Role of Private Law”*

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FACULTY OF LAW

Introduction – Regulating Private Regulators: Understanding the Role of Private Law

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1. Setting the scene

A consumer finds the t-shirt he bought does not meet the retailer's corporate social responsibility (CSR) policy. A user of a social networking service sees his online content removed by the platform operator for reasons not contained in the platform's community norms. A patient suffers harm because the medical device used for his treatment was falsely approved to conform to the applicable safety standards. Each individual brings an action against the private actor that regulates the economic activity involved. In the absence of clear laws and regulations, how should the court respond? Should it deny the action and thus preserve the autonomy of the private regulator to set and enforce non-state rules at the expense of the plaintiff's interests? Or should it allow the action and require the private regulator to meet accepted principles of rule-making and decision-making, such as participation, fairness, reasonableness, and transparency?

These are essentially questions of whether and how to regulate private regulators. The contributions in this Special Issue begin to answer that question by exploring the role that *private law* has in governing the regulatory activities of private, non-state actors. Private actors have historically played an important role in rule-making, monitoring and enforcement in economic sectors such as commercial trade, banking, food and transport.¹ As such, their activities frequently preceded the elaboration of norms of public regulation by states. The privatisation of public services and the rise of "regulatory capitalism" as a paradigm portraying the contemporary division of labour between state and society, have created new ground for private actors to assume key regulatory roles across many domains in western capitalist societies.² Accordingly, since the 1980s we have witnessed a rapid growth of various forms of private regulation

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¹ See for an insightful historical accounts of private regulation in these and other domains: J. BRAITHWAITE & P. DRAHOS, *Global Business Regulation* (Cambridge: Cambridge University Press 2000), p. 491-494.

² D. LEVI-FAUR, "The Global Diffusion of Regulatory Capitalism", 598. *The Annals of the American Academy of Political and Social Science* 2005, p. (12).

in areas as diverse as education,³ finance,⁴ health and safety,⁵ media,⁶ and telecommunications.⁷

In that new paradigm, the question of whether and how to regulate private regulation has been debated mainly by scholars of administrative law and competition law. The principal preoccupation in the administrative law discourse has been to understand how state actors can ensure that, within a regime of private regulation, the public interests in privatised services are protected.⁸ In competition law, the focus has been on how to prevent that private regulation facilitates the pursuit of narrow private interests through manipulation, exclusion or collusion at the expense of the public interest of having competitive markets.⁹ Accordingly, calls have been made in both fields to ensure inclusive, fair, transparent and non-discriminatory private rule-making, monitoring and enforcement.

This Special Issue reviews whether and how private law (contract and tort law in particular) may serve to influence and control private regulators, and ensure they are responsive to public interests.¹⁰ Implicit in this question is the assumption that private law is an appropriate and invaluable mechanism to address the activity (and non-activity) of private regulators. In order to more accurately frame this perspective and show how the contributions in this Special Issue apply it, this Introduction will first briefly turn to the phenomenon of private regulation, its linkages to private law, and the need to exert control over private regulators.

1. Private regulation as a growth industry

The concept of 'private regulation' has emerged in the academic literature to discuss a variety of forms of collective governance of economic activities. 'Regulation' signifies the sustained influence and control over activities following a set of predefined norms with the purpose to attain broadly defined policy outcomes.¹¹ This control is not just limited to the promulgation of norms and

³ S. SCHWARZ & D. F. WESTERHEIJDEN, "Accreditation in the Framework of Evaluation Activities: A Comparative Study in the European Higher Education Area", in: S. Schwarz & D. F. Westerheijden (eds), *Accreditation and Evaluation in the European Higher Education Area* (Dordrecht: Springer Netherlands 2004), pp. 1-41 at 33.

⁴ G. P. MILLER & F. CAFAGGI, *The Governance and Regulation of International Finance* (Cheltenham: Edward Elgar 2013).

⁵ C. HODGES, *European Regulation of Consumer Product Safety* (Oxford: Oxford University Press 2005), 14.

⁶ D. Goldberg, T. Prosser & S. Verhulst (ed.), *Regulating the Changing Media : A Comparative Study / Edited By* (Oxford : New York: Clarendon Press ; Oxford University Press 1998), p. 313.

⁷ P. GENSCHEL, "How Fragmentation Can Improve Co-Ordination: Setting Standards in International Telecommunications", 18. *Organization Studies* 1997, p. (603), 604-607.

⁸ See e.g.: D. C. MICHAEL, "Federal Agency Use of Audited Self-Regulation as a Regulatory Technique", 47. *Administrative Law Review* 1995, p. (171), 244-245; N. GUNNINGHAM & J. REES, "Industry Self-Regulation: An Institutional Perspective", 19. *Law & Policy* 1997, p. (363), 400. See for a critical perspective: J. BLACK, "Constitutionalising Self-Regulation", 59. *Modern Law Review* 1996, p. (24)

⁹ I. MAHER, "Competition Law and Transnational Private Regulatory Regimes: Marking the Cartel Boundary", 38. *Journal of Law and Society* 2011, p. (119); M. MATAIJA, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in Eu Economic Law* (Oxford: Oxford University Press 2016), p. 68-113.

¹⁰ TEUBNER views private law as best-placed legal institution to respond to and 'constitutionalize' forms of private ordering and norm-creation. G. TEUBNER, "After Privatization? The Many Autonomies of Private Law", 51. *Current Legal Problems* 1998, p. (393) at 399-400.

