Escola Nacional de Administração Pública

Doutorado Profissional em Políticas Públicas

Diego Muniz Benedetti

Private Regulation Instruments as a Master Tool for Regulatory Reform Following OECD Regulatory Policy Directives

Brasília-DF

2024

B462p Benedetti, Diego Muniz

Private regulation instruments as a master tool for regulatory reform following OECD Regulatory Policy Directives/ Diego Muniz Benedetti. -- Brasília: Enap, 2024.

62 f. : il.

Tese (Doutorado – Programa de Doutorado Profissional em Políticas Públicas) -- Escola Nacional de Administração Pública, 2024.

Orientação: Prof. Dr. Marcelo de Carvalho Griebeler

1. Reforma regulatória. 2. Governança. 3. Regulação. 4. Regulação privada. I. Título. II. Griebeler, Marcelo de Carvalho orient.

CDD 352.8

Bibliotecária: Kelly Lemos da Silva – CRB1/1880

Escola Nacional de Administração Pública

TESE DE DOUTORADO PROFISSIONAL EM POLÍTICAS PÚBLICAS

Private Regulation Instruments as a Master Tool for Regulatory Reform Following OECD Regulatory Policy Directives

DIEGO MUNIZ BENEDETTI

ORIENTADOR: MARCELO DE CARVALHO GRIEBELER

Brasília, Janeiro de 2024

Escola Nacional de Administração Pública

TESE DE DOUTORADO PROFISSIONAL EM POLÍTICAS PÚBLICAS

Private Regulation Instruments as a Master Tool for Regulatory Reform Following OECD Regulatory Policy Directives

DIEGO MUNIZ BENEDETTI

Tese de doutorado submetida à Escola Nacional de Administração Pública como parte dos requisitos para a obtenção do título de Doutor.

Banca Examinadora

_____

Marcelo de Carvalho Griebele, Ph.D. (orientador)

_____

Julia Maurmann Ximenes, PhD. (examinadora)

_____

Julio Cesar Andrade de Abreu, PhD. (examinador)

_____

Diana Vaz de Lima, PhD. (examinadora)

_____

Rejane De Souza Fontes Busson, PhD. (examinadora)

Escola Nacional de Administração Pública
Doutorado Profissional em Políticas Públicas

Tese: Private Regulation Instruments as a Master Tool for Regulatory Reform Following OECD Regulatory Policy Directives
Aluno: Diego Muniz Benedetti, PhD.
Orientador: Marcelo de Carvalho Griebeler, PhD.
Data de defesa: 12/2023

Resumo

Fundamentado na análise da evolução dos mecanismos de reforma regulatória documentados pela academia e por organismos internacionais dedicado ao desenvolvimento da ciência e da prática regulatória, neste trabalho, defende-se a sistematização da avaliação da adoção de instrumentos de regulação privada como alternativa para melhorar a governança regulatória. Com foco na discussão sobre a viabilidade e adequabilidade de implementação dos instrumentos de regulação privadas, discute-se e compara-se os principais fatores que afetam a adoção desses instrumentos em questões regulatórias de natureza econômicas e técnicas, levando à demonstração de relevantes diferenças na dinâmica regulatória afeta aos dois universos. Delimitado o conceito e as principais características de instrumentos de regulação priavada com base na análise de 133 documentos selecionados entre artigos acadêmicos e publicações oficiais de entidades internacionais relevantes ao contexto regulatório, são caracterizadas as principais estratégias de implementação, cobrindo-se desde as abordagens mais liberais até as mais conservadoras. Como ferramenta prática, é desenvolvido um fluxo prático de seleção e avaliação que permite a consideração sistemática sobre a introdução desses instrumentos por reguladores e pesquisadores da regulação. Como principal ferramenta de avaliação de viabilidade são oferecidas diretrizes de gestão de riscos regulatórios que permitem a redução do universo de instrumentos aplicáveis a cada contexto regulatório em análise. Além disso, dois casos reais e emblemáticos são analisados em profundidade como prova de conceito, reforçando a argumentação sobre o potencial de utilização dos instrumentos de regulação privada sob diferentes níveis de participação estatal. Finalmente, com referência na evolução das diretrizes e métodos defendidos pela OCDE, sugere-se a introdução dos instrumentos de regulação privada como alternativa de consideração obrigatória no processo de construção ou reforma de qualquer estrutura regulatória e recomenda-se a ampliação do campo de pesquisa relacionado à utilização desses intrumentos abordando aspectos operacionais, sociais, tecnológicos e legais.

Escola Nacional de Administração Pública
Doutorado Profissional em Políticas Públicas

Tese: Private Regulation Instruments as a Master Tool for Regulatory Reform Following OECD Regulatory Policy Directives
Aluno: Diego Muniz Benedetti, PhD.
Orientador: Marcelo de Carvalho Griebeler, PhD.
Data de defesa: 12/2023

Abstract

In this work we support the systematic consideration of private regulation instruments as alternatives to improve regulatory governance. The key factors affecting the adoption of these instruments for economic and technical issues are discussed. An objective systematization of strategies for implementing regulatory frameworks based on private regulation instruments is proposed, ranging from the more liberal to the more conservative approaches; and directives for suitability check and regulatory risk management are drawn up. Two emblematic cases are analysed as proof of concept, strengthening the argumentation towards the potential of private regulation instruments. Finally, referring to the OECD regulatory reform directives and supported methods, we suggest that private regulation instruments should be seen as a mandatory alternative to be considered, while building or reforming any specific regulatory framework.

Escola Nacional de Administração Pública
Doutorado Profissional em Políticas Públicas

Tese: Private Regulation Instruments as a Master Tool for Regulatory Reform Following OECD Regulatory Policy Directives
Aluno: Diego Muniz Benedetti, PhD.
Orientador: Marcelo de Carvalho Griebeler, PhD.
Data de defesa: 12/2023

Acknowledgements

I would like to acknowledge the support of Professor Marcelo Griebeler, who kindly accepted the challenge of exploring the universe of private regulation instruments working as an effective mentor.

I thank my family for the support and comprehension through the years of development, and, especially, to my children, Heloisa and Guilherme, which have been sources of love, inspiration and discipline in our life and the most important project for the years to come.

Contents

List of Figures

Private Regulation Instruments as a Master Tool for Regulatory Reform Following OECD Regulatory Policy Directives

1. Introduction – Outcomes from the OECD Reports on Regulatory Reform and The Opportunity to Foster Private Regulation

Regulatory reform is a continuous process of review and optimization of the regulatory structure and philosophy. Although there were some steps towards deregulation since the 1970s, the concept of regulatory reform as a process aiming to improve the regulatory framework, rather than to just abolish it, came only in the 1990s (Malyshev, 2008). Today, regulatory reform is seen as an important issue which must be continuously revisited by any government seeking optimal levels of competitiveness and social well-being. In this context, several directives, methods, and specific techniques have been developed by cooperative international organizations and by the academic community over the past decades. However, as regulatees become increasingly eager for regulatory efficiency and regulators reciprocally concerned about regulatory effectiveness, alternatives balancing these objectives keep being designed by governments and non-governments organizations.

As stated by the OECD (Paris, 1997, p.5), a central function of any democratic government is to promote the economic and social well-being of its people. In this way, regulations which impede innovation or create unnecessary barriers to trade can become an obstacle achieving this same goal. Therefore, all governments have a continuing responsibility to review their own regulatory structures and processes to ensure that they promote efficiently and effectively the economic and social well-being. The OECD *"Report on Regulatory Reform"* (Paris, 1997) can be seen as the first step of a sequence of advances toward regulatory reform as approached today. Among the seven recommendations in the OECD 1997 report, it is worthy to call attention to recommendations number 1, which addresses the need for taking regulatory reform to a political level with a broad programme with clear objectives and frameworks, number 5, which supports deregulation except in face of clear evidence demonstrating that regulating is the best way to serve public interests, and number 6, which fosters the implementation of international agreements and strengthening of international principles. Altogether, it can be said that 1997 OECD report set a milestone for regulatory reform centred on treating regulatory reform as a public policy programme focused on reducing regulation to an optimum framework founded upon public interest.

A second step was taken by the OECD with the publication of *"Regulatory Policies in OECD Countries - From Interventionism to Regulatory Governance"* (Paris, 2002a), which focused on techniques to assure the evolution of regulation. This is, perhaps, the most practical step towards better regulations in the course of regulatory reform because it has established fundamental tools which are, nowadays, obligatory requirements for the regulatory activity, but which have been overlooked in the past resulting many of the examples of poor

regulation that have justified the worldwide effort to reform the regulatory framework. Without trying to cover all the important inputs brought by this singular contribution, it is imperative to mention three topics: Regulatory Impact Analysis, Regulatory Alternatives, and Regulatory Quality. These are three major concerns which have driven relevant improvements. The impact analysis helps to detect and avoid undesirable consequences of regulating, the systematic consideration of regulatory alternatives helps to assure that the decision made represents in fact the better way to proceed, and the continuous evaluation of the outcomes originated from regulations strengths the regulatory activity by monitoring effectiveness and efficiency.

The OECD efforts to support regulatory reform were especially valuable at the early 2000s. The report entitled "From Red Tape to Smart Tape, Administrative Simplification in OECD Countries" (Paris, 2003) brought to light several mechanisms to reduce administrative burden and to make procedures more efficient. However, it still represented another step following the minimalist philosophy originally embedded in the regulatory reform purpose. A different approach, however, was launched in 2005, when The OECD "Guiding Principles for Regulatory Quality and Performance" (Paris, 2005) highlighted the fact that the regulatory reform is not only about removing unwanted regulations or reducing regulatory activities to a minimum. In fact, regulation is often desirable and can be the most effective way to protect competitiveness and peoples' well-being. Therefore, regulatory reform should make the regulatory structure efficient and effective enough, leading to responsive and yet predictable regulations. Following this same philosophy, a new milestone was reached with the publication of the OECD "Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest" (Paris, 2011), which has widened the scope of the discussion initiated in 2005 and reached a new roadmap based on the concept of regulatory governance. As paraphrased from the OECD material: the concept of regulatory governance highlights the dynamic aspect of regulation, suggesting a pro-active and integrated governmental approach assuring the quality of regulation, which includes institutions, tools, and processes. This same material addressed private regulation as a tool to be considered for good regulatory governance:

> *Regulatory governance involves addressing public-private co-operation more effectively and taking a closer look at the place of self-regulation in the mix. Governments need to assign (and review) responsibilities which they have, or intend to delegate to the private sector, international organisations (such as private standard setting bodies), the charitable (or voluntary) sector, and even citizens. The regulatory structures of the twentieth century, however efficient in themselves, tended to be silo-based, creating barriers (sometimes embedded in law) to co-operation across the public-private sector divide, frustrating good governance (and in the case of the financial sector, generating a crisis). There is debate about the right balance, especially in the wake of the*

> *financial crisis, which shook assumptions about the merits of self-regulation. The debate raises important issues of accountability, regulatory capture and the need to avoid regulatory gaps as well as overlaps. (OECD, 2011)*

Following the breakthrough of regulatory governance, the OECD has published the "OECD Regulatory Policy Outlook" reports in 2015, 2018 and 2021. Those reports provide a comprehensive overview of what has been done and what must be done in order to further enhance regulatory governance and to sustain the regulatory reform. Two points should be highlighted from the last edition (2021): First, the importance of implementing risk-based regulation, and the fact that there is still a significant implementation gap even in countries where binding legislation exists. Secondly, the fact that governments spend far too little time checking whether rules work in practice and not just on paper (OCDE, 2021). Both topics directly influence the discussion about private regulation alternatives since the acceptance of private participation into the regulatory process raises risk-assessment considerations and demands modern tools to monitor effectiveness.

Figure 1 shows a simplified timeline of the regulatory reform based on selected milestones which emphasizes the major directives driving the evolution of regulatory framework's state-of-the-art.

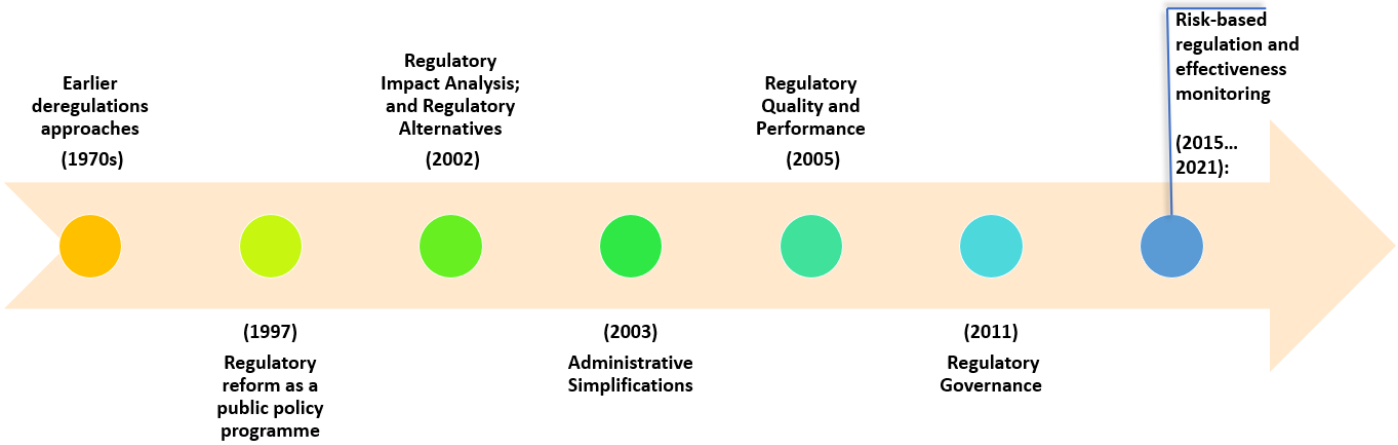

Figure – 1: Timeline of the regulatory reform – (figure produced by the author)

As schematically depicted in Figure 1, the regulatory reform has undertaken a comprehensive transformation, and it is possible to notice a clear tendency to establish an approach based on governmental supervision. Which means, the State should care for the effectiveness and efficiency of the regulatory structure but does not have to operate it all by itself. This supervision approach still requires specific expertise from State representatives but reduces the administrative burden and enhances process flexibility and efficiency. Therefore, if we are to add a new milestone to that timeline, the best candidate would be prioritizing the introduction of private regulation instruments (PRI) as the next step in regulatory reform, provided that it can be done in a socially responsible manner. The following sections discuss such a possibility, opening the

discussion towards methods and techniques for implementing private regulation as a keystone in the modern regulatory framework. In section 2 we address the concept of Private regulation sharpening the edges of such a broad term and proposing a specific categorization which makes the application easier. In section 3 we draw a line between economic and technical regulation revealing the differences on the factors affecting the regulatory process and its relation to private regulation instruments. In section 4 we offer a useful set of strategies using private regulation and the directives driving its selection. In section 5 we present two different and emblematic examples of successful implementation of private regulation as proof of concept, exercising the edges of the range of strategies presented in section 4. Finally, in section 6 we demonstrate how using private regulation instruments fits the OECD directives for regulatory reform and how the logic developed in the previous sections may help regulators and regulatees building better regulatory governance together.