¹¹ R. BALDWIN, M. CAVE & M. LODGE, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press 2010), p. 2-3.

objectives (rule-making or standard-setting), but also involves processes through which information is gathered about compliance with these norms (monitoring) and that attempt to modify non-compliant behaviour so that compliance is achieved (enforcement).¹² 'Private' denotes that the regulation is principally created, administered and funded by private, non-state actors. These involve (networks of) firms, industry associations, NGOs, technical experts or groups of activists. Their activities cause businesses to implement new production standards that make their products safer, improve labour conditions for workers, or contribute to environmental protection. As Büthe has astutely put it: 'they get various economic actors to do things they would otherwise not do.'¹³

Private regulation appears in many guises. As the contributions in this Special Issue demonstrate, it comprises industry self-regulation, in which firms adopt community norms (Dan Wielsch), codes of conduct (Anna Beckers) or technical standards (Jorge Contreras) to guide their own economic behaviour. It is now widely recognized, however, that private regulation has moved beyond the model of collective self-regulation, in which the business actors involved in developing the norms (rule-makers) coincide with those who will apply the rules (rule-takers).¹⁴ Private regulation more and more involves civil society-led or multi-stakeholder initiatives, which may regulate business activities by including not only rule-takers, but also rule-beneficiaries¹⁵ and rule-intermediaries.¹⁶

Even though private regulation is primarily driven by private actors, links with the state or state regulation are abundant. Government may have created a space for private actors to regulate by awarding specific (constitutional) rights, privileges or competences.¹⁷ In other instances, states enrol them for purposes of standard-setting (Barend van Leeuwen, Mislav Mataija, Paul Verbruggen in this Issue), or for the monitoring and enforcing of regulatory compliance (Carola Glinski & Peter Rott, Jan De Bruyne). Moreover, private regulators often take public law as a baseline for their standard-setting and monitoring activities (Timothy Lytton, Tara Van Ho & Carolijn Terwindt). As the various contributions in this Special Issue testify, private regulation is frequently the outcome of an

¹² Cf. C. Hood, H. Rothstein & R. Baldwin (ed.), *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford: Oxford University Press 2001), p. 23-27.

¹³ T. BÜTHE, "Private Regulation in the Global Economy: A (P)Review", 12. *Business and Politics* 2010, p. 1.

¹⁴ See e.g. K. W. ABBOTT & D. SNIDAL, "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State.", in: W. Mattli & N. Woods (eds), *The Politics of Global Regulation* (Princeton: Princeton University Press 2009), pp. 44-88, at 49-50; F. VAN WAARDEN, "Varieties of Private Market Regulation: Problems and Prospects", in: D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Cheltenham: Edward Elgar 2011), pp. 469-485.

¹⁵ Rule-beneficiaries involve consumers, workers and communities who are intended to benefit from the rules adopted. M. KOENIG-ARCHIBUGI & K. MACDONALD, "The Role of Beneficiaries in Transnational Regulatory Processes", 670. *The Annals of the American Academy of Political and Social Science* 2017, p. (36).

¹⁶ Rule-intermediaries involve experts, consultants, networks, and certification and accreditation bodies that facilitate the implementation of rules by rule-takers. K. W. ABBOTT, D. LEVI-FAUR & D. SNIDAL, "Theorizing Regulatory Intermediaries: The Rit Model", 670. *The Annals of the American Academy of Political and Social Science* 2017, p. (14).

¹⁷ See for an early account L. L. JAFFE, "Law Making by Private Groups", 51. *Harvard Law Review* 1937, p. (201).

iterative process of interaction between public and private actors, both at national or international level.

While the privatisation of public services since the 1980s have triggered the rise of private regulatory activities in a wide range of economic sectors, technological advancements and globalisation have created new demands for 'transnational' private regulation.¹⁸ For example, internet and wireless telecommunication networks, as Contreras outlines in his contribution, not only depend on, but are today literally defined by global technical standards. A perceived lack of capacity among states or intergovernmental organizations to regulate global business, and address its social and environmental impact has led to more and more private-rulemaking that has effects beyond national borders.¹⁹ Such effects principally follow from the international character of rule-makers, such as multinational firms that develop CSR policies (Beckers) and the global audit firms that verify compliance with these policies amongst subsidiaries and foreign suppliers (Van Ho & Terwindt).

Following the growth of transnational private rule-making activity, private auditing and certification surged as mechanisms to monitor and enforce compliance. Certification schemes provide a structured process through which independent experts periodically verify conformity of products, processes or management systems with private standards.²⁰ A single standard that enjoys a high market uptake may lead to hundreds of thousands of verification audits, the costs of which are typically borne by the firm applying for certification. An (extreme) example is the private standard adopted by the International Organization for Standardization (ISO) for environmental sustainability (ISO 14001), for which in 2017 there were over 360.000 valid certifications worldwide.²¹ Also in areas such as product quality and safety (see Lytton, Glinski & Rott, De Bruyne in this Issue) and labour conditions (Van Ho & Terwindt) private certification is big business, and has grown into a true global industry with major multinational companies.²²

2. Private law controls over private regulators

The result of these contemporary developments is that in various economic sectors private actors wield significant rule-making and decision-making powers over others: private regulators may effectively determine conditions for market access, implement public policy goals, or otherwise affect the activities of

¹⁸ See in general T. BARTLEY, "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions", 113. *American Journal of Sociology* 2007, p. (297); F. CAFAGGI, "New Foundations of Transnational Private Regulation", 38. *Journal of Law and Society* 2012, p. (20).

¹⁹ F. MAYER & G. GEREFFI, "Regulation and Economic Globalization: Prospects and Limits of Private Governance", 12. *Business and Politics* 2010, p. (1).

²⁰ T. BARTLEY, "Certification as Mode of Social Regulation", in: D. Levi-Faur (eds), *Handbook on the Politics of Regulation* (Cheltenham: Edward Elgar 2011), pp. 441-452.

²¹ See ISO Survey, <https://www.iso.org/the-iso-survey.html> (accessed 1 December 2018).

²² M. M. BLAIR, C. A. WILLIAMS & L.-W. LIN, "The New Role for Assurance Services in Global Commerce", 33. *Journal of Corporation Law* 2008, p. (325). Galland suggests that the global certification industry is further pushing the development of private (management) standards as a strategy to consolidate its own global regulatory power. See J.-P. GALLAND, "Big Third-Party Certifiers and the Construction of Transnational Regulation", 670. *The Annals of the American Academy of Political and Social Science* 2017, p. (263).

businesses, communities and consumers.²³ Yet, private regulators are usually detached from electoral politics associated with the nation state. This presents challenges to their constitutional standing and legitimacy.²⁴ Legal scholarship has grappled with the question of how to control and oversee this influence, and make private actors accountable for regulatory activities. Administrative law, which is the law that controls the exercise of public power, applies to private regulators only in so far as they act on, or are mandated by national, supranational or international law, or when their activity can effectively be considered 'state action'.²⁵ International trade law, as the contribution of Mataija highlights, also demands a link to the state before its disciplines regarding non-discriminatory market access apply. Competition law, too, is limited in controlling private rule-making or decision-making, because its application assumes the manipulation of free competition that unreasonably restraints trade.²⁶ Moreover, it offers redress for pure economic loss only. Physical harm to person or property caused by bad standards (Verbruggen) or poor compliance auditing and inspection (Lytton, Van Ho & Terwindt, Glinski & Rott, De Bruyne) is not protected under competition law.

The contributions in this Special Issue highlight the importance of private law as a complementary mechanism of control and protection for individuals and firms against the exercise of private regulatory power. This perspective is necessary given the limitations of other fields of law in regulating private regulation. It is also original and innovative given that private law scholarship has only incidentally discussed the capacity of private law to control private regulatory activity.

Academic writers have, of course, recognized that private law and private regulation are intimately linked. In commercial law, for example, it is not easy to separate formal private law from those private rules stemming from community usage or custom.²⁷ The two are analytically distinct, however. While private law first and foremost concerns norms developed or recognized by public law bodies through a formalized process (e.g. codifications, statutes, and judicial decisions), private regulation concerns norms set by private actors outside the confines of the state.

²³ In some cases, such as credit rating agencies, private regulators may even directly affect state actors. See for this perspective C. SCOTT, "Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance", 29. *Journal of Law and Society* 2002, p. (56).

²⁴ C. SCOTT, F. CAFAGGI & L. SENDEN, "The Conceptual and Constitutional Challenge of Transnational Private Regulation", 38. *Journal of Law and Society* 2011, p. (1) at 2.

²⁵ See for English law: P. CRAIG, "Public Law and Control over Private Power", in: M. Taggart (eds), *The Province of Administrative Law* (Oxford: Hart Publishing 1997), pp. 196-216 and in U.S. law: J. FREEMAN, "The Private Role in Public Governance", 75. *New York University Law Review* 2000, p. (543), at 574-588. See for a 'global' perspective: B. KINGSBURY, N. KRISCH & R. B. STEWART, "The Emergence of Global Administrative Law", 68. *Law and Contemporary Problems* 2005, p. (15).

²⁶ See in detail for private standardisation B. LUNDQVIST, *Standardization under Eu Competition Rules and Us Antitrust Laws: The Rise and Limits of Self-Regulation* (Cheltenham: Edward Elgar 2014).

²⁷ See also J. BASEDOW, "The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making", 56. *The American Journal of Comparative Law* 2008, p. (703) at 718; V. MAK, "Pluralism in European Private Law", *Cambridge Yearbook of European Law* 2018, p. (202), at 228-231.

The relationship between the two normative systems has primarily been discussed with reference to the ways in which private regulation gains binding effect in private law.²⁸ First, private law enables private rule-making, monitoring or enforcement to have legally binding effects between those who choose to abide by it. The rules of contract law determine the conditions under which private regulation is binding in bi- or multilateral relations (e.g. formation, unilateral promises, sufficient agreement), or vis-à-vis third parties (e.g. third-party beneficiary clauses). The law of associations adds rules on how associations may bind their members to themselves, to fellow-members, and third parties via internal regulations (e.g. codes, guidelines or bylaws). In either case, autonomy or consensus constitutes the primary source for binding effect. While associations have historically been key institutions for private regulation, in the last two decades the use of (commercial) contracts as a means to develop and implement private regulation has gained prominence, in particular in the economic governance global supply chains.²⁹

Second, private regulation may gain binding effect through open norms in private law, such as fairness and reasonableness. Courts frequently use codes of conduct, technical standards or industry guidelines to substantiate these norms, both in contract and tort law. While their approach in doing so varies strongly,³⁰ courts do seem to concur on the position that the defendant's non-compliance with private regulation creates a rebuttable presumption of the violation of his duty of care, and that compliance will not immunize him from liability.³¹ A third way in which the relationship between private law and private regulation has commonly been discussed is where the first requires compliance with the latter. In this case, the legislator has made compliance with private regulation mandatory by recognizing specific private norms or the private entity setting those norms. An example of this relationship we find in the field of company law, where several jurisdictions require companies to comply with a corporate code of governance (or explain why they did not follow the code).³²

Whether and how private law may influence and control the exercise of private regulatory power has been much less explored in recent scholarship.³³ Private

²⁸ See for these two perspectives: F. CAFAGGI, "Private Regulation in European Private Law", in: A. S. Hartkamp e.a. (eds), *Towards a European Civil Code* (Alphen aan den Rijn: Kluwer Law International 2011), pp. 91-126.

²⁹ See for a path-breaking study: M. P. VANDENBERGH, "The New Wal-Mart Effect: The Role of Private Contracting in Global Governance", 54. *UCLA Law Review* 2007, p. (913).

³⁰ Menting shows that courts in the Netherlands have not set a clear policy on the conditions they apply (if any) to determine whether private regulatory norms should be given binding effect in civil litigation. M.-C. Menting, *Industry Codes of Conduct in a Multi-Layered Dutch Private Law* (PhD-thesis Tilburg University 2016), p. 191-256.

³¹ CAFAGGI (n 28), p. 97 (with further references).

³² E. WYMEERSCH, "The Enforcement of Corporate Governance Codes", 6. *Journal of Corporate Law Studies* 2006, p. (113).

³³ Notable exceptions in Europe are G. SPINDLER, "Market Processes, Standardisation and Tort Law", 4. *European Law Journal* 1998, p. (316); TEUBNER (n 10) and F. CAFAGGI, "Rethinking Private Regulation in the European Regulatory Space", in: F. Cafaggi (eds), *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn: Kluwer Law International 2006), pp. 3-75, at 67-75. In the U.S. contract and tort law have previously been considered to provide causes of action to review private rule-making and decision-making. See EDITORIAL NOTE, "Developments in the Law: Judicial Control of Actions of Private Associations", 76. *Harvard Law Review* 1963, p. (983). Since then, few U.S. scholars have addressed the topic.

law sets rules that govern the validity of private regulation as contractual or associational arrangements, as well as rules that determine the liability for harm caused to individuals and firms as a result of private rule-making, monitoring and enforcement activities. Understanding to what extent private law (contract and tort law in particular) may regulate private regulators, thus requires the examination of the application of these validity and liability rules to private regulatory activities. As noted, this assessment presumes that private law is regulatory.