With a similar purpose, Cafaggi and Renda (Cafaggi & Renda, 2012) proposed a theoretical framework to help policymakers assessing whether, and in what form, private regulation is more appropriate as a policy intervention. In this mandatory reference, the authors confirm the widespread observation that overconfidence in market-generated outcomes and distrust in state regulation has inappropriately led to the idea that private regulation should substitute public regulation. Recognizing that private regulation instruments may result desirable improvements even from a societal perspective, they point to the notion that state should opt for collaborative structures to maintain a minimum level of control over regulatory governance. The authors highlight the fact that the role of private governance schemes is again under the spotlight, with special relevance for dealing with regulatory issues at a transnational level, a subject that has been a hot topic to which private regulation seems to be a fruitful alternative. Other topics encouraging the progress of private regulation are high-tech and knowledge-intensive markets since the dynamic nature and the level of expertise demanded grant clear advantage to private actors who hold the position of most informed parties.

Therefore, diving into the proper academic bibliography as well as material from key organizations related to the regulatory universe, it is possible to encounter several cases of private regulation instruments being applied worldwide; even if done on a case by case basis instead of following any intentional directive. Laying the foundations for a change on such a chaotic scenario, with the objective of characterizing the influential variables and framing the implementation of private regulation instruments into a process for practical assessments, the content presented through the sections ahead is presented based on the critical review of 133 selected documents containing theoretical discussions and practical applications of private regulation instruments documented by scholars and practitioners over the last 30 years. The documents were carefully selected from popular peer-reviewed journals, academic textbooks, and State and non-State institutional

repositories. The selection was based on the use of keywords like: “private regulation”, “regulatory reform”, and “regulatory private instruments” in recognized academic repositories; as well as, by consultation of materials from respected regulatory bodies and international entities which devote attention to discussing regulation as the OECD and the world trade organization. This database allowed identifying the most relevant factors driving private regulation instruments implementation and the main strategies used to introduce those instruments on different types of regulatory frameworks, as well as directives for assessing the risks of private regulation instruments implementation. Afterwards, a process for private regulation instruments implementation consideration was synthesized following the Patton, Sawicki and Clark methodology for streamlined development of pragmatic tools (Patton, Sawicki and Clark, 2013). Following this method, an iterative routine for alternative selection was coupled with a decision-making checklist generating a simple process flowchart driving the systematic application of the relevant information extracted from the database.

2. Private Regulation – A Cooperative Concept

Different from what may be rashly understood from the term "private regulation", the use of non-governmental regulatory tools has little to do with privatization of the regulatory activity. In fact, these tools are ways to cooperatively enhance regulatory quality, efficiency, and effectiveness. It is a known fact that even the most well-prepared regulatory authority does not have the means to master the operational details of each regulated activity as well as the service/product provider. At the same time, the total absence of governmental supervision dangerously elevates the risks of social and economic hazards. Therefore, working complementarily and cooperatively is key achieving an optimum regulatory framework.

Before digging into the details of private regulation, it is mandatory to explore the concept and to limit the scope of such a controversial term. The academic community is far from reaching a consensual definition of private regulation. There are, for example, definitions differentiating self-regulation from private regulation and definitions suggesting an overlap between these concepts. This is already a barrier which jeopardize many studies advocating for or against private regulation since the boundaries of what is being discussed can be easily misunderstood and, consequently, arguments may be weakened. In this way, to avoid such a risk in the on-going discussion, and without the intention to valuate any specific definition, it will be adopted the complete explanation provided by Verbruggen:

> *Private regulation can be defined as comprising sustained activities undertaken by private, non-state actors to influence the conduct of themselves or other business actors following a set of pre-defined norms and objectives. These activities involve standard setting, monitoring and enforcement, and may be administered not only by firms, company consortia or industry associations but also by consumer groups, non-governmental organizations (NGOs) and other public interest groups. Private regulation is therefore a wider concept than 'self-regulation', which essentially concerns normative rules adopted to guide the conduct of oneself. The term 'private' in private regulation thus principally refers to a sense of ownership; the regulatory regime is private when it is primarily created and administered by non-state, private actors. This does not exclude the possibility that public actors can rely on, endorse or can be otherwise involved in the operation of private regulatory regimes. Furthermore, the object of private regulation does not necessarily have to be private entities. Also, public actors, such as government and public agencies, can be subject to private regulation. (Verbruggen, 2017)*

Such a definition is certainly the most adequate because it centres the meaning of private regulation on the nature of the organization responsible for it and stresses the interface between private and public sectors

encompassing the process of governmental endorsement. In this way, although our final discussion will focus on the private regulation instruments endorsed or indirectly accepted by public authorities, it is worthy do briefly explore the other facets of private regulation.

Figure 2 proposes a simplified representation of the concept of private regulation merging the major aspects from the selected definition to the objectives related to discussing private regulation as a tool in regulatory reform.

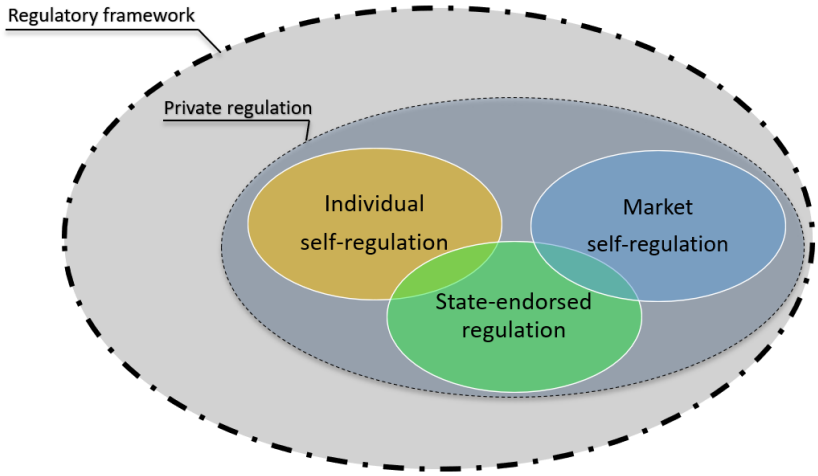

Figure – 2: Schematic simplification of the private regulation universe – (figure produced by the author)

As illustrated in Figure 2, private regulation may comprehend different types of instruments which may be classified into three categories:

2.1 Individual self-regulation instruments:

Individual self-regulation instruments are elaborated by a single non-state entity to establish and/or apply standards or objectives to itself. They are not negotiated or subjected to acceptance or approval in any level. It can be exemplified by Corporate Social Responsibility (CSR) codes, a common instrument which can be seen as a global movement of self-regulation (Sheehy, 2012). Companies tend to present their CSR code as a statement to society and as a guidance or rule to its own administration, frequently addressing, but not limited to, ethical issues, operational safety, financial transparency, and environment protection. As CSR codes, and the processes put in place to its implementation, contribute to compliance and often overlaps regulations, it could, at least in theory, be somehow endorsed by official authorities. However, several authors argue that these instruments cannot be effectively enforced and do not pre-empt regulation (Beckers & Kawakami, 2017). In fact, it seems far-fetched to imagine a regulatory authority adopting as a rule or

compliance process an instrument unilaterally built by a single regulatee, or even to expect that non-endorsed CSR codes and derived procedures could be judicially enforced. Nevertheless, a discussion about the legal possibilities of CSR codes endorsement and enforcement is, per se, a controversial and complex issue, which is out of scope.

2.2 Market self-regulation instruments:

Market self-regulation instruments are voluntary consensus-based rules, standards or procedures developed and maintained cooperatively by non-governmental entities. It has been used for decades to set safety and quality standards in several branches of productive sectors. The ISO standards (OECD/ISO, 2016) are excellent examples of successful manifestation of market self-regulation instruments. Even if not endorsed by a public authority, some of these standards got a mandatory strength over time in face of market demand and public opinion. It goes without saying that using a market self-regulation instrument as a preferential means of compliance to an official rule is fairly easy; especially if the state representatives participate on the development. However, state endorsement is still necessary to legally enforce these standards.

2.3 Cooperative private regulation:

Both individual and market self-regulation instruments may be endorsed or somehow accepted by the state, however, cooperative private regulations are instruments produced under cooperation between state and non-state entities. Most commonly, they are published as non-state instruments and endorsed by an official regulatory instrument. The main difference between the development of such an instrument and the endorsement of a pre-existent one is that the public authority mediate or drives the development process, and normally holds a “golden vote” linked to the decision to endorse. Therefore, the convergence of market players is limited by the state’s will.

The recent development of the FAA Part-23 Accepted Means of Compliance Based on ASTM Consensus Standards is a good example of this kind of process (OECD, 2021b). For years the FAA discussed with the industry, related associations, and other authorities at the so-called committee F44 until reaching an acceptable output which allowed a revolutionary simplification of the former Part-23 section. The Part-23 of the Code of Federal Regulations deals with small aircraft airworthiness certification and has been considered extremely complex. The official adoption of ASTM standards as means of compliance was a decisive measure to modernize the entire regulatory framework. This case is thoroughly examined in section 5.

> This kind of strategy combines the use of the market expertise and flexibility with the supremacy of public interest. It is mandatory to highlight the fact that such a process successfully handles the regulatory risk because, even if the final standards rest on private hands, the final decision over the endorsement rests on public hands, which is sufficient to steer the discussion towards an acceptable, effective, and yet efficient regulatory instrument.

Completing the pertinent conceptualization, it is important to highlight that private regulation is not only about rulemaking. What we are generically calling "instruments" can also refer to other regulatory activities as certifications, tests, statistical analysis, and inspections. The extent of using each instrument (including processes) will depend on several factors, which must be carefully evaluated by the authorities to guarantee the accomplishment of the regulatory objectives. That is the role of private regulation implementation evaluation techniques, which must be designed to set the means and the limits for introducing private regulation as a promising alternative for regulatory reform.

2.4 Enforcement of private regulation instruments:

Talking about private regulations raises the issue of enforcement. Enforcement is necessary, especially in highly competitive markets, and faces limitations which may seems more challenging if the instrument setting the expected behavior is not issued or officially endorsed by the State. How does one enforce consensual rules or punish a non-compliance without legal rights to do so? The answer is actually found into the economic theory.

Following Cooter & Gilbert (2022) narrative, from an economic point of view, the main reason to enforce rules is deterrence. Which means, the simple threat of feared consequences shapes the behavior of the players who will, then, comply. Applying this concept to the scenario of private regulation instruments implementation, it is possible to notice a fruitful convergence between the foundations of consensual rules and the dynamics of transnational regulations when it comes to enforcement.

Looking internally, from a regulatory framework perspective, the option for adopting consensual rules or standards is based on the idea that by engaging all the actors, including competitors and government agents, on an attempt to set standards, rules, directives or limitations to a specific activity would produce a better outcome than if an official regulatory body did it by itself. As the process is intrinsically cooperative, the acceptance of the final result leads to a natural willing to comply.

Looking externally, from a market perspective, the existence of transnational regulations supposes the existence of a transnational market. Therefore, the attempt to harmonized standards or rules is directly

related to maximizing business efficiency and globally expanding activities for each player. Therefore, participating in an internationally-harmonized market is a common benefit, and the compliance to consensual rules becomes a fair price to pay for accessing such a market.

Finally, the individual decision to participate in a consensual standards rulemaking process and the potential individual benefits for integrating a global market converge to compliance, even if the enforcement instruments in place are not legal, but economical. This is to say that a non-compliant actor may face market-driven consequences which supersede any legal consequence. This is a key factor for transnational regulations to which enforcement tools could be severely limited by jurisdictional boundaries and sovereignty issues. In this way, the use of private regulations in transnational regulatory frameworks expands the possibilities of enforcing standards and rules across the borders.

The different types of mechanisms through which internationally agreed instruments may be enforced across the globe include: direct sanctions on trading, interruption in supply chain, awareness of international public opinion, and influence to trigger local government actions. All of those may be planned together with the regulatory structure under design. It is important to highlight that the introduction of PRI can be closely related to the implementation of compliance programs, mandatory or voluntary. Private instruments may provide a more efficient solution for the design of acceptable means of compliance to laws and regulations demanding the structuration of accountability mechanisms inside the regulated organizations.

The two cases selected as proof of concept in section 5 demonstrate the extremes of enforcement strategies. The first case presents a structure in which public opinion plays an important part for enforcement, where non-compliance driven decision is issued by a commission and an eventual refusal to comply would lead to a series of coordinated actions among the compliant players damaging the offender reputation or even triggering independent State's actions. The second case is much more conventional in the sense that a non-compliance can cause the regulator to immediately stop operations in the country and even to revoke a production permit.

Overall, it is correct to say that private-regulations effective enforcement tools exist, and the lack of direct endorsement does not always jeopardize the regulatory objectives. Nevertheless, it is important to recognize that the level of officiality required from enforcement tools grows with the severity and intrusiveness of such a tool, which should be dictated by the criticality of the activity under regulation in terms of safety and security. It falls into the enforcer's dilemma, which balances the decision of how much effort must be put on enforcement. And the answer to that will depend mainly on what is being protected and from what that is being protected.

To illustrated let's compare the decision about putting in place two surveillance structures related to regulations, one to prevent pharmacies to sell controlled drugs without prescriptions, another to guarantee effective maintenance of nuclear material storage and transportation equipment. In the first case, training millions of inspectors to survey a representative number of selling all over a country to prevent someone to take the drug without prescription seems disproportional, but having as much well-trained inspector as needed to periodically inspect all the facilities that handle radioactive material seems reasonable.

Private regulations can even be helpful to set the perfect level of enforcement. Which is the level of surveillance and severity of consequences imposed to non-compliers. Whereas for States to set or change a specific enforcement structure it takes a lot of political movements and negotiation with no guarantees that the outcome would indeed led to effective compliance, for private-instruments-based structures, the market flexibility allows fast response to ineffective enforcement. For example, if a predicted sanction is shown to be ineffective, a sequential coordinated decision among compliant players may exclude or hardly damage non-compliant players, triggered by the fact that the initial sanction was ineffective.

To sum up, it must be considered that private regulations are operable means to improve behavior by coordinating information-driven actions leading to informal sanctions as necessary to prevent or punish non-compliance. These instruments may penetrate diverse economies and cultures much better then official rules. It can shape the behavior of local and multinational players acting over the supply chain, the public opinion and even the local law enforcement structure. Because of that, enforcement should not be seen as an obstacle to private instruments implementation but as a tool to be applied in situations where conventional strategies do not work.

Having set the ground to discuss private regulation, it is fair to state that there is no consensus in the academic community about establishing private regulation as a suitable alternative for regulatory reform. While some authors present it as an undiscussable solution to improve efficiency (Yilmaz, 1998), others highlight the flaws and the risks involved on delegating state responsibilities (Ogus, 1995). As in many other issues, it seems that an equilibrated view leads to the most fruitful attitude. Thirty years of regulatory reforms show us that using market expertise and flexibility is beneficial to improve effectiveness and efficiency and, at the same time, several cases prove that the state cannot simply delegate its responsibilities as regulator without leading to hazardous consequences to the economy or to people's well-being. Therefore, the questions to be answered are: which are the factors affecting the adoption of private regulation instruments? through which strategies they may be applied? and how to evaluate the suitability of a certain instrument facing a specific regulatory scenario?

3. Economic Regulation Versus Technical Regulation – A Fundamental Distinction in Regulatory Discussions

Despite of the fact that there are several classifications used to stratify the different types of regulation, most of the academic discussions towards regulations fails limiting their conclusions to a specific subset of the regulatory universe. This overlooked differentiation is, in fact, a major issue impairing the validity of many directives and guideline published by important institutions and knowledgeable authors. As will be discussed further on this text, most of the time, a specific regulatory instrument or technique is very efficient if applied for a specific subject, but it can be completely ineffective to another. In the same way, two contradictory approaches may be simultaneously valid if applied to the right regulatory objective. It happens because the factors driving economic and technical regulations operates very differently from each other.

Years of practical and academic development aiming to assist governments to undertake regulatory reform have produced a considerable number of manuals and best practices which can be used as reference to face nowadays regulatory challenges. However, the ability to judge which alternatives fit each problem is crucial for an effective and successful use of such a wide span of tools. The OECD (Paris, 1997, p.6) classifies regulations into three categories:

- ☑ Economic regulations: Mainly defined by the actions with potential interference in market decisions such as pricing, competition, market entry or exit.
- ☑ Social regulations: Mainly defined by rules and limitations enforced to protect public interests such as health, safety, the environment, and social cohesion.
- ☑ Administrative regulations: Mainly defined by the procedures and formalities (the so-called "red tape") through which regulations are developed, formalized and enforced.

This is, as many others, a valid and useful classification. However, it seems much more practical to look at “administrative regulations” as the tools associated to the implementation of economic and social regulations. In fact, even if governments have reached the nirvana of administrative efficiency, it will be some procedures and formalities to guarantee the accomplishment of the objectives set by economic and social regulations. Besides, the objective of reducing administrative burden must be nourished and maintained at every aspect of governmental activity. Therefore, from this point we opt for not differentiating administrative regulations but treating these aspects as intrinsic elements existing in economic or social regulations.

The term “social regulation”, as used, gives the idea that potential market failures are not a social problem, which neglects the relevant social impact that these issues may cause. For example, the existence of entrance

barriers in food or transportation market may deny access to essential goods to the lower strata of society. For that, the term "technical regulation", derived from the definition presented by the World Trade Organization on the "Agreements to Technical Barriers to Trade" (WTO, 2020), seems to be more appropriated, since regulation by itself exists to guarantee peoples' well-being and, besides handling market failures, regulators must implement technical requirements able to guarantee health, safety, security, environment protection and any other aspects which trespass the interests of the players. For not being directly focused on competition or market dynamics, these regulatory activities can be seen as manifestations of pure technical regulation. This term was already used by the OECD on reports from the series "Enhancing Market Openness Through Regulatory Reform" (OECD, 2007) and offers a better way to set a boundary line between the two universes of interest.

As addressed by Windholz and Hodge (2012), it is not obvious distinguishing the notions of economic regulation and social regulation, and, although the concept of economic regulation encounters a certain consistency in the literature, the concept of social regulation varies relevantly, pointing to conflicting conceptualizations. This reinforces the relevance of the proposed approach, which provides a fairly simple way to look at any regulatory problem. Such a dual categorization provides an objective way to constrain the applicability of directives and techniques so that they become more effective and valuable. To support such a definition, however, it is important to evaluate the contrasting factors acting on the regulatory process applied to economic regulation and technical regulation respectively.

Figure 3 illustrates the six key factors driving economic and technical (or "social") regulatory discussion, which are detailed in the following subsections, and for each one it is explained how it affects the discussion about private regulation.

	Relevant Factors for Economic Regulation	Relevant Factors for Technical Regulation
Regulatory focus	Regulation focus on the players on the market;	Regulation focus on the society, as consumers or just as citizens;
Regulatory objectives	Regulatory activities focus on competitivity and economic efficiency;	Regulatory activities focus on social well-being (health, safety, environment, etc.);
Regulatees' interests	Competing interests of regulatees towards regulation;	Converging interests of regulatees towards regulation;
Public awareness	Regulatees are highly participative during rulemaking;	Society tends to be oblivious of the rulemaking process;
Political influence	Regulatees have strong political influence to steer the regulatory discussion;	Citizens or associations have a minor influence on politicians and regulators;
Technical Knowledge	Regulatees master all the technical aspects involved.	Citizens have limited knowledge about the technical aspects involved

Figure – 3: Contrasting factors driving economic and technical (or "social") regulatory discussions. – (figure produced by the author)

3.1 Regulatory focus:

Whereas economic regulations are designed thinking about players on a specific market, technical regulations are designed thinking about society as a whole. Therefore, the adequacy of implementing private economic regulations strongly varies with the type of market under regulation. For example, a regulator must be more careful dealing with the introduction of private regulation instruments in a monopolistic activity than in a fairly competitive scenario. On the other hand, the decision about implementing private technical regulations depends only slightly on the type of the market or the nature of the activity, as its challenges are fundamentally centred around the need to protect public interest, and the decision drivers are often related to technical agreement between the proposition sources and the regulatory body.

3.2 Regulatory objectives:

Whereas economic regulations pursue economic efficiency by removing entry barriers, promoting competition, and guaranteeing market's fair play; technical regulations pursue peoples' well-being, protecting society against any risk deriving from the regulated activity affecting health, safety, the environment, or any other relevant externality. Therefore, economic regulations tend to be designed as "game rules" and technical regulations tend to be designed as "standards and limitations". This leads to two very different scenarios for private regulation adoption: economic private regulation initiatives may be more easily considered under a sandbox structure, which means that less previous intervention from regulators to start implementation are necessary, and regulatory actions and revisions may be applied further on. On the other hand, technical private regulations should be more carefully analysed before launching due to the unreversible and catastrophic nature of some of the risks to society associated to non-compliances. It should be highlighted that, in times of regulatory reform, if any specific issue is sufficiently relevant to become a technical requirement, it is expected that non-compliance has the potential to result relevant and undesirable consequences, otherwise it should not remain as a requirement and should be moved to best practices or guidelines.

3.3 Regulatees' interests:

Regulatees commonly present conflicting interests when discussing economic regulations but converging interests when discussing technical regulations. Therefore, whereas in economic

discussions the natural dispute between regulatees tends to promote a better outcome, in technical discussions the common interest in lowering standards and removing limitations may operate against society's best interests. Because of that, when dealing with the introduction of private economic and technical regulations, the attitude of the regulator must shift respectively from a mediator/optimizer position to a guardian position.

3.4 Public awareness:

Whereas regulatees are in constant contact with regulators to negotiate terms driving the regulatory structure, citizens and civil associations has a much lower participation in the process. The attitude of regulatees is often pro-active in terms of contributing to public audiences, technical panels and taking every opportunity given by the authority for steering regulations. On the other hand, people hardly care enough to follow regulatory activities. Even civil associations created to defend some regulation-protected social interests do not have the same level of participation, and often take actions only after a relevant event triggering practical concerns has happened. This reality makes some regulatory instruments, like public audiences for example, severely limited when dealing with technical regulations, what raises additional concerns regarding the introduction of private regulation instruments. That is to say, if for economic private regulation instruments a sign of agreement between a sufficient number of competitors, even through silence, provides a valid clue towards acceptability, for technical regulations the sole absence of public opposition does not mean validation or agreement at any level.

3.5 Political influence:

Whereas regulatees have direct access to politicians and sufficient power to exert pressure over them, the public in general has little access to decision makers and little leverage to protect their interests. In this way, considering that the proposition of private regulation endorsement comes predominantly from associations and institutions sustained by the regulatees, exercising its institutional independency becomes a fundamental requirement for authorities implementing private regulation alternatives, especially for topics related to competition and market performance. In this context, whereas the acceptance of private technical regulations tends not to be a hot topic in political circles, dealing with economic private regulation may require a much higher level of regulatory authority independency.

3.6 Technical knowledge:

In any kind of regulatory discussion information asymmetry exists between regulators, regulatees, and society. Regulatees have a much better position collecting data to support their arguments; regulators do not have comparable resources but are expected to have the same level of knowledge on the subject, and the power to decide; and finally, the public may be completely lost through the technicalities of regulations. It highlights the fact that the alternatives based on private regulation can be especially beneficial, since the regulatees have all the means to produce the necessary data supporting effectiveness and efficiency. This is more important for technical regulations, where accessing relevant data without the cooperation of the regulatees is much more difficult. From another perspective, in the event of an undesirable economic rule the consequences tend to be quickly visible and the regulatory means to revert them more effective; on the contrary, in the event of unduly weakening technical standards the consequences can take years or decades to become visible and the harm may be unreversible or catastrophic. It presents a contrasting reality: It can be said that private regulations are preferable alternatives enhancing regulatory quality of technical regulations but requires a much more careful consideration by the regulator before endorsing it.

Figure 4 summarizes how the differences between economic regulation and technical regulation affects the process of private regulation implementation. It reinforces the argument that separating the two universes is a fundamental practice in developing regulatory directives and methods.

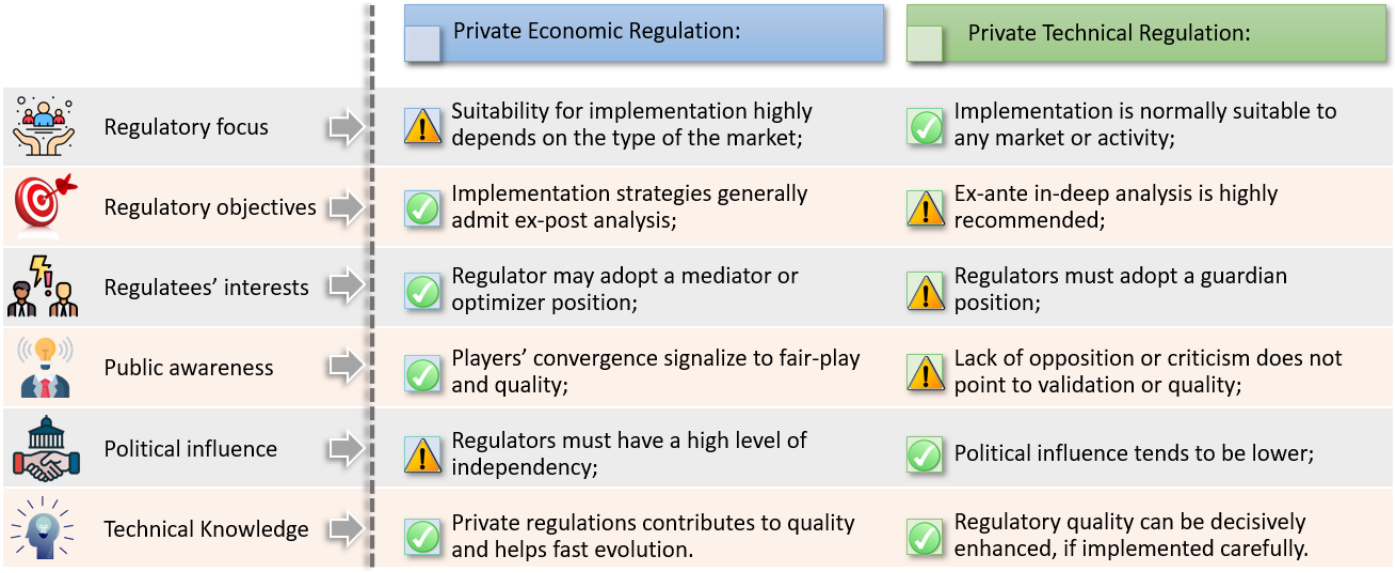

Figure – 4: Differences between economic and technical regulations affecting the process of private regulation implementation. – (figure produced by the author)

For both economic and technical regulations, private regulation alternatives play a great role in optimizing the regulatory process. It is a fact that using consensual rules and cooperative compliance assurance processes

has the potential to enhance efficiency and effectiveness. However, as exemplified in Figure 4, the key factors affecting the decision about using private regulation instruments, as well as the way and the extent to which these tools should be applied to each universe of regulation, are particularly different. Conclusively, these key factors must be always taken into account when evaluating private regulation implementation strategies.

4. Private Regulation Implementation Strategies – General Considerations and Directives

There are several ways in which private regulation instruments can be used in a regulatory framework. From the simple suppression of state regulation to the creation of complex cooperation schemes. A careful regulatory risk analysis will determine if and how private regulation can be implemented by considering the type of regulation, the players on the market, the characteristics of the regulatory objectives, and the instruments available. In this context, the first step is to comprehend the scope of possibilities to be selected as regulatory alternatives. For that, there is a considerable number of private regulation taxonomies with different levels of complexity proposed in the literature, which are of great value in terms of theoretical classification. However, for the purpose of systematizing alternatives in a practical level, a dedicated categorization will be proposed based on an elementary representation of the regulatory cycle whose activities are divided between private sector and public sector.

Figure 5 illustrates an elementary regulatory cycle focusing the chain of activities which should generate the outcomes sought by the regulatory framework.

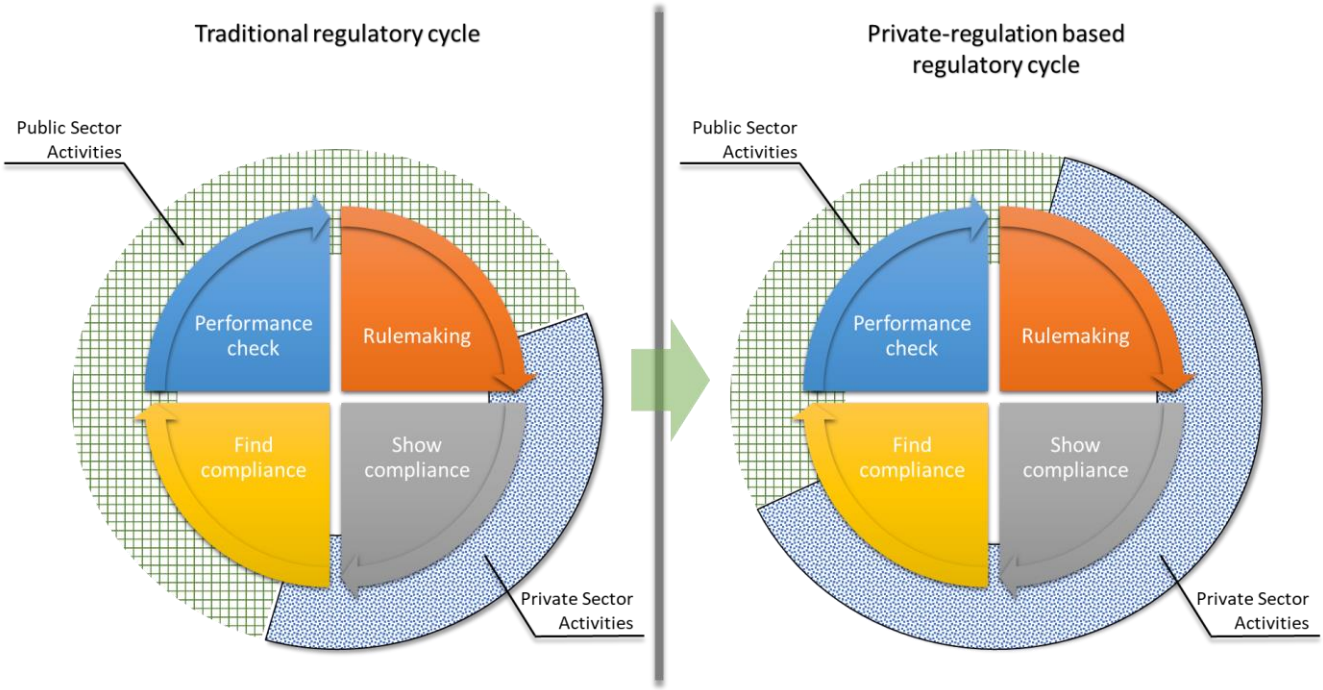

Figure – 5: Regulatory cycle focusing the chain of activities and public-private distribution scope. – (figure produced by the author)

In traditional structures the state authority directly operates most of the regulatory cycle. Rulemaking is mainly executed by the state, with the punctual participation of regulatees and society seen as a contribution to a legally reserved activity. The find-compliance phase is also largely dominated by state activities, with some

level of delegation of secondary procedures and low-risk issues. Naturally, show compliance is an activity for the regulatees and the responsibility for performance check is held by the government.