3. Private law as regulation?

This question has been heavily debated in the literature. A traditional, deontological view would reject the idea that private law is regulatory. In this view, private law constitutes a self-referential system having its own principles and concepts in support of bipolar relations between plaintiffs and defendants. The main preoccupation of private law, then, is to achieve internal coherence and consistency, for which corrective justice provides the structure.³⁴ A consequentialist view of private law understands private law through the public policy objectives it pursues, such as the distribution of wealth, the control of risk of harm in society, and deterrence. Scholars engaging in the economic analysis of law are the protagonists of this functional view and seek to assess the efficiency of contract or tort law in delivering on those goals.³⁵ Private law is then seen as a form of public law regulation, the regulatory capacities of which can be measured up to administrative, criminal or tax law.

Again others take a more intermediate position and consider private law as a distinct discourse, yet one that is infused with public policy objectives stemming from economic and social welfare regulation. In contract law, this infusion manifests through the growth of specific regimes for contractual practices (e.g. in sales, credit, rent, construction, labour) where general private law rules failed to adequately address market failures.³⁶ In Europe, the harmonization of national private laws through Directives and Regulations of the European Union (EU) is held to further expand the regulatory function of private law in terms of solving market failures and achieving market integration.³⁷ Also in tort law scholarship, there is an increasing understanding of the potential of tort law to address public policy concerns regarding health, safety and environmental risks through injunctions or (collective) damages actions, in particular where political stalemates bar effective legislative action.³⁸

³⁴ See e.g. E. J. WEINRIB, *The Idea of Private Law* (Oxford: Oxford University Press 2012), p. 19.

³⁵ See e.g. M. J. TREBILCOCK, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press 1993) and S. SHAVELL, "Liability for Harm Versus Regulation of Safety", 13. *The Journal of Legal Studies* 1984, p. 357-374. See for more references on the deterrence function of tort law DE BRUYNE in this Issue.

³⁶ H. COLLINS, *Regulating Contracts* (Oxford: Oxford University Press 1999), 46-62.

³⁷ *Ibid.*, 53-54. See extensively the contributions in F. CAFAGGI & H. MUIR WATT (ed.), *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar 2009) and H.-W. MICKLITZ, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge, Cambridge University Press).

³⁸ See e.g. E. R. DE JONG, "Tort Law and Judicial Risk Regulation: Bipolar and Multipolar Risk Reasoning in Light of Tort Law's Regulatory Effects", 9. *European Journal of Risk Regulation* 2018, p. (14) at 17-21 (with further references); D. A. KYSAR, "The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism", 9. *European Journal of Risk Regulation* 2018, p. (48).

The contributions in this Special Issue align with this intermediate perspective. They assess the actual and potential capacity of private law – being responsive to public policy demands – to regulate rule-making and decision-making activities of private regulators. Such influence or control may for example follow from a change in the governance of rule-making activities, the use of different regulatory instruments, or the development of new procedural and substantive standards. Beckers, for example, shows in her contribution on the development of CSR policies by multinational companies that the form and content of these self-regulatory policies is influenced by the binding effect that contract law may give to these policies. Where such companies want to bind subsidiaries of the corporate group or other firms operating in their global supply chain, they integrate CSR policies in binding contractual arrangements. However, the policies are typically phrased in such a way that they are not binding for consumers, firms and other members of the public that may rely on the policies to purchase goods and services. Neither are the policies binding for beneficiaries, such as employees of supply chain partners or local communities where such partners operate. The will to create binding effects internally and anxiety to be bound externally under private law doctrines on unilateral promises and third-party rights, make multinational firms act strategically in their rule-making activities.

The regulatory effects of private law on private regulators may also be explained by reference to the collective dimension of private regulation.³⁹ A challenge of the validity of private norms may then not only affect the relationship between the rule-maker (defendant) and the individual rule-taker (a firm), but also the relationship between the rule-maker and other rule-takers in the regime, amongst rule-takers generally, and with rule-beneficiaries (e.g. consumers, communities or workers). In his discussion of digital intermediaries such as Facebook and Google as authoritative private regulators of access to information, Wielsch demonstrates that fairness rules for standard contract terms and commercial practices affect the way in which intermediaries may condition who can and cannot access information, and how to share it amongst users. More generally, these private law rules impact on how power is distributed in the regime, and their (*ex officio*) application by national courts offers to users, as Wielsch contends, ‘a kind of constitutional review for non-state law’.

Similarly, litigation on the tort liability between an injured plaintiff and a private regulator for its development of inadequate product standards or poor monitoring will also frequently affect the way in which the latter generally goes about its activities. As Lytton and Van Ho & Terwindt stress, a court’s finding that a private auditor owes a duty of care to the injured plaintiff to exercise reasonable care in performing audits exposes the auditor to civil liability. This threat, by extension, creates incentives for the private auditor to adopt new substantive standards specifying the required safety practices for products and services, as well as new procedural standards for conducting audits and inspections. Accordingly, the relation between the private regulator and (other)

³⁹ See also CAFAGGI (n 33), p. 68 and 73.

rule-takers, among rule-takers themselves, and with rule-beneficiaries is recalibrated.

To be sure, the contributions acknowledge that the regulatory effects of private law are restrained and imperfect. For example, private law's normative framework is structured around rules that are abstract and general in character (e.g. fairness, reasonableness). This characteristic undermines the ability of these rules to be regulatory, as such a purpose presupposes a clear understanding of the scope and content of the rules amongst rule addressees.⁴⁰ Contreras makes this point in relation to the general private law rules governing the interpretation of contracts. In the case of global technical standards such as Wi-Fi, Bluetooth and USB, private standards bodies have developed internal rules to minimize the risk that participants holding patents that are essential to the development of standards frustrate the adoption and implementation of those standards. Local contract law provides the normative framework for the interpretation of the internal rules, yet threatens the rules' consistency as the law's meaning and application varies in different jurisdictions. Contreras proposes courts and arbitrators in the field to use a *lex mercatoria* – a system of rules administered and interpreted not by national and state courts, but by the expert practitioners of a particular trade – to supersede legal interpretations imposed by local contract law. Greater consistency and predictability would be the result.

A victim may also be reluctant to initiate litigation against a private regulator because in the individual case the costs exceed the anticipated benefits. As Lytton notes in his contribution on the liability of private food safety auditors, victims of foodborne illness rarely make the investments necessary to identify the root cause of contamination. Legal claims arising out of foodborne illness are relatively rare due to collective action problems. The volume of litigation may thus never be sufficient to have much impact on private auditors.⁴¹ What is more, the range of available remedies or sanctions is limited in private law. Particular types of harm (in particular pure economic loss) are more difficult to recover and the use of sanctions (i.e. punitive damages) may be barred.⁴² Flexibility in application of remedies and sanction also is limited. Scholars of regulation have forcefully argued that regulatory effectiveness depends on the availability of a variety of measures and sanctions (including punitive sanctions), and the ability to apply these sanctions flexibly, also taking into account previous conduct.⁴³ Such understanding is generally absent in civil litigation, as remedies and sanctions apply to particular and isolated activity, independent of previous

⁴⁰ See in general C. DIVER, "The Optimal Precision of Administrative Rules", 93. *Yale Law Journal* 1983, p. (65) and COLLINS (n 36), p. 76-79.

⁴¹ In this contribution LYTTON goes on to discuss empirical studies to argue that liability exposure can promote consistency in the quality of professional services.

⁴² See in general M. BUSANI & V. V. PALMER (eds.), *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press 2003).

⁴³ I. AYRES & J. BRAITHWAITE, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press 1992).

conduct or private relationships.⁴⁴ A damages award may then just be too little, too late.⁴⁵

Private law should not be discounted as a regulatory instrument, however. It has some features that enable it to play an important regulatory role and exert influence over the activities of private regulators. Regardless of the outcome of civil litigation, the litigation process constitutes an important way in which the private regulator must publicly account for its rule-making and decision-making. The filing and pleading of a case may create media coverage that influences the way in which the public, industry and government think about responsibilities of the private regulator. Depending on the applicable rules of civil procedure, discovery may also unearth new information about the risks involved in the regulatory activity and the appropriateness of the responses by the defendant.⁴⁶ Importantly, courts have a duty to adjudicate and must therefore provide an answer to the complaining plaintiff. An independent state institution is called upon to assess the conduct of a private regulator and must, to that end, develop standards on the appropriate role and responsibility of the private regulator in addressing a certain risk.⁴⁷ Moreover, coordinated litigation and class actions may enable injured plaintiffs to overcome the collective action problems that prevent individuals from bringing an action against private regulators. Class actions have long been considered a potent form of ‘regulation through litigation’ to address health and safety risks.⁴⁸ As the contributions of Van Ho & Terwindt and Glinksi & Rott show, class actions are now used as a litigation device against private auditors who allegedly performed negligent audits to verify manufacturer compliance with labour and product safety standards. These actions also help to address the limited third-party effects civil litigation usually has.⁴⁹

4. In this Special Issue

This Issue comprises ten substantive contributions discussing the role of private law in governing the activities of private regulators. The contributions are organised in three clusters.

5.1 Private Law and the Governance of Global Private Regulation

The first cluster assesses the impact of private law, contract law in particular, on the governance of global private standards. *Dan Wielsch* inquires into the potential of private law rules to govern the way in which giant digital intermediaries regulate user access to information. Through the use of standardized contracts and technological code, social networks such as Facebook create global private normative orders, in which control over the flow and content of information is mediated by self-enforcing technology. Private law is

⁴⁴ COLLINS (n 36), p. 90-91.

⁴⁵ See also CAFAGGI (n 33), p. 71

⁴⁶ KYSAR (n 38), p. 54. See also LYTTON in this Issue.

⁴⁷ *Ibid*, p. 54.

⁴⁸ See e.g. W. K. VISCUSI (ed.), *Regulation through Litigation* (Washington D.C.: AEI-Brookings Joint Center for Regulatory Studies 2002), p. 7-20.

⁴⁹ Cf. SPINDLER (n 33), p. 332.

not only primary to the constitution of such orders, but also sets secondary rules (i.e. rules of unfair contract terms and unfair competition law) that determine the legitimacy of private regulation by digital intermediaries. As Wielsch contends, these rules, which jointly govern the liability of digital intermediaries and the validity of their private norms and decisions, mimic the role constitutional law has in relation to governmental action and enable, in substance, a constitutional review of private regulation. By discussing case law on the liability of digital intermediaries and the validity of their rule-making, the contribution shows how private regulators of cyberspace are challenged to ensure that the regulatory activities meet standards of transparency, certainty and procedural fairness.

Next, *Anna Beckers* presents the case of CSR policies set by multinational companies as a form of global self-regulation. Such policies govern the behaviour of subsidiaries (and their employees) in the corporate group, and suppliers in transnational supply chains. Contract law enables multinational companies to design CSR policies in such a way that they are internally binding for subsidiaries and foreign suppliers. However, contract law does not generally create rights for third parties who stand to benefit from these policies, e.g. workers in foreign factories, or local communities in the vicinity of production facilities, unless explicitly acknowledged. The private law domains of unfair contract terms and commercial practice (as regulated by the EU) offer protection to consumers only, be it under limited circumstances.

However, development politics, civil society and (some) scholars have voiced calls to review these and other private law doctrines affecting CSR policies with a view to create more opportunities for third party to enforce compliance with such policies on multinational companies. This leads Beckers to investigate the likely impact of the expanded regulatory role of private law that is suggested by the calls. Basing herself on insights from organization theory and socio-economic studies, Beckers warns that a bigger regulatory role for private law is only appropriate if business leadership and corporate culture supports it. If not, the likely effect is that companies will abandon CSR policies as a tool to regulate subsidiaries and supply chains in the way they do now. Alternatively, policies will be redrafted to ensure that they remain internally binding, but externally voluntary.

Jorge Contreras discusses the influence of national and state contract law in Europe and the United States (U.S.) on the development and application of global IT standards, which determine large parts of the technology infrastructure that companies around the world use to ensure the interoperability of products. In the practice of developing these standards several problems around intellectual property have transpired. A key issue is that owners of patents that are considered essential for products to comply with the standard, so-called 'standards-essential patents' (SEPs) can 'hold-up' the market by requiring excessive royalty rates after a standard has been widely implemented and manufacturers have made considerable investments in the standardized technology. Bodies overseeing the development of IT-related standards have set

policies in place to manage these and other problems, including the requirement that firms that participate in the development of standards license SEPs on terms that are 'fair, reasonable and nondiscriminatory' (FRAND).