In a modern structure, the official authority basically concentrates efforts on managing the performance of the regulatory framework. It means that the state prioritizes the continuous evaluation of outcomes and impact originated from the regulatory cycle instead of devoting too many resources operating it. From such a viewpoint, both rulemaking and find-compliance may be substantially transferred to private organizations, with the state assuming a supervising approach to these processes. Rulemaking can make use of private consensus-based rules as much as possible, with or without official endorsement; and find-compliance can be fully executed by non-state organizations and oversighted by the authority through the use of transparency assurance strategies and risk-based enforcement processes.

The idea behind focusing the performance check phase finds support on a recent observation in the OECD Regulatory Policy Outlook 2021 which affirms that: “governments spend far too little time checking whether rules work in practice and not just on paper” (OCDE, 2021). This idea does not advocate for the complete delegation of rulemaking and find-compliance but suggest a smart participation of the state by acting as an approver of rules and find-compliance processes instead of as a lawmaker and an inspector. It also does not undermine the obligation of authorities maintaining a fully competent workforce able to discuss in detail every aspect of rulemaking and find-compliance. On the contrary, it demands extremely experienced and knowledgeable staff to prevent worthless rules implementation and hidden non-compliances.

Without the intention to be exhaustive, a practical scheme ordering the most important types of strategies to be used implementing private regulation is presented in Figure 6, which relates to the pertinent phase of the regulatory cycle the range of instruments graded in terms of State participation.

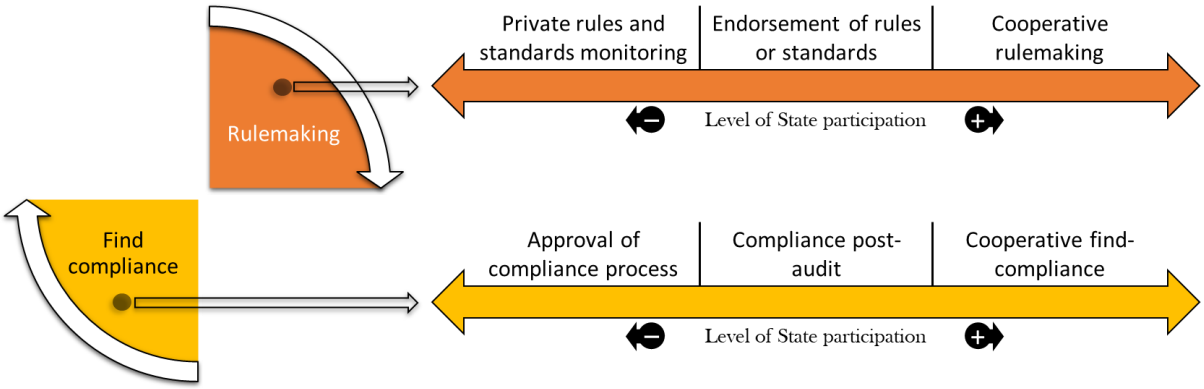

Figure – 6: Possible strategies for private regulation implementation. – (figure produced by the author)

The two triplets of strategies category listed in Figure 6 can be combined depending on the subject under regulation and the associated objectives. Each triplet is ordered left-right from the alternative in which government authorities are less involved to the alternative in which authorities drive the activities. Each one of these strategies leads to different considerations and limitations as detailed below. Even so, regardless of which strategy is adopted, the implementation of an effective performance monitoring structure is mandatory to support the decision of including private regulation instruments into the regulatory framework, because it provides the evidence supporting the trust in the regulatory risk management process and guaranteeing an acceptable level of regulatory governance.

4.1 Private rules and standards monitoring:

This strategy consists of simply watching the market, working solely with the "right to regulate". In this approach, the regulator sees a market with potential risks which are being kept at an acceptable level due to mitigation actions managed by the players themselves. In such a scenario, the authority dialogs with the potential regulatees without implementing any rules but providing nudges about what it takes to allow the government to sustain such an observer position. Obviously, this option limits the ability of the state to act promptly if necessary and requires a high level of voluntary transparency from the regulatees so the authorities can evaluate the performance of the existent self-regulatory framework. However, for low-risk issues this is the most economical alternative and may result better use of the state regulatory potential. In fact, other authors have successfully shown that in many cases the existence of a private regulation is effective to pre-empt state regulation (Malhotra, N., Monin, B., & Tomz, M., 2019).

The following directives should be observed when considering this kind of strategy:

a) ***Risk-level check:*** The decision of not implementing official regulation leads to a higher probability of misbehaviour and to a substantial lag between a relevant event and the regulatory response, due to the lack of continuous enforcement. Therefore, issues which are critical, present catastrophic potential, or may nourish latent hidden threats should avoid such an alternative.

b) ***Reliability check:*** The authority should access its own capability to continuously judge if the private regulation is effective and the ability of the organizers to respond promptly revising the instruments when necessary is sufficient. If the authority can evaluate the performance and trusts the organizers, the decision of monitoring the market is always preferable from an economic perspective.

c) ***Intervention capability check:*** The authority must demonstrate the capability to effectively regulate the market whenever necessary. Otherwise, the mechanism of regulation based on the "right to regulate" becomes an empty threat, and the performance is immediately impaired.

4.2 Endorsement of rules or standards:

The main point of endorsing rules or standards is to incorporate these instruments developed freely by non-governmental entities into the enforceable regulatory framework. This can be done in several levels: from the adoption as the official rule to the acceptance as means of compliance justifying a more concise, objective, and performance-based set of rules. This strategy may pre-empt, substitute, or complement state regulation. Government may decide to adopt (or endorse) previously existent voluntary consensus-based instrument as, for example, standards approved by non-government organizations. The endorsement decision may be unilateral or negotiated. This option has been applied using ISO standards and has led to important ameliorations in the regulatory structure for important sectors of the economy (OECD/ISO, 2016)

The following directives should be observed when considering this kind of strategy:

a) ***Quality and effectiveness check:*** The fact that a voluntary consensus-based instrument was approved by a group of specialists does not mean that this instrument is sufficient to guarantee the accomplishment of all the regulatory objectives from the government perspective. Therefore, before endorsing, a deep analysis of the rule or standard must be carried out by the regulatory authority, registered, and validated by the highest level on the regulatory governance chain.

b) ***Institutional evaluation:*** The authority should access the history and objectives of the non-state organization responsible for the rule/standard. The assessment must include the commitment of the organization to the regulatory objectives, the nature of the participants and sponsors, the technical capability to produce and update the rules as required, the level of political influence to which it is subjected, and the level of accountability to which the organization is submitted.

c) ***Find-compliance capability check:*** The authority must demonstrate the capability to directly execute the find-compliance based on the endorsed rules. Otherwise, the whole regulatory cycle becomes dependent on a third-party and the organizers become inclined

to steer the enforcement process, since they are the only ones able to evaluate compliance.

4.3 Cooperative rulemaking:

A cooperative rulemaking process is one in which government and private experts dialog to reach a final instrument published and maintained by a non-government entity to be endorsed and enforced by the authority. The fact that the rulemaking is based on consensus seeking does not means that it cannot be subjected to conditions from the authority that holds the endorser position. This may happen during the technical discussions, but it does not jeopardize the cooperative nature of the process, which can be completely run by the non-government entity with the authority participating as an invited member.

It is important to make clear the differences between a participative rulemaking process and the state-driven endorsement of private regulation. A traditional rulemaking process can include high levels of participation of regulatees and society, however, it tends to occur when the authorities has already an initial proposition. Besides, the level to which the private sector representatives may influence the final rule is comparatively limited. On the other hand, in a cooperative development the centre of the process is not the government position, but the collaborative work towards an equilibrated rule or standards. The organizers are the primarily responsible for proposing the rule, and the opinion of the majority of the specialists have a major impact on the final rule. The authority, however, participates from the beginning and steers the discussion to reach an acceptable final rule.

This is a suitable first step for governments entering the universe of private regulation implementation because it allows building trust between authorities and non-government organizations devoted to private regulation or standardization. This is also the safest strategy because it allies the gain in quality originated from having a process conducted by a wider group of specialists to the guarantees of having the State participating closely throughout the whole process.

In the same way that endorsement of private pre-existent regulations can be done in several levels, the implementation of cooperative private instruments can be exercised to generate rules, means of compliance or even guidelines. Additionally, considering the direct participation and interest of the state, public resources may be applied to foster the development of trustable private entities

supporting the regulatory framework, and the level of authorities' participation may be stipulated according to the level of the instrument under consideration.

The following directives should be observed when considering this kind of strategy:

a) ***Complexity check:*** The cooperative development of regulation tends to be a long and complex project. Therefore, if a specific regulatory objective can be met by direct endorsement of private rules or standards, or even by simply monitoring the market, these alternatives should be the first option.

b) ***Independence check:*** The authority should assure that the selected organizer demonstrates an acceptable level of independency from each individual regulatee as from specific political parties, associations, and any other organization which might have interests steering the rulemaking process. It does not mean that the organizer must be an organization apart from the market, but it must be able to conduct the process at hand in a fair and transparent way.

c) ***Technical expertise check:*** The authority must demonstrate the knowledge and expertise to participate on an equal level in the discussions, and also to execute find-compliance whenever necessary. Otherwise, authorities' participation ends up serving as pure validation of the private sector proposals and important regulatory objectives may be jeopardized.

4.4 Approval of compliance process:

The find compliance phase is the most important phase enforcing the regulations because it is what provide the regulator with evidence of efficacy of the rules. It still does not reflect effectiveness, but it provides a fundamental requirement to that. Even if the regulatory framework includes severe penalties for deviations, enforcement becomes jeopardized if non-compliances cannot be identified. Therefore, transferring these activities from the regulators to the regulatees, or to an independent organization, undoubtedly raises the regulatory risk. Nevertheless, the state may choose to lower its participation in this phase by adopting an oversighting strategy.

The approval of compliance processes consists of approving the procedures, staff and methods established by the regulatee, or an independent third-party, for verifying and documenting the compliance with the applicable rules and standards. It means that the statement of approval is fully delegated to the approved organization. The enforcement is then exerted through periodical or

special audits evaluating the effectiveness of the approved process. Such a strategy is sometimes referred to as "delegated organization approval" because it is common that regulatees create specific internal entities to hold these responsibilities. In either way, the nature of the strategy is the same: to trust a private organization to handle the find-compliance based on the previous acceptance of a devoted structure (processes, staff, and methods) in order to reduce authorities' participation in this phase. Once authorized, the delegate entity can approve as many submissions as necessary, provided that the authorization remains valid and the object under analysis is within the scope of approval.

The following directives should be observed when considering this kind of strategy:

a) ***Risk-level check:*** The decision of delegating find-compliance leads to a higher probability of non-compliance or defective compliance, largely regarding to the application of unacceptable means of compliance or lack of sufficient evidence. Therefore, issues which are critical or present catastrophic potential should avoid such an alternative.

b) ***Reliability check:*** The authority should access its own capability to judge the effectiveness of the find-compliance processes executed by the delegates. It encompasses authorities' capability to audit, and the level of transparency of the approved process. If the authority can continuously evaluate the find-compliance and trusts the delegate, the decision of approving a process is always more efficient.

c) ***Enforcement strategy:*** The decision to delegate find-compliance brings the need for an effective strategy of enforcement. It means that the consequences of non-compliances should be severe enough to discourage the delegate of being negligent towards full compliance.

4.5 Compliance post-audit:

A compliance post-audit can be understood as a more conservative approach to approving the find-compliance process. The main difference is the need for auditing each instance of approval executed by the regulatee or the independent organization. These audits can be delayed and must be selective, which means, a statement of compliance is accepted beforehand, and a verification based on a sample of find-compliance registers is executed to finally endorse the statement. In this case, the authority evaluates the delegate's structure as a pre-requisite for implementing the strategy but focus on the oversight and direct endorsement of each statement of approval.

Although it heavily increases state participation in comparison with the process approval, it still expressively reduces the amount of work to be done executing the find-compliance procedures. As the authority may adjust the auditing sample for each submission based on regulatory risk management directives, this strategy is beneficial to keep a closer look at risky issues. Besides, the individual endorsement avoids legal issues related to the complete delegation of statements of approval.

The following directives should be observed when considering this kind of strategy:

a) ***Minimum evaluation script:*** The option for auditing introduces the audit risk, and the level of such a risk is directly related to the capability of the regulators to identify the potential flaws or non-compliance treads. Therefore, issues which are critical, novelties, or present catastrophic potential should be established by the regulator as “mandatory for review”. If any of these issues encounters barriers to be post-evaluated, this strategy should not be selected.

b) ***Capability check:*** The authority should access the capability and commitment to regulatory objectives of the potential delegate, which must demonstrate potential for an eventual approval of compliance process, that is to say, the structure is adequate in terms of process, staff, and method, but the nature of the subject under regulation prevents that option.

c) ***Revocation feasibility check:*** The authority must assure the possibility of revocation in case of non-compliance identification. There are cases where the annulment of an approval may represent an unacceptable cost to the regulatee or to the economy, therefore, for such cases post-audit strategies are not recommended.

4.6 Cooperative find-compliance:

A cooperative find-compliance is a process of compliance assurance in which the authority selects specific requirements or standards to directly execute the find-compliance procedures and oversighting a pre-approved process executed by the delegate, which can be the regulatee or an independent organization. It combines the need for a direct verification of compliance for high-risk requirements/standards or novelties with the advantages of not having the state executing all the find-compliance phase itself. The oversight procedures may be graded by level of involvement based on the risk of non-compliance. In this way, regulatory risk is well managed by the authority

and the performance executing the find-compliance is enhanced by the extensive support from the delegate. The main objective of such a strategy is to have the authority verifying compliance before approval but concentrating its effort on critical issues and novelties. This option is acceptable to most situations and has been largely applied by authorities worldwide.