While these policies have transnational effects given the international character of the standards bodies and their activities, it is the contract law of a specific jurisdiction that governs the interpretation of these policies. As Contreras shows, court interpretations of FRAND terms vary per jurisdiction and this effectively undermines the uniform solutions that standards bodies have sought to craft in response to problems in global standards development. Private international law rules are regulatory in the sense that they administer regulatory competition between jurisdictions to attract cross-border litigation.⁵⁰ However, they do not offer consistency and predictability in outcomes. Instead, as Contreras writes, the rules lead to 'an unproductive race to the courthouse among litigants and a race to the bottom among jurisdictions'. A solution is to be found in a new *lex mercatoria* for global IT standards, a system of rules and interpretations administered by expert practitioners in the field which courts and arbitral institutions can employ when resolving disputes regarding the standardisation policies. Contreras analyses how this new (meta-)standard for standards interpretation should be developed, by whom, and how it should be used once developed.

5.2 Regulating Technical Standardisation: Beyond the Public-Private Divide

The second cluster of contributions specifically focus on technical standardisation. This form of private regulation is principally developed by experts who set out technical specifications for the quality and performance of a given product, practice or procedure.⁵¹ *Barend van Leeuwen* first stresses the imperfections of private law in regulating technical standardization from the perspective of European market integration. Private law, as it stands, is frequently used by courts to determine the appropriate contractual standard of care or the required standard of care in tort cases based on fault.⁵² This also applies to technical standards that are developed within the EU's New Approach framework, which is a not so new legislative framework adopted in the 1980s to improve the free movement of goods in the European internal market. The application of these European private standards in private law disputes, so holds the Court of Justice of the EU, is not required or controlled by EU law. Instead, national private law applies and sets the terms for liability in contract or in tort law once the conforming products are placed on the market.⁵³

⁵⁰ See in general on the regulatory dimension of private international law in global governance: R. WAI, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", 40. *Columbia Journal of Transnational Law* 2002, p. (209).

⁵¹ Cf. T. BÜTHE & W. MATTLI, *The New Global Rulers. The Privatization of Regulation in the World Economy* (Princeton: Princeton University Press 2011), p. 5 and 17; N. Brunsson & B. Jacobsson (ed.), *A World of Standards* (Oxford: Oxford University Press 2001), 4-5.

⁵² See at notes 30 and 31 *supra*.

⁵³ ECJ 27 October 2016, C-613/14, *James Elliott Construction Ltd v. Irish Asphalt Ltd*, ECLI:EU:C:2016:821; ECJ 16 February 2017, C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128. See for earlier accounts of the relationship between European technical standards and civil liability: F. CAFAGGI, "A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities", in: F. Cafaggi (eds), *The Institutional Framework of European Private Law*

Van Leeuwen critiques this position because it undermines the effectiveness of the New Approach and the functioning of the internal market more generally. The approach of the European Court of Justice (ECJ), Van Leeuwen argues, denies that European standards also concern the conformity of products once placed on the market and put to use, while private (contract) law also sets conditions for market access. Moreover, the position does not match the approach the Court has taken in its jurisprudence regarding the free movement of goods under Article 34 of the Treaty on the Functioning of the EU. Van Leeuwen therefore argues that, from the perspective of market integration, it is best to expand the application of the New Approach, along with the ECJ's case law, to private law disputes. Accordingly, closer coordination between EU internal market law and national private law would be ensured.

Mislav Mataija offers us a perspective on the regulation of technical standardisation from international trade law. States increasingly rely on private bodies to develop technical standards to regulate cross-border trade in products and services. As noted,⁵⁴ also lead firms in global supply chains more and more require producers and suppliers overseas to meet specific technical standards as a condition to contract. These trends create concerns over market access and barriers to trade, in particular for small-and-medium-sized enterprises located in developing economies, for meeting technical standards requires skills and knowledge, and is thus costly. Mataija investigates the strengths and weaknesses of international trade law, and in particular the Agreement on Technical Barriers to Trade (TBT) of the World Trade Organization (WTO), in addressing and regulating the growing influence of technical standardization on global trade in commodities. As such, his analysis complements the other contributions in this Special Issue in important ways since it also carves out the space for private law to complement and fill the regulatory gaps left by WTO law.

Mataija finds that the application of the TBT Agreement to technical standardisation revolves around the establishment of a link between the standards and some activity by a WTO Member State. While there are several ways in which such a connexion can be established, the norms of the TBT Agreement that prohibit technical standards to be discriminatory and more trade-restrictive than necessary, and require compliance with procedural safeguards such as notice and comment, transparency and reason-giving, only kick in when the link is found. Mataija discusses in detail how the link to state action can be established following the case law developed by the WTO's dispute resolution bodies. However, he also identifies ways in which WTO law may more indirectly motivate private bodies to meet its substantive and procedural demands for technical standardisation. These indirect ways of influencing the governance of private bodies, Mataija hypothesises, are likely to be more important in practice given the institutional limitations that surround the direct

(Oxford: Oxford University Press 2006), pp. 191-243; G. SPINDLER, "Interaction between Product Liability and Regulation at the European Level", in: F. Cafaggi & H. Muir Watt (eds), *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar 2009), pp. 243-258.

⁵⁴ See at notes 19 and 29 *supra*.

disciplining of these bodies via WTO litigation, which only concerns disputes amongst Member States. He therefore suggests to look beyond the direct enforcement of WTO law as a tool to regulate technical standardisation and explore how substantive and procedural demands of international trade law may be leveraged to bolster the governance of private standards bodies outside the confines of WTO litigation.

Tort litigation may present another domain through which the governance of private standards bodies may be strengthened to meet substantive and procedural principles of justice. *Paul Verbruggen* is concerned with tort liability for the development of technical product standards and inquires to what extent the exposure of standards bodies to such liability may foster good governance in private standardization. As private standardization is an inherently political game with high stakes for the firms concerned, these firms are keen to influence standardization and ensure that it meets their private interests. Standards bodies that operate on the basis of open, inclusive and transparent procedures of decision-making, base their standards on the state-of-the-art of scientific research, and regularly revise standards in the light of gained experiences are said to be less prone to such influence.

Does tort law generate incentives for private standards bodies to comply with good governance principles such as inclusiveness, transparency and reasoned decision-making? Drawing on case law in the U.S. and EU regarding the liability for negligent standardization, Verbruggen demonstrates that tort law currently offers limited incentives for standards bodies to comply with good governance principles and improve the quality and integrity of private standardization. The lack of a specific relationship between the plaintiff and defendant standards body, and considerations of policy and justice have frequently led courts in the U.S. to argue that the defendant standards body does not owe a duty of reasonable care to the plaintiff. As a result, these private regulators were frequently not answerable to plaintiffs in tort law claims for the effects of standardization. Courts in the EU have hardly been concerned with the matter: case law on the liability for negligent standardization is virtually absent. Even if a standards body is considered to owe a duty of care to those at risk of suffering a loss from negligently developed standards, compliance with good governance principles is not straightforward. In a breach inquiry, courts (and juries in the U.S.) generally make such compliance dependent on an ex post weighing of conflicting interests in the light of the circumstances of the case. This balancing, Verbruggen argues for the case of negligent standardization, should at least involve consideration of the magnitude of risk the standards body is concerned with; the body's existing internal rules and procedures; the costs concerned with the (re)organization of such rules and procedures to improve standardization processes; and the character and societal benefit of private standardization more generally.

5.3 Liability of Private Auditors in Health & Safety

The third and last cluster of contributions focus on the liability of private auditors, inspectors and/or certifiers as key actors involved in the monitoring

and enforcement of health and safety regulation. The contributions assess to what extent their activities are captured by contemporary tort law doctrines and what the potential implications of (the threat) of such liability is to their commercial operations. *Timothy Lytton* first discusses the example of private food safety auditing of fresh produce (i.e. vegetables and fruits) in the agri-food sector, where private auditing is pervasive.⁵⁵ Lytton notes that private auditing is said to suffer from two problems. First, it operates on the basis of overly stringent standards that are unsupported by science or cost-benefit analysis. Second, auditors are typically paid by the farmers whom they audit, thus creating a conflict of interest that leads some auditors to reduce the rigor of their audits and award certification lightly.

Lytton discusses how these problems, which are likely to surface in other sectors as well, have developed in the U.S. He argues that liability exposure of private auditors created by the imposition of a common law duty to exercise reasonable care in conducting audits is instrumental in addressing these problems. Such exposure creates incentives for auditors to take into account the cost-effectiveness of auditing standards and improve the rigor and integrity their activities. Lytton illustrates this anticipated effect of U.S. tort law on private auditing practices by discussing the litigation triggered by the widely publicized *Listeria* contamination of cantaloupes, which caused 147 reported cases of serious illness and thirty-three deaths across the U.S.

Tara Van Ho and *Carolijn Terwindt* discuss the exposure of social auditors to tort liability in relation to compliance monitoring of health and safety standards for workers in global supply chains. Since the 1990s private, social audits have become a popular tool for multinational companies to verify adherence to social (labour) standards, in particular in the garments sector. However, the fire that raged in the factory of Ali Enterprises in Karachi, Pakistan in 2012 (killing at least 255 factory workers and over 30 injured),⁵⁶ and the collapse of the Rana Plaza building in Dhaka, Bangladesh in 2013 (at least 1130 workers died and over 2500 were injured)⁵⁷ have led many to question the quality and integrity of the monitoring activities of social auditors.

Van Ho and Terwindt assess whether social auditors can be held to owe a duty of care to injured workers of audited companies under the English tort of negligence. English case law remains a very relevant source for courts in common law jurisdictions hearing cases on auditor liability. A Canadian court recently denied to impose a duty of care in a negligence action brought by a number of Rana Plaza victims against the social auditor involved. The court, applying Bangladesh common law, also based its decision on English cases

⁵⁵ In 2005, the directors for food quality and safety of the 16 biggest food retailers in the world estimated that 50–75% of fruits and vegetables sold in their supermarket chains were audited and certified by private actors based on private standards. Since then this number is expected to have risen significantly due to increase used of private certification schemes in the sector. See L. FULPONI, "Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in Oecd Countries", 31. *Food Policy* 2006, p. (1) at 7.

⁵⁶ https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_629839/lang-en/index.htm.

⁵⁷ https://www.ilo.org/global/topics/geip/WCMS_614394/lang-en/index.htm.

concerning the liability of financial auditors, whose liability for negligent audits can only be established under very restrictive conditions.⁵⁸ Van Ho and Terwindt argue that courts should not rely on the analogy with financial auditors. The function and nature of social audits, as well the type of harm caused to workers by negligent audits are fundamentally different and justify a different approach to determine the existence of a duty of care for social auditors to injured workers. The degree of control social auditors have over the health and safety conditions that workers are exposed, and the vulnerable position of workers in global supply chains, the authors contend, would argue for the imposition of a non-delegable duty of care, which imputes a positive duty on social auditors to protect workers of audited companies from harm. As the Canadian case is on appeal at the time of writing, the arguments presented by Van Ho and Terwindt are timely and seek to contribute to the ongoing debate about the scope of auditor responsibility in transnational labour governance.

Carola Glinski and *Peter Rott* discuss the infamous breast implants scandal around the French manufacturer Poly Implant Prothèse (PIP) to analyse the role of tort law in keeping private certification bodies in check when auditing the design of medical devices and inspecting production facilities. The PIP scandal involves the use of substandard silicone gel, making the implants susceptible to premature rupture and leaking of silicone. The defective implants are alleged to have caused physical and mental harm to thousands and thousands of women around the world. After the bankruptcy of PIP in 2010, the certification body involved in the placing on the market of the PIP implants has been a principal target of litigation.

Glinski and Rott offer a comparative analysis of this litigation against the background of the prominent role that private certification bodies perform in the regulatory regime for trade in medical devices in the EU. The contributors argue that tort law is an invaluable instrument that helps to ensure that certification bodies comply with their duties under EU medical devices law and, thus, contribute to the protection of the health and safety of patients. As such, tort law is a necessary complement to fill the gaps left by public law frameworks and enable victims to obtain compensation for the harm they have suffered. The threat of being liable for damages, together with the recent reforms of the monitoring duties of certification bodies by the EU legislature, has already had an impact the certification business. As Glinski and Rott note, 25 per cent of the bodies no longer offer their services for medical devices. The hope is that remaining players on the European certification market will offer safety audits and inspections that meet the highest professional standards congruent with the risks the inspected devices pose to patients.