The following directives should be observed when considering this kind of strategy:

a) ***Level of involvement methodology:*** The authority must have an efficient an official methodology for level of involvement definition. Since the cooperative find-compliance demands the classification of requirements and standards and the selection of activities to be totally or partially executed by the authority, the directives must be made clear to regulators, delegates and to society. Such a definition is important because it prevents bias in the classification process and guarantees that critical issues will be verified by the authorities.

b) ***Risk assessment review:*** Even if the level of involvement methodology is designed to be generally applied, the risk assessment parameters may be revised for every statement of approval. The risk in terms of compliance review is related not only to the consequence and probability of non-compliance but also to the likelihood of the delegate acting negligently towards full compliance once he knows that the item will not be reviewed. Therefore, the systematic review of risk assessment parameters, considering both the specificities of the submission at hand and the past performance of the delegate, can bring the overall risk to an acceptable level.

c) ***Technical expertise check:*** The authority must demonstrate the knowledge and expertise to execute the find-compliance over the selected items. Otherwise, authorities' participation may reduce the effectiveness of the assurance process jeopardizing the accomplishment of regulatory objectives. If the authority is not able to demonstrate such a level of expertise a post-audit strategy becomes more recommended.

4.7 Continuous performance evaluation and performance-based enforcement strategies:

Figure 5 illustrates the conclusion that performance check is the main role of the state in a modern regulatory framework. In fact, having a reliable regulatory performance monitoring structure can be considered as a fundamental requirement for the successful and responsible implementation of private regulation strategies. When relying on non-government organizations to develop rules or

to assure compliance the state can be provided with an endless source of technical support for building better regulatory instruments, but it also opens many windows to the intentional or accidental deterioration of the regulatory activity. The capability of monitoring the effectiveness of the regulatory framework is, therefore, the only way to assure the accomplishment of the regulatory objectives, which means good regulatory governance.

From another perspective, the tempestive identification of a drop in regulatory performance is useful only if there are instruments capable of enforce recovering. Therefore, states must always keep instruments able to compel the regulatees and delegates to act responsibly and committed to the maintenance of the agreed performance standards.

The following directives should be observed when assessing regulatory performance monitoring capability:

a) Monitoring structure and strategy: The authority must have an efficient an official strategy and a fully equipped staff for monitoring regulatory performance. The available structure must include proven indicators and trustable data sources allowing the tempestive identification of performance deterioration. If the authority cannot demonstrate a high level of performance monitoring capability, private regulation strategies must be approached carefully.

b) Enforcement instruments: The authority must have access to effective enforcement instruments as, for example, the right to suspend or revoke approvals or authorizations, the right to issue fines, and the means to seek judicial punishment to the responsible for relevant transgressions or regulatory performance severe deterioration.

c) Reclaiming capability: The authority must maintain the capability of reclaiming the basic regulatory activities in face of an eventual collapse of the cooperative structure. This is a valid concern in regulatory frameworks deeply dependent on non-government organizations. Therefore, as the adoption of private regulation alternatives increases, the periodical evaluation of such a capability becomes more and more important.

4.8 The process for PRI consideration

The main strategies discussed above exemplify how private regulation instruments can be implemented in the regulatory framework as a fundamental resource to improve efficiency and effectiveness. This is not an exhaustive list, but it encompasses the range of possibilities and reflects well the process of selecting techniques to fit a specific regulatory challenge. It is clear that application of the more liberal techniques (e.g.:

private rules monitoring, approval of compliance process) may encounter resistance from government representatives or critics of state-activities delegation. However, even the most traditionalist regulator would concur that the implementation of cooperative techniques must be considered as a valid alternative due to the potential for regulatory quality improvement. Because of it, the process of considering private regulation strategies should flow from the most permissive alternatives to the most conservative ones.

Influencing factors, regulatory baseline strategies, and risk-management directives converge to a straightforward sub-process for considering the introduction of PRI into regulatory alternatives as defined by the flowchart below:

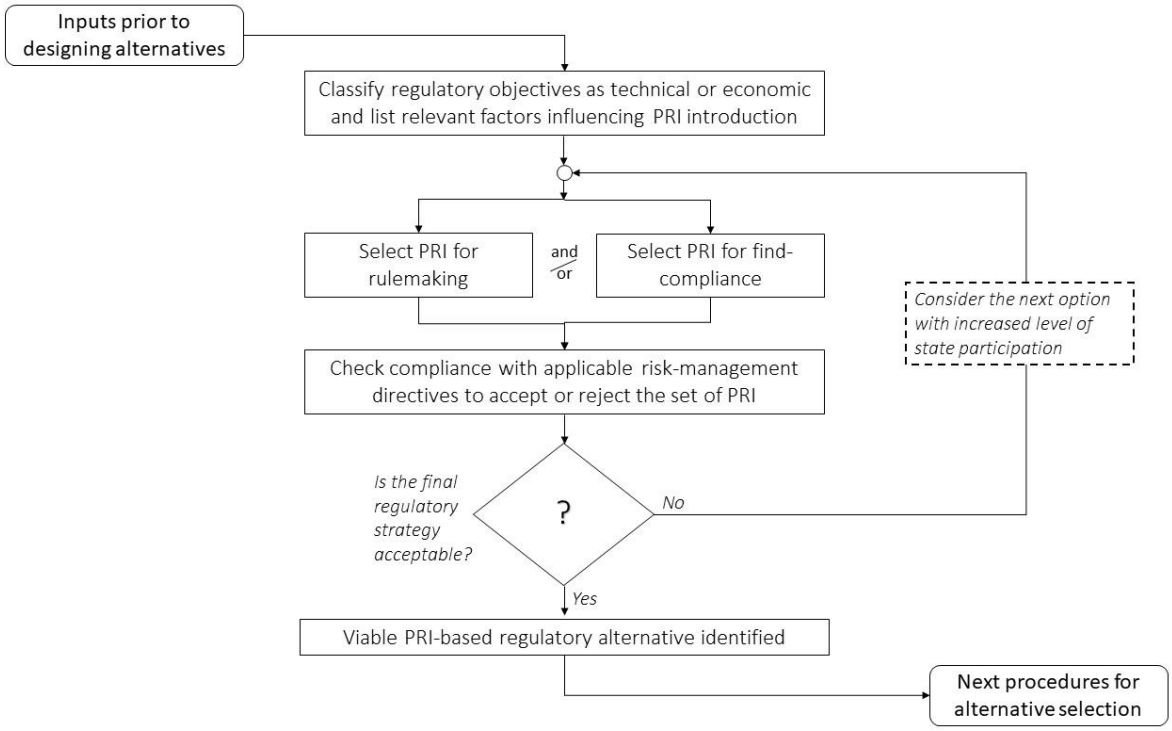

Figure 7: Process for PRI consideration – (figure produced by the author)

The process above represents a practical deliverable for general use in regulatory reform efforts. The introduction of this process as a compulsory step contributes to better regulatory frameworks because it forces the regulator considering to add into the regulatory alternatives instruments which may provide expertise, data and resources beyond State's capability. The final alternatives including PRI will still follow the process for selection and implementation as specifically designed by the regulator, but the previous consideration of the risk-management directives already support its viability aligned to the risk policy set by the State.

Figure 7 illustrates the process of considering private regulation as an alternative to handle a specific regulatory objective. As it shows, in a didactic approach, regulators should explore the full potential of private

regulation by considering first the alternatives which allows authorities to fully concentrate its efforts on performance monitoring, and then, move to options with higher level of state involvement if it is recommendable under a risk-based evaluation.

After having discussed multiple strategies to implement private regulations, it is important to briefly discuss what should not be pursued in terms of private regulation implementation. First of all, private regulation works when there is a minimum of validated performance indicators to monitor regulatory performance in a level of accuracy proportional to the risk of non-compliance. If the state is blind to what is really happening in a situation where risks are high, it must act carefully enough to keep full control of the regulatory cycle. Secondly, private regulation implementation is about improving effectiveness and efficiency, not about reducing costs and the capacity of the authority. The adoption of private regulation strategies as a cost reduction alternative is highly unrecommended because it undermines the capacity of the state to act when necessary and may put at risk peoples' well-being in the long term. What is expected is that resources being expend in non-essential activities may be redirected to build a strong system of regulatory performance monitoring and a modern structure for good regulatory governance.

5. Proof of concept – Cases of Private Regulation

Whereas the popularization of private regulation instruments dates back to the 1990s, the systematization of the process of considering private regulation instruments as regulatory alternatives can be seen as a recent topic. For example, the FDA Modernization Act of 1997 (USA, 1997) resulted in consensual standards from organizations like the International Electrotechnical Commission – IEC and the International Organization for Standardization – ISO being endorsed by the Food and Drug Administration. However, it was not done by following any structured processes, but based on complementary initiatives which led to the introduction of such instruments in a useful but yet random manner. Even today, the manuals guiding regulators through the process of regulatory framework designing have failed giving the necessary attention to private regulation instruments. For instance, the "OECD Best Practice Principles for Regulatory Policy - Regulatory Impact Assessment" (OECD, 2020) tackles the subject, while discussing targeted and appropriate Regulatory Impact Analysis - RIA methodology, by mentioning co-regulation and voluntary approaches as alternatives to "command-and-control" regulations. It also calls attention for the importance of considering transnational regulations. However, no precise instructions to evaluate a broader range of private regulation instruments are provided nor the importance of considering such instruments is highlighted. The same can be said about many others relevant references.

That being said, a comprehensive analysis of the history of private regulation is completely out of scope, and the important argument to be made rests on recent evidence demonstrating the merit of fostering private regulation strategies for regulatory reform. In this way, two cases were selected for an in-deep discussion exploring the conceptualization and the directives drawn up in the previous sections. The first one explores a situation leading to a disruptive alternative in terms of reducing state participation to a minimum whereas the second one explores a situation in which a conservative approach based on public-private cooperation was found to be more adequate. In each case, the official and academic registers describing the regulatory context, the alternatives, and the choices made by the State to establish the specific regulatory framework were used to simulate the running of the process depicted in figure 7, leading to the conclusion about the coherence of the adoption of such a process as a tool for private regulation instruments implementation evaluation.

5.1 The case of advertising self-regulation (economic regulation):

The advertising industry is one of the most challenging activities to be regulated because any State intervention may raise concerns about private initiative, free speech, and other fundamental pillars of modern democracy. However, assuring market fair play and protecting customers, users or electors from predatory and false advertising is a genuine concern and deserves to be considered

as a regulatory objective. Such a dichotomic reality led to a long-established solution which illustrates well the utility of private regulation instruments.

As described by the International Council for Advertising Self-Regulation (ICAS) in its Global Factbook of Advertising Self-Regulatory Organizations ('Global SRO Factbook') – (ICAS, 2021), *L'Autorité de régulation professionnelle de la publicité* (ARPP) in France dates from 1935 and is the oldest Self-Regulatory Organizations - SRO in the world. In the US, the National Advertising Division (NAD) was created in 1971 with similar objectives. Over time these organizations become popular all over the globe and the OECD has already used the Advertising Self-regulatory Organizations as a successful example of industry self-regulation (OECD, 2015b). Nowadays, the system of advertising SROs is globally spread as it can be seen on figure 8, which illustrates the countries adopting the International Chamber of Commerce (ICC) Advertising and Marketing Communications Code. All these countries opted for a regulatory framework in which consensual standards are adopted by the industry and somehow recognized, and sometimes enforced, by the state.

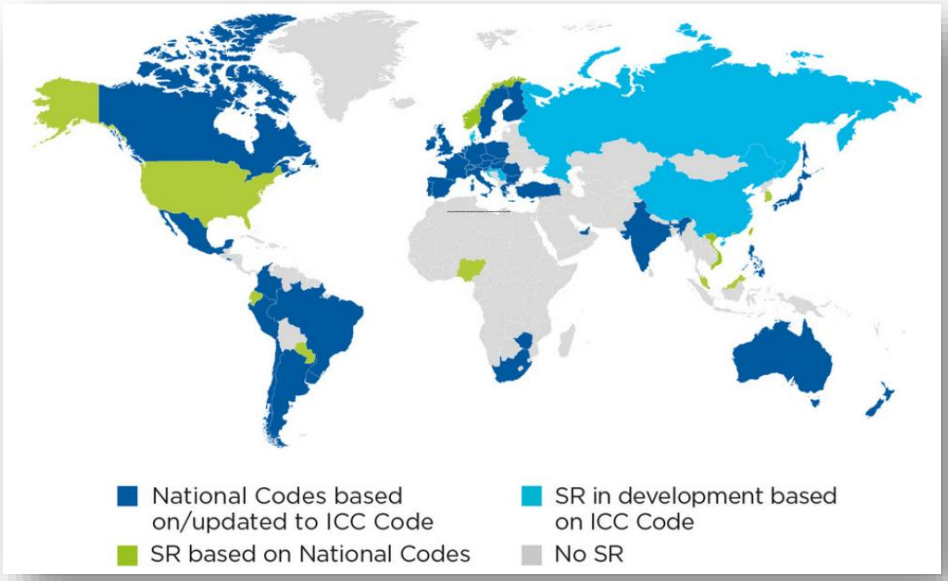

Figure – 8: Use of the ICC Marketing Code worldwide– Addapted from: ICAS (2021). Global Factbook of Advertising Self-Regulatory Organizations – available at: https://icas.global/

The self-regulatory system works based on independent entities, known as advertising standards bodies (SROs), which proactively act on the market to ensure that advertising is legal, decent, honest, and truthful. The way they act is providing standards, advice, and training to companies, and also, by fighting harmful, misleading, or offensive ads through different mechanisms base on

the recognition they have from the public authorities and even legislative texts. In the words of the ICAS: "this self-regulatory system an effective and 'collective' regulatory system for advertising is unparalleled when compared to other forms of industry self-regulation". The SROs handle complaints from competitors, consumers, or general public and judge each case providing decisions which are normally accepted by the market. However, what can be seen as a soft enforcement mechanism can also become a hard one depending on each state legal framework. As described by the International Chamber of Commerce:

> *"As SRO decisions are published, advertisers will generally ensure they comply with advertising standards to avoid the adverse publicity from failing to comply. (…) Ultimately, self-regulatory bodies may refer a situation where an advertiser refuses to comply with a decision or to participate in the self-regulatory process to the appropriate statutory authorities. Options available to the self-regulatory body will depend on the existing legal framework" (ICC, 2020).*

In the United States, for example, the US Federal Trade Commission tends to follow the National Advertising Division (NAD) decisions, operating a kind of supplemental enforcement mechanism which makes non-compliances subject to legal actions at state level. However, it can be said that cases of non-compliance with SRO decisions are rare since a tacit endorsement is in place. It exemplifies the mechanism described in section 4.1, were the authority choses to assume an observer position, acting only when strictly necessary. Figure 9 below repeats the process depicted in Figure 7 illustrating how the discussed directives could have been applied to the case leading to the strategy adopted.