Finally, *Jan De Bruyne* assesses the role of tort law in the regulation of classification societies, arguably the oldest institutional form of private safety auditing. Classification societies emerged in the 1800s as an industry to offer paid-for services to inspect and certify the seaworthiness of ships. They soon

⁵⁸ *Das v. George Weston Limited*, 2017 ONSC 4129 (decision of 5 July 2017), paras. 404-458.

became key intermediaries in the global maritime sector between, on the one hand, ship owners and shipyards and, on the other hand, cargo owners, transporters, investors, creditors and insurers. They are now also enrolled by Flag States to implement and enforce safety obligations at sea under international maritime law. However, a number of maritime disasters have shed a dark light on classification societies as private safety regulators. The disasters have led some to question the accuracy and reliability of certificates awarded, in particular because classification societies operate on the basis of a commercial fee paid by the same entity that is certified.

De Bruyne analyses whether tort law provides sufficient incentives for classification societies to accurately assess the seaworthiness of ships and deter them from awarding certificates all too lightly. His findings suggest that tort law does not create a sufficient deterrent to induce societies to increase the accuracy of their inspections, in particular where they act within the scope of public law competences delegated under maritime safety law. The absence of a single, uniform international legal framework governing the liability of classification societies, the limited success of damages claims in national tort law, and the award by courts of sovereign immunities, effectively undermine the deterrent function of tort law here. To leverage that function in the short term, De Bruyne suggests, policymakers could consider a reversal of the burden of proof regarding negligence to benefit the position of plaintiffs or restrain the possibilities for classification societies to rely on sovereign immunity.

5. Conclusions

Taken together, the contributions in this Special Issue demonstrate that regulatory activities of private actors are increasingly subject to private law scrutiny. Doctrines in contract law (e.g. unilateral promises, unfair terms, interpretation) and tort law (e.g. unfair commercial practices, negligent misstatements, affirmative duties) serve as key sources to initiate civil proceedings against private regulators and hold them publicly accountable for rule-making, monitoring and enforcement activities. Civil litigation may simply be the only independent review mechanism available to do so, since the activities of the private regulators involved frequently escape the purview of other fields of law, in particular administrative law, competition law or trade law. Litigation is then typically focused on damages as a remedy. Applications for injunctive relief, for example to ensure the participation of plaintiffs in the adoption of a code of conduct (Beckers) or to prevent the promulgation of a specific private standard,⁵⁹ are rare.

The contributions also recognize the potential that contract and tort law have to regulate private regulators. Perhaps most fundamentally, as Wielsch notes, private law constitutes private regulators and sets rules for their validity and

⁵⁹ See e.g. *Appalachian Power Co. v. American Institute of Certified Pub. Accountants* 20 177 F.Supp. 345 (S.D.N.Y.), *aff'd per curiam*, 268 F.2d 844 (2d Cir.), *cert. denied*, 361 U.S. 887 (1959) (plaintiffs' application for injunction to restrain an professional association for accountants to adopt new accounting standards is denied because the association would not be liable for any (pure economic) losses the plaintiffs would allegedly sustain as a result of the adverse effects the new standards would have on plaintiffs' ability to obtain credit.)

liability that, if enforced, lead to changes in the scope and depth of private regulation. Civil litigation puts the private regulator on the spot and, regardless of the outcome, they are required to defend and revisit their policy choices before an independent forum. As Wielsch, Beckers, Verbruggen, Lytton, and Van Ho and Terwindt show, liability exposure has effectively lead a variety of private regulators to change internal procedural standards for rule-making and decision-making, and/or substantive standards regulating the domain they oversee. A credible threat of liability may not always have desired effects, however. As Beckers and Verbruggen discuss, an increased risk of liability may also result in the lowering of ambitions and standards, or may drive out private regulators from a particular field. The implications of increase liability exposure is generally part of the policy considerations that courts in common law jurisdictions deploy to determine whether a private regulator owes a duty of care in negligence to third parties at risk of suffering a loss caused by its regulatory activities.

To be sure, the contributors also highlight apparent gaps in the regulatory capacity of private law. Contreras, as noted, draws attention to the fundamental mismatch between the policies that surround the fair and non-discriminatory use of global IT standards and the national contract law rules that govern their interpretation. The mismatch undermines the desired uniformity in policy application. Wielsch and Beckers welcome such interventions based on national private law, yet for a very different purpose, namely that of keeping leverage over global private regulators and the significant power they wield over individuals.

A major obstacle in establishing the tort liability of private regulators, Verbruggen, Lytton, Van Ho and Terwindt, Glinski and Rott, and Jan De Bruyne note, is the duty of care element. Courts in common law jurisdictions have been reluctant to impose on private standards bodies and auditors a duty to act with reasonable care to those at risk of suffering a loss caused by their regulatory activities. These courts have frequently reasoned that a duty cannot be imposed because of the limited foreseeability of harm that the regulator's conduct would cause to the plaintiff, the lack of closeness between the regulator's conduct and the plaintiff's harm, and the great burden of liability for the regulator and society if a duty were to be imposed. The qualification of the regulator's conduct as nonfeasance (i.e. an omission) would also argue against the imposition of a duty. However, where the loss sustained concerns physical harm (either personal injury or property damage) rather than pure economic loss, courts show a greater willingness to accept a duty of care for private regulators. The regulatory potential of tort law therefore appears to be stronger in the domain of health and safety than, for example, in banking and finance since the type of loss concerned receives more protection in tort law.⁶⁰

Private law, it is clear, plays an important, yet incomplete role in regulating private regulators. Given its nature and functions, it cannot and should not

⁶⁰ See generally D. DOBBS, P. T. HAYDEN & E. M. BUBLICK, *Hornbook on Torts* (St. Paul, Minn: West Academic Publishing 2016), p. 5; C. VAN DAM, *European Tort Law* (Oxford: Oxford University Press 2013), p. 171, 208.

replace the control exerted by other fields of law over private regulation.⁶¹ Private law complements other fields of law in that role, but it also requires these other fields to complement itself. Van Leeuwen, Mataija, and Glinski and Rott present different insight of the ways in which that mutual complementarity should take shape. The optimal mix of public and private law in regulating private regulatory power will likely depend on the specific actors and risks involved in the regulated domain. The collection of contributions in this Special Issue will hopefully inspire other legal scholars for the years to come to further explore the complementarities between public and private law in addressing the pertinent influence of private regulators in the public domain.

⁶¹ See also SPINDLER (n 33), p. 332.