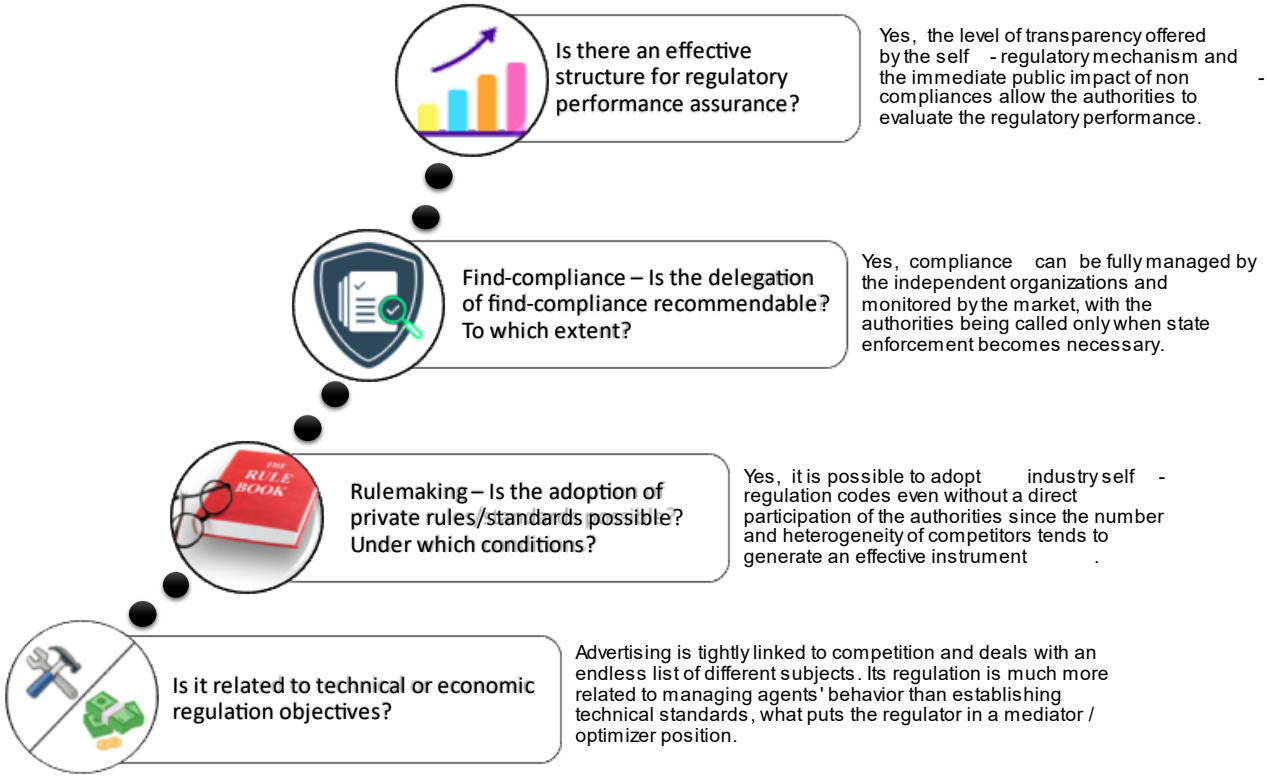

Figure – 9: Summary of the simulated application of private regulation strategies consideration as an alternative for the advertising self-regulation regulatory framework. – (figure produced by the author)

The first step for considering the adoption of private regulation, not yet restricted to the final SROs structure, would be identifying the issue as an economic regulation subject, and evaluating the factors steering regulation as depicted in Figure 4. In this case, the control of harmful advertising is a subject directly related to competition and with a high level of public participation and awareness, which allows the regulator to assume an observer position.

Regarding rulemaking, the options of monitoring the voluntary compliance with industry self-regulatory codes is completely possible, even with no state participation on the development of such a code. The social risk originated from the activity is sufficiently mitigated by the forces of competition and public opinion, so that state action may be reserved to cases where the non-government structure failed establishing necessary limitations or sustaining the fair play. Observing the directives written for considering this type of strategy we realize that the SROs alternative is fully compliant:

a) ***Risk-level check:*** The level and type of risk offered by advertising does not lead to sudden catastrophic events and is such that authority's oversight is capable of promptly identifying relevant misbehaviour and of taking appropriate actions in time.

b) ***Reliability check:*** The authorities' capability to evaluate the self-regulatory structure effectiveness is assured by the level of transparency and public awareness encountered in the advertising market. And the ability of the organizers to respond promptly revising the instruments when necessary is expected due to the low level of technical complexity of these standards and the level of expertise of the participants.

c) ***Intervention capability check:*** The authorities involved as, for example, the Federal Trade Commission, has full capability of regulating the market whenever necessary.

Defining find-compliance strategies for this case goes hand in hand with the rulemaking option. The acceptance of self-regulation based on a private code with no state participation brings together the preference for accepting the voluntary compliance process. The sustainability of such a process is provided by the mechanisms preventing non-compliances, which is based on the effectiveness of SROs enforcement tools and supplementary state support. In this way, looking at this structure as an approved process strategy, the SROs alternative is fully compliant with the listed directives:

a) ***Risk-level check:*** For the same reasons stated for rulemaking, the level of risk related to accepting a structure based on voluntary compliance is completely acceptable in the case of advertising since ex-ante actions are not necessary or even desirable.

b) ***Reliability check:*** In advertising a non-compliance is normally a public and flagrant event. Also, competitors and the public end up acting as regulators' representatives. Therefore, the lack of an official state-driven find-compliance process does not impair the effectiveness of the model.

c) ***Enforcement strategy:*** The voluntary compliance process is complemented by the system of complaints and monitoring which makes the advertising code effective. Even in cases where players refuse to comply with SRO's decisions there are legal instruments in place to force compliance or to make these players accountable.

Finally, regulatory performance evaluation and performance-based enforcement can be easily applied by the state through the Federal Trade Commission and other regulatory bodies supporting the process executed by the SROs. Observing the directives written for evaluating performance monitoring capability we realize that the SROs structure is fully compliant:

a) ***Monitoring structure and strategy:*** The transparency provided by the SROs processes allow constant monitoring, especially in cases of violations which trigger the action of the regulatory body.

b) ***Enforcement instruments:*** The FTC and other related regulatory bodies have legal means to foster compliance and to react to non-compliances at any time and circumstances.

c) ***Reclaiming capability:*** The FTC and other related regulatory bodies have full capability of regulation, without depending on the SROs.

The case at hand illustrates well the application of private regulation in its most liberal form. It means that the state removes itself from the center of the regulatory framework and acts as an observer. The age and worldwide range of such a solution proves its effectiveness. It must be highlighted that a less intrusive yet strong position of the state towards advertising self-regulation not only provides an effective system for preventing harmful dishonest advertising, but also offered a clever solution for the complex conflict between the need for regulation and freedom issues.

5.2 The case of small aircraft airworthiness standards (technical regulation):

The aeronautical industry is one of the most regulated activities worldwide. Naturally, the level of regulation depends on the category of the aircraft, which is directly related to its purpose. As depicted in figure 10 below, regulation over commercial transport category airplanes should be heavier than over homebuilt sportive aircraft, since the first aims to guarantee the safety of passengers, crew, and a minimum environmental impact, and the second focus on protecting the airspace, shared infrastructure, and third parties not directly involved in these activities. Between these two poles there is still a wide span of categories defining, each one, an optimum level of regulation.

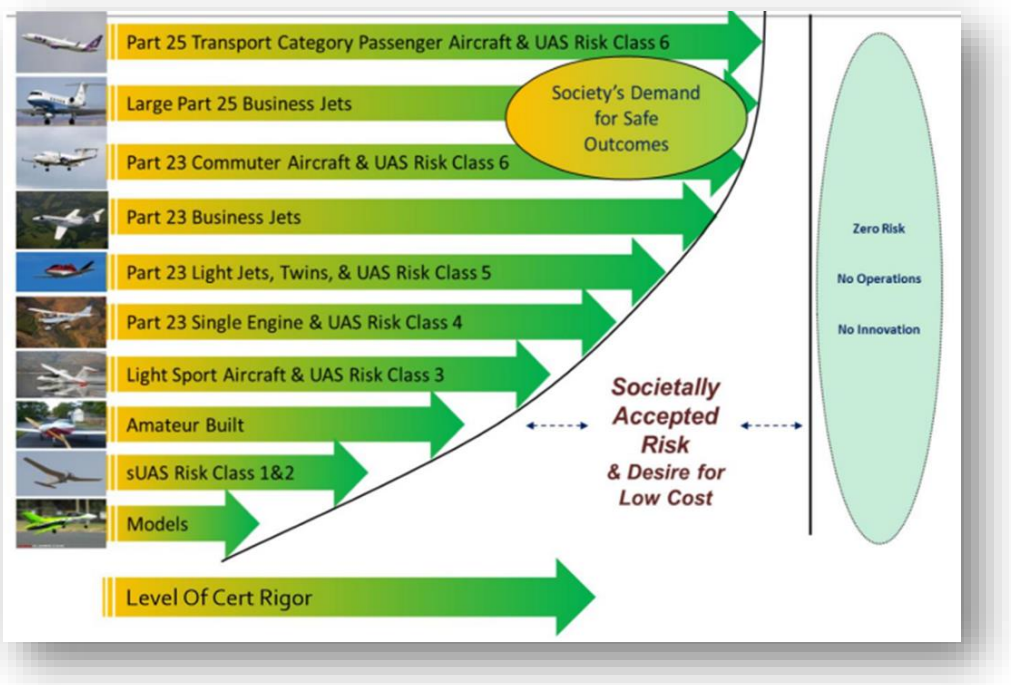

Figure – 10: Trade-off between risk tolerance and level of certification rigor with FAA certification categories – Addapted from: Gunnarson, Tom, (Jan. 2018). Aircraft Type Certification Considerations. AHS TVF Workshop – available at: https://vtol.org/files/dmfile/13-TVF5-2018-Gunnarson-ASTM-Jan191.pdf

Although, in theory, the gradient shown in figure 10 has been established to accommodate the categories in a rational and progressive level of regulation, the truth is that the American Federal Aviation Agency - FAA regulation over small aircrafts (e.g. CFR Part-23 scope) were so heavy that the US government finally approved in 2013 the "Small Airplane Revitalization Act of 2013" (USA, 2013). The documentation supporting the bill stated that outdated and inappropriate regulations have been stifling innovation and increasing costs of the general aviation industry. Because of that, stakeholders were called to discuss strategies for modernizing the regulatory framework while keeping the necessary control over the aeronautical industry activities. Dating back to 2009, the Part 23 Reorganization Aviation Rulemaking Committee finally pointed to a solution based on private regulation strategies. More specifically, by using state-endorsed consensus-based standards produced by the ASTM - American Society for Testing and Materials. The regulatory framework was reformed by substituting prescriptive design constraints for broad, outcome-driven safety objectives, commonly called performance-based requirements – PBR. These requirements are then supported by consensus-based standards developed by private parties with direct participation of the FAA. The mechanism through which the FAA adopted the ASTM standards is illustrated in Figure 11 below:

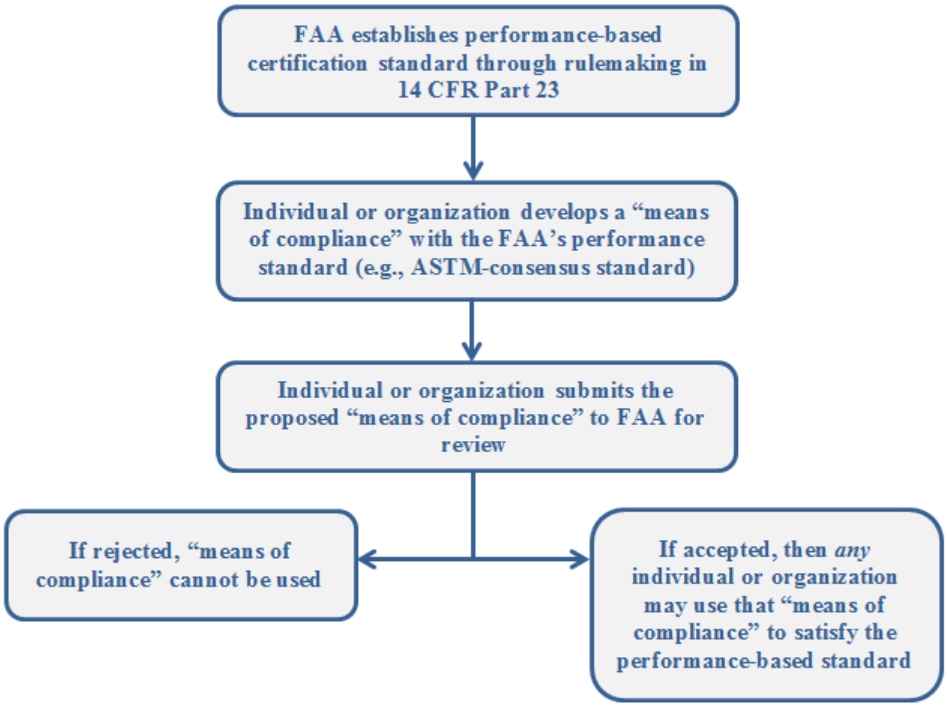

Figure – 11: FAA mechanism of ASTM standards endorsement for small aircraft certification - Obtained from: AOPA (2022) - Understanding PART 23 Rewrite – available at: https://www.aopa.org/advocacy/advocacy-briefs/understanding-part-23-rewrite

As shown in Figure 11, after modernizing the rule using performance-based requirements, the FAA opens a window for consensus-based standards accepted as means of compliance. Although it may appear minor to someone who does not know the aeronautical certification process in deep, the novelty represents a revolution on the field and a successful introduction of private regulation alternative which substantially enhanced the regulatory framework in terms of efficiency and effectiveness. The pace and quality by which consensus-based standards are set overpowers any governmental options. Besides, the fact that the authority actively participates in the standards definitions and keeps the right to accept or reject these standards safeguards public interest.

Moving down on the categories in Figure 10, FAA Order 8130.2J (FAA, 2017) was even more permissive for light sport aircraft (LSA) allowing both the use of ASTM standards as the basic rule and the issuance of statements of compliance by the regulatees, subjected to review under specific conditions. In case of LSA, it can be noticed a very low level of participation of the authority in the find-compliance process, but the influence on the standards remains due to the active participation of government representatives within the ASTM and the need for endorsement in a Notice of Availability - e.g. NOA-21-01 / NOA#16 (FAA, 2022).

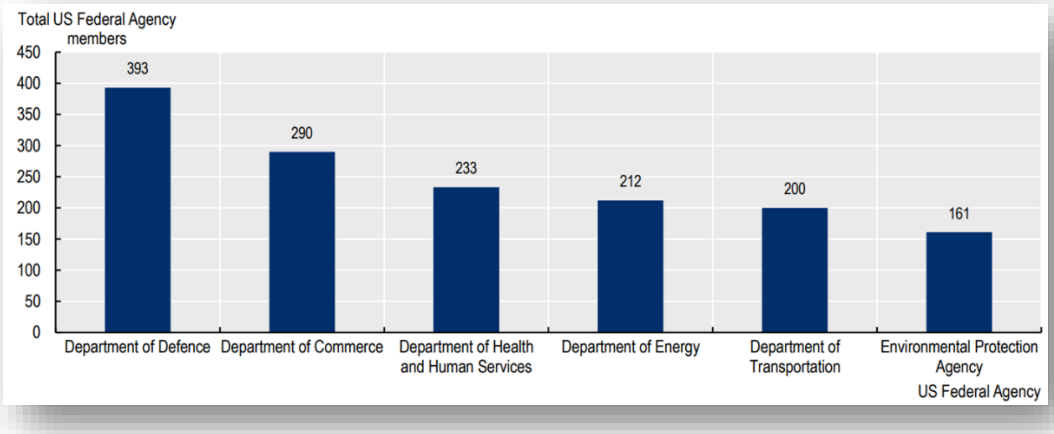

Figure – 12 - ASTM International United States Federal Agencies members by sectors. Obtained from: International Regulatory Co-operation and International Organisations: The Case of ASTM International (OECD, 2021)

The cooperation with specific non-governmental organizations to set technical standards supporting regulatory objectives, such as transportation safety, has increased in the last three decades. The OECD has already mentioned that ISO is seen as a "quasi-governmental organisation" (OECD/ISO, 2016) because of the role it plays setting standards widely accepted and sometimes enforced by authorities. In the same way the OECD sees ASTM International as a unique private international standard-setting organization due to its membership structure which ensures an inclusive and representative decision-making process (OECD, 2021). In an ASTM committee unanimous agreement is not required to achieve consensus, but negative votes need to be carefully justified and addressed by the members. Also, the conflicting interests are handled by classifying each member in one of the four classes: Producers, users, consumers, and general interests (which includes government representatives), and preventing producers to outweigh the combined voting from the others. This process promotes technical excellence and provides transparency to regulators at an international level, taking these organizations to a position between the service/product providers and the authorities. Such a strategic position combines a high level of efficiency with a sufficient level of independency and governmental legitimacy; and all this allow thinking about these organizations as the best tool for overcoming transnational regulatory challenges.

Figure 12 shows the level of participation of U.S. regulators in the ASTM committees, reinforcing the argument that regulatory reform in countries with well-established regulatory structures has support the option of participating as a member on consensus-based rulemaking processes as the best alternative in many cases. However, this same movement cannot be assumed worldwide. As

illustrated in Figure 13, obtained from the OECD material, even in some countries with expressive levels of industrialization, the adoption of these standards is still timid. It supports the claim that private regulation, as a strong regulatory reform tool, has not been fully exploited by many governments.

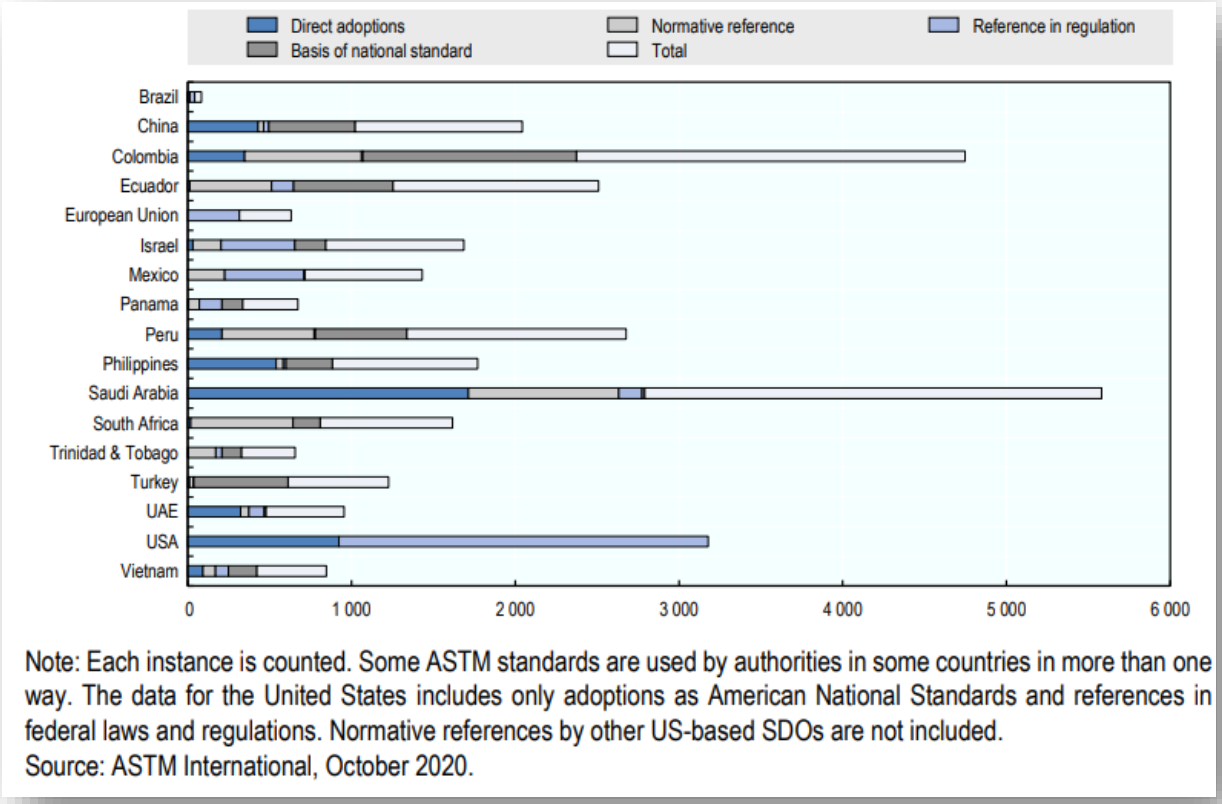

Figure – 13 – Relevance of ASTM standards for selected national standard development organizations and regulators. Obtained from: International Regulatory Co-operation and International Organisations: The Case of ASTM International (OECD, 2021)

Finally, getting back to the specific case of small aircraft airworthiness certification under CFR Part-23, it is possible to correlate the path to the decision of endorsing ASTM International standards to the directives for private regulation implementation strategies selection discussed in section 4. Figure 14 repeats the process depicted in Figure 7 illustrating how the discussed directives could have been applied to the case leading to the strategy adopted.

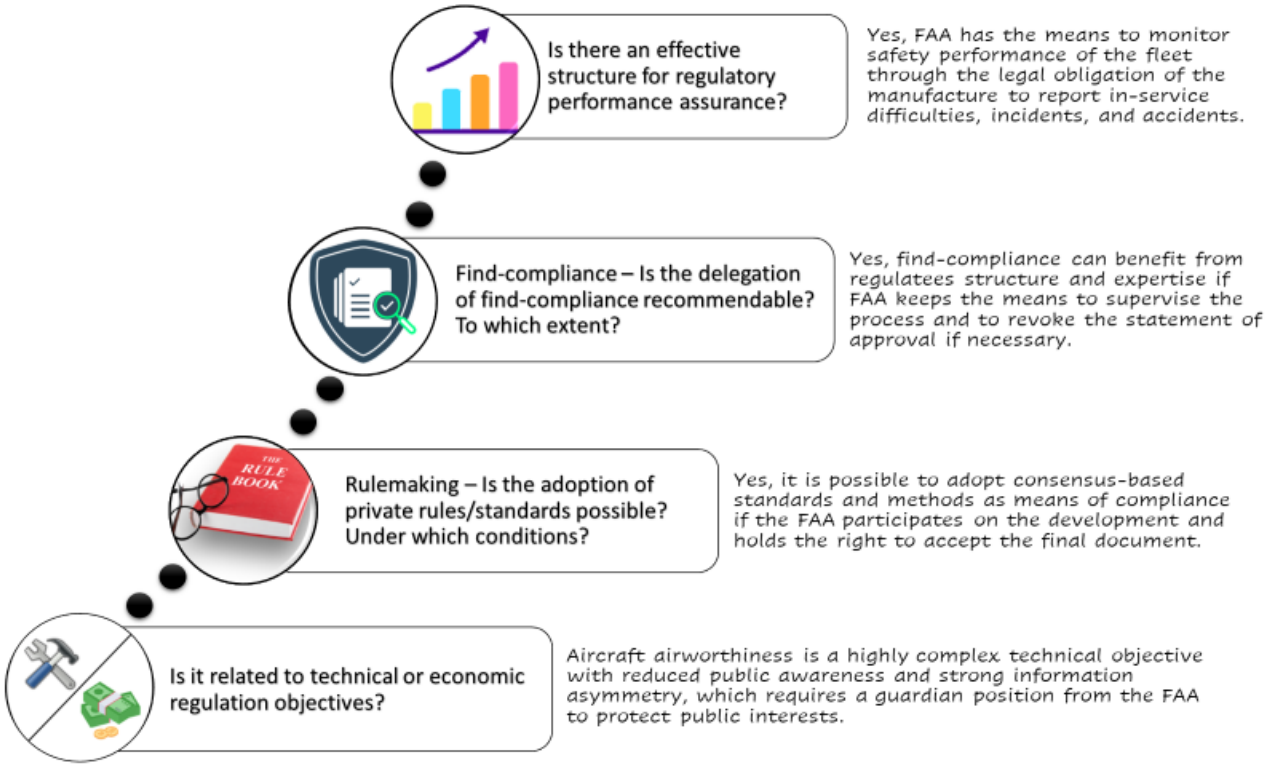

Figure – 14: Summary of the simulated application of private regulation strategies consideration as an alternative for the small aircraft airworthiness regulatory framework. – (figure produced by the author)

The first step for considering the adoption of private regulation instruments, not yet restricted to the final ASTM alternative, would be identifying the issue as a technical regulation subject, and evaluating the factors steering regulation as depicted in Figure 4. Obviously, it reveals a highly technical and complex nature, which call for an ex-ant in-deep analysis of the regulatory framework due to the criticality of aerial safety; and requires a guardian position from the authority since the interests of the regulatees are convergent and potentially conflicting with public interest, what is aggravated by the low level of public awareness and comprehension of the subject under regulation.

Regarding rulemaking, the options of monitoring the voluntary adoption of non-governmental standards or endorsing consensus-based standards with no state participation are not recommendable due to the level of social risk originated from the activity and the need for a previous check on quality and effectiveness. Such a context points to a cooperative consensus-based rulemaking strategy, such as the selected option of working with ASTM International to set the standards endorsed as means of compliance to performance-based revised rules. Observing the directives written for considering this type of strategy we realize that the ASTM alternative is fully compliant:

a) ***Complexity check:*** Airworthiness standards are highly complex, and the relevance of aeronautical safety justifies an active participation of the FAA in the rulemaking process.

b) ***Independence check:*** The ASTM demonstrates a high level of independency, solid reputation producing technical standards, and the decision-making process is fair and transparent enough to provide a sufficient level of confidence to the FAA.

c) ***Technical expertise check:*** The FAA has the knowledge and expertise required to participate as a valuable member in the ASTM committee and to execute find-compliance if necessary.

Defining find-compliance strategies can be more complex, because more than one strategy may be adopted simultaneously for different regulatees. Depending on the regulatee the FAA may use a Delegated Organization (ODA) or its chain of Designated Engineering Representatives (DER). Either way, as a rule, the process is supposed to include some participation of the FAA before approval. In a conservative approach, observing the directives written for considering the risk-based cooperative find-compliance strategy we realize that the ASTM alternative is fully compliant:

a) ***Level of involvement methodology (LOI***): The FAA has an experimented methodology to define LOI which can be found on certification plans and specific orders. Novelties, for example, are usual candidates for direct find-compliance or revision.

b) ***Risk assessment review:*** Small aircraft certification allows a higher level of delegation and, at the same time, demands a minimum participation of the authority oversighting each instance of approval by executing find-compliance or revising compliance of specific items***.***

c) ***Technical expertise check:*** FAA has the knowledge and expertise required to execute find-compliance of any selected item.

Finally, regulatory performance evaluation and performance-based enforcement can be applied by the FAA based on its continued airworthiness process. The FAA keeps track of in-service performance and is ready to act in case of safety issues or identified non-compliances. Observing the directives written for evaluating performance monitoring capability we realize that the FAA structure is fully compliant:

a) ***Monitoring structure and strategy:*** The FAA has a traditional and effective structure for monitoring safety and, thus, regulatory effectiveness.

b) ***Enforcement instruments:*** The FAA has legal means to enforce rules and to react to non-compliances at any time and circumstances.

c) ***Reclaiming capability:*** The FAA maintains full capability of regulation without depending on private organizations.

The reform of the FAA regulatory framework for small aircraft certification illustrates how private regulation can be successfully used as an instrument to improve regulatory performance. It must be highlighted that a smart structure generated by the combination of official performance-based requirements and private consensus-based means of compliance not only provided the agility demanded by such a high-tech market, but also offered a reliable process guaranteeing safety.

The two cases selected as proof of concept have in common the success enhancing the regulatory framework. It exemplifies how different strategies of private regulation implementation may fit specific regulatory objectives. It is clear that the first one has the advantage of minimum state participation whereas the second one has the advantage of better control over regulatory performance. It does not mean that the first case is ineffective, or the second case retains unnecessary state intervention. On the contrary, it illustrates how each regulatory objective calls for an optimum solution depending on the type of regulation, the characteristics of what is being protected, the domestic or multinational characteristic of the market, and the means available to public and private actors involved. Such a statement is illustrated by Muchmore (2010) in a particular discussion related to the regulatory reform affecting the American Food and Drugs Administration - FDA:

> *"Overall, the choice between these regulatory strategies implicates basic questions about the scope of government. Within an individual state, the choice between direct regulation and delegation to a private entity - between the size of the Securities and Exchange Commission (SEC) and the size of its private sector counterpart, the Financial Institutions Regulatory Authority- is a question about the role of government and the value placed on competing power structures. In the multinational context, this choice expands to include the allocation of authority, and regulatory burden, between importing and exporting countries."*

Finally, it is important to call attention to a specific aspect of private regulation as a tool for regulatory reform: Although the most liberal methods (e.g. section 5.1) are frequently pursued by policy makers trying to revolutionize the regulatory framework reducing costs and diminishing state interference, it is rare to find regulatory objectives to which these options are actually optimal. On the other hand, it is equally rare to find a regulatory objective to which the more conservative approaches to private regulation (e.g. section 5.2)

cannot be successfully applied. Therefore, it is fair to conclude that both examples show that private regulation instruments work, if correctly applied.

5.3 Private regulation instruments in Brazil

For decades Brazil not only has figured in the top ten economies in the world but it also is recognized by its level of technological and social development. However, in terms of using private regulations there is room for improvement in the Brazilian regulatory scenario. Brazilian regulatory structure relays heavily on governmental institutions operating the regulatory cycle, and the few initiatives of private regulation which can be seen are restricted to specific functions or complemented by State actions. It is fair to say that although it is common to find private instruments being used by regulators as references, guidance, or means of compliance, it is uncommon to have important sectors of the Brazilian economy being conducted under self-regulation or cooperative structures.

In order to illustrate some applications of private regulation instruments in Brazil, two different cases were selected focusing rulemaking and find-compliance respectively. The first case deals with the regulation of securities market, which is based in self-regulation with parallel oversight of a state agency. The second case presents the on-going structure for carbon credit certification, which still lacks full regulation but has already set a clear path towards delegated statements of compliance.

Securities market in Brazil operates under a specific arrangement of self-regulation which includes rulemaking. As described by Freire (2021), the responsibility for regulating the whole ecosystem of financial instruments trading is given by the law to the CVM (mobile values commission), a governmental entity which instead of issuing norms to regulate every aspect of such a varied and dynamic market opts for delegating a relevant portion of its regulatory competencies to the market itself, allowing a type of oversighted self-regulation structure. The way it works is through two different mechanisms: part of the activities is legally delegated to the market whereas others uses private instruments put in place voluntarily.

The law 6.386, approved in 1976, declares the stock market operator as an auxiliary entity to the CVM. Through the times, this structure gave birth to an independent private entity – the BSM - which handles stock market supervision issuing rules to be followed by the participants, supervising activities, and even enforcing these rules through the application of penalties as suspensions and fines. To deal with other aspects of the financial market, not specifically predicted by the law, the CVM uses the same logics under a voluntary system of recognized agents which operates the certification of financial agents, rulemaking about public offers and open-market trading, and many others subsidiary activities which would demand a gigantic structure if were State-driven. Up to now, this complex system has been proved trustable and solid. Although there are critics

about the timid and rare punishments enforced by those entities, the financial stability and the growth on the volume of resources being negotiated in the Brazilian market are proof that the system has been successful.

Exploring the other relevant phase of the regulatory cycle, the on-going establishment of climate-management regulations in Brazil presents a clear path to the adoption of private instruments for find-compliance. Whereas the rules and standards are being fiercely disputed in a governmental level, the responsibility for find compliance with those rules have been automatically delegated to private companies specialized in issuing statements of compliance as, for example, certificates of carbon credits. Under the current system, carbon credit certificates are issued by accredited private companies (Maciel et.al. 2009). A person unfamiliar with the subject may not detect how disruptive such an option is. Far from having straightforward methods, determining carbon credits relays heavily on engineering judgement. Because of that, many claims from climate activists target those entities accused of selling dubious carbon credits certificates. The attempt of raising official criteria or standards continues, but the decision of using a private structure for carbon credit certification seems to be final. In this context we see that the adoption of oversighting activities handle by the State may be key to the success of the environmental policy.

Both examples above show a coexistence of public and private actors working together to achieve a common regulatory goal, and for both of them it is possible to trace the origin of the system to the high cost of having it all executed by the State. This is an important aspect to be reflected on. In Brazil these initiatives often face critics from representatives who see the discussion as source of political capital. Which means, the critics are sometimes driven by political interests rather than by concerns about regulatory performance. On the other hand, the drivers leading to the decision of implementing private regulation instruments are frequently more related to saving costs than to improving the regulatory outcome. Therefore, despite of having some relevant examples of private regulation instruments being used, Brazil has a lot to learn in terms of private regulations instruments and should strength ties to internationally recognized institutions in order to perfect and expand the mechanisms of regulatory reform using these tools.

5.4 The references to private regulation instruments by the OECD

Although there is still no dedicated manual or report produced by the OECD focusing private regulation instruments (PRI), an increasing attention to it can be clearly perceived. The OECD report named Reviews of Regulatory Reform: Regulatory Policies in OECD Countries (Paris, 2002b) has placed private regulation in the middle of the spectrum of regulatory and non-regulatory policy instruments, indicating that even twenty years ago private regulation instruments were seen as an equilibrated alternative weighing market-driven and government-driven solutions. The same report affirms that, by that time, most of OECD countries required

regulators to assess regulatory and non-regulatory alternatives before adopting new regulation. Also, among other regulatory practices, "outsourcing" regulatory functions was already a valid option as the implementation of co-regulation schemes, which closely resemble the more conservative approaches to private regulation discussed in section 4.

However, although private regulation considerations have appeared in several OECD reports, ten year later, no focused attention was given to this particular alternative. For instance, the only recommendation in the OECD Recommendation of the Council on Regulatory Policy and Governance (2012) which relates to private regulation is number 12:

> *"In developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction."*

The detailing of this recommendation brought two specific mentions related to private regulation, always focusing transnational regulation:

> *"12. 5 Governments should contribute to international fora, including private or semi-private, which support greater International Regulatory Co-operation (IRC). "*
>
> *"12.6 Governments should avoid the duplication of efforts in regulatory activity in cases where recognition of existing regulations and standards would achieve the same public interest objective at lower costs."*

This recommendation somehow encompasses private regulation instruments; however, it does not give the importance that this subject requires.

Even the most recent OECD evaluation of regulatory reform, the OECD Regulatory Policy Outlook 2021, fails to give the high emphasis to private regulation instruments, although It does mention those tools, as in the section entitled: Looking ahead – a glance to the future of regulation:

> *"Using approaches such as outcome-oriented regulations, co-regulations, standard-setting or leaving space for self-regulation has to become more common in order to permit more flexibility in response to the fast-pace of technological changes."*

The 2021 report tackles all the aspects which encircles private regulations instruments as: evidence-based policy making, which benefits from the advantage of private organizations by obtaining operational data from regulatees; regulatory oversight, which is a pre-requisite to successfully implementing private regulation

solutions; international co-operation, which points to the scenario of an independent body setting standards adopted by several states; regulatory governance, which is the key factor defining private regulation implementation suitability; and finally, risk-based regulation, which represents the basis for picking the right private regulation strategy as the most adequate alternative to a specific regulatory objective. Yet, there is no dedicated section on private regulation. Also, there is no discussion about methods or directives for considering private regulation instruments in the process of regulatory policies definition. Therefore, the full potential of private regulation strategies, in the form of oversight of self-regulation structures or in the form of co-regulation alternatives, remains as a next step to be deeply considered in the regulatory reform.

Based on the observations discussed above, although it was proven that OECD have been addressing PRI in its many contributions to regulatory reform, it is reasonable to expect from the OECD a closer look at the potential benefits of introducing these tools in many regulatory frameworks, and also, at the development of directives and methods to help countries considering private regulation instruments in a more systematized way.

6. Conclusion – Regulatory Reform Using Private Regulation

The analysis of several manifestations of Private Regulation Instruments (PRI) encountered in the literature highlighted the potential of PRI enhancing regulatory quality and allowed the outlining of influence factors, baseline strategies, risk management directives and, finally, a process for the systematic consideration of PRI introduction into regulatory alternatives.

Following the OECD perspective towards regulatory reform, we came to the conclusion that private regulation is a master tool for regulatory reform because, if applied under the correct strategy, it has the potential to enhance regulatory governance by providing technical quality, flexibility, responsiveness and efficiency in a level that supersedes any isolated State-based structure. Using two emblematic cases, it was shown how PRI may optimize regulatory frameworks by setting the right combination of public and private activities. The selected cases have in common the success improving efficiency and effectiveness of the regulatory framework, and their differences reinforce how each regulatory objective calls for an optimum solution depending on the type of regulation, the characteristics of what is being protected, the domestic or multinational characteristic of the market, and the means available to public and private actors involved. From this discussion, it is possible to argue that: if it is rare to find regulatory objectives to which the more liberal options of PRI are actually optimal, it is equally rare to find a regulatory objective to which the more conservative approaches cannot be successfully applied.

The limitations of this work are mostly related to the lack of a minimum number of test-cases were the offered process has been purposefully used into different regulatory contexts, leading to a practical validation of the findings in this text. However, it is understandable that the only way it may be accomplished is by having the tool available to future scholars and practitioners who may continue this research by implementing the process and testing the offered directives against specific cases. Thus, the present work lays the foundation for a number of by-products which may flow from the present analysis and cover additional important topics like: The legal boundaries of private regulation instruments implementation, challenges implementing private regulation instruments into specific regulatory environments, and, performance checking on private regulation instruments.

6.1 Remarks for practitioners:

a) Even though there are several cases proving the suitability of private regulation as a regulatory governance improvement tool, it must be stressed that the inappropriate use of this same tool leads to the weakening of the regulatory framework and put at risk market competitiveness and people's well-being.

b) Private regulation alternatives become a fallacious trap when it is used to speed up approval or to lower technical standards. It is always politically seductive the implementation of simplification programs under the claim of administrative burden reduction, which, in fact, reduces the added value supposed to be provided by the regulatory activity.

c) As a rule of thumb, it can be said that private regulation instruments designed to improve regulatory efficiency are being correctly applied only if they also improve regulatory effectiveness assuring the intended outcomes.

d) it is reasonable to suggest that private regulation instruments should be a preferred alternative to be considered by governments executing regulatory reform programs, always going from the most liberal to the most conservative strategy, because, whereas self-regulatory private regulation instruments may frequently encounter limitations, the introduction of cooperative instruments is recommendable in almost any case

7. Bibliography

1. Beckers, A. and Kawakami, M. (2017) "Why Domestic Enforcement of Private Regulation Is (Not) the Answer: Making and Questioning the Case of Corporate Social Responsibility Codes (Introduction)," Indiana Journal of Global Legal Studies: Vol. 24 : Iss. 1 , Article 1. Available at: https://www.repository.law.indiana.edu/ijgls/vol24/iss1/1
2. Cafaggi, F. and Renda, A. (2012) Public and Private Regulation: Mapping the Labyrinth. CEPS Working Document No. 370, October 2012, Available at SSRN: https://ssrn.com/abstract=2156875
3. Cooter, R. D; Gilbert, M. D. (2022). Public law and economics - Oxford University Press, 2022, pg. 490-556 DOI: 10.1093/oso/9780197655870.001.0001
4. FAA. (2017), Order 8130.2J, U.S. Department of Transportation – Federal Aviation Administration (FAA)
5. FAA. (2022) - FAA NOA-21-01 (NOA #16), U.S. Department of Transportation – Federal Aviation Administration (FAA), published in the Federal Register on February 23, 2022.
6. Freire, L. A. (2021) - O Modelo Brasileiro de Autorregulação do Mercado de Valores Mobiliários: identificando possíveis fragilidades na autorregulação de base voluntária. Revista da PGBC – V. 15 – N. 2 – Dez. 2021 pg 157-174.
7. ICAS (2021), Global Factbook of Advertising Self-Regulatory Organizations ('Global SRO Factbook') – https://icas.global/wp-content/uploads/2021-Global-Factbook_ICAS.pdf
8. ICC (2020), The Benefits of Advertising Self-Regulation in Ensuring Responsible and Compliant Advertising - https://iccwbo.org/news-publications/policies-reports/the-benefits-of-advertising-self-regulation-in-ensuring-responsible-and-compliant-advertising/
9. Kitroeff, N., Gelles, D. and Nicas, J. (2019) - The Roots of Boeing's 737 Max Crisis: A Regulator Relaxes Its Oversight, The New York Times, July 27, 2019 - https://www.nytimes.com/2019/07/27/business/boeing-737-max-faa.html
10. Maciel,C.V.; Coelho, A.R.G.; Santos, A,M; Lagiola, U.C.T.; Libontati, J.J.; Mâcedo, J.M.A. (2009) - Crédito de Carbono: Comercialização e Contabilização a partir de Projetos de Mecanismos de Desenvolvimento Limpo. In: RIC - Revista de Informação Contábil, 2009. Vol. 3, p.112.
11. Malhotra, N., Monin, B., & Tomz, M. (2019). Does Private Regulation Preempt Public Regulation? American Political Science Review, 113(1), 19-37. doi:10.1017/S0003055418000679
12. Malyshev, N.A. (2008). The Evolution of Regulatory Policy in OECD Countries. Paris.
13. Muchmore, A. I. (2010). Private Regulation and Foreign Conduct - Penn State Law eLibrary - 47 San Diego L. Rev. 371. Available at: https://digital.sandiego.edu/sdlr/vol47/iss2/4
14. OECD (1997), The OECD Report on Regulatory Reform: Synthesis, Paris.
15. OECD (2002a), Regulatory Policies in OECD Countries. From Interventionism to Regulatory Governance, Paris
16. OECD (2002b), Reviews of Regulatory Reform: Regulatory Policies in OECD Countries, Paris – ISBN 92-64-19893-8
17. OECD (2003), From Red Tape to Smart Tape, Administrative Simplification in OECD Countries, Paris.

18. OECD (2007), Regulatory Reform in France: Enhancing Market Openness through Regulatory Reform, OECD Reviews of Regulatory Reform, Paris.
19. OECD (2005), OECD Guiding Principles for Regulatory Quality and Performance, Paris.
20. OECD (2011), Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest, Paris.
21. OECD (2015a), OECD Regulatory Policy Outlook 2015, Paris.
22. OECD (2015b), Industry Self Regulation: Role and Use in Supporting Consumer Interests, OECD Digital Economy Papers, No. 247, OECD Publishing, Paris - http://dx.doi.org/10.1787/5js4k1fjqkwh-en
23. OECD (2018), OECD Regulatory Policy Outlook 2018, Paris.
24. OECD/ISO (2016), "International Regulatory Co-operation and International Organisations: The Case of the International Organization for Standardization (ISO)", OECD and ISO.
25. OECD (2020), OECD Best Practice Principles for Regulatory Policy - Regulatory Impact Assessment, OECD, Paris.
26. OECD (2021a), OECD Regulatory Policy Outlook 2021, Paris.
27. OECD (2021b), International Regulatory Co-operation and International Organisations: The Case of ASTM International, OECD, Paris.
28. Ogus, A. (1995). Rethinking Self-Regulation. Oxford Journal of Legal Studies, 15(1), 97–108. http://www.jstor.org/stable/764582
29. Patton, C., Sawicki, D. & Clark, J. (2012). *Basic Methods of Policy Analysis and Planning*. Pearson e-Text 3rd ed. ISBN:9781315664736.
30. Sheehy, B. (2012). Understanding CSR: An Empirical Study of Private Self-Regulation. Monash University law review. Monash University. Faculty of Law. 38. 103.
31. United States of America - USA. (1997). H. Rept. 105-399 - Food and Drug Administration Modernization Act of 1997. 21 USC 301 note, PUBLIC LAW 105-115—NOV. 21, 1997 - https://www.congress.gov/105/crpt/hrpt399/CRPT-105hrpt399.pdf
32. United States of America - USA. (2013). H. Rept. 113-151 - Small Airplane Revitalization Act of 2013. 49 USC 44704, PUBLIC LAW 113–53—NOV. 27, 2013 – https://www.congress.gov/congressional-report/113th-congress/house-report/151/1
33. Verbruggen, P. W. J. (2014). Regulatory governance by contract: The rise of regulatory standards in commercial contracts in 'Regulatory Governance'. Recht der Werkelijkheid, 35(3), 79-100.
34. WTO (2020), Agreement on Technical Barriers to Trade, Geneva.
35. Windholz, E. and Hodge, G. (2012), Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity, Monash University Law Review, Vol. 38, No. 2, pp. 212, 2012, Available at SSRN: https://ssrn.com/abstract=2215334
36. Yilmaz, Y. (1998). PRIVATE REGULATION A Real Alternative for Regulatory Reform.