

Novelty and the demand for private regulation: Evidence from data privacy governance

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Puzzle : Regulatory novelty in private regulations

Under which conditions do private regulations depart from their legal requirements and include regulatory novelty ?

Two definitions

- Private regulations : Policy documents codifying rules for multiple businesses
- Regulatory novelty : The first time a rule is enunciated in a specific governance field

Public and private regulations in global governance

1. A first strand of literature criticizes the rise of private forms of regulation as representing 'retreat of the state' (Strange, 1996 ; Cutler, 2006 ; Dauvergne & Lister 2013)
2. A second strand of literature emphasizes the potential for private regulations to fill regulatory voids (Abbott and Snidal, 2009 ; Green, 2013).
3. More recent contributions now point out the potential for public and private regulation to interact and complement each other (Bartley, 2011 ; Eberlein et al., 2014 ; Gulbrandsen, 2014 ; Green, 2017 ; Renckens, 2020)

Private regulations “can serve as an arena of experimentation and learning” (Green & Auld 2017 ; see also Bartley, 2011)

Two characteristics of private regulation support this potential role :

1. Flexibility

- Low degree of legalization
- Voluntary nature

2. Expertise

- Technical knowledge
- Proximity with the issues

The demand for novelty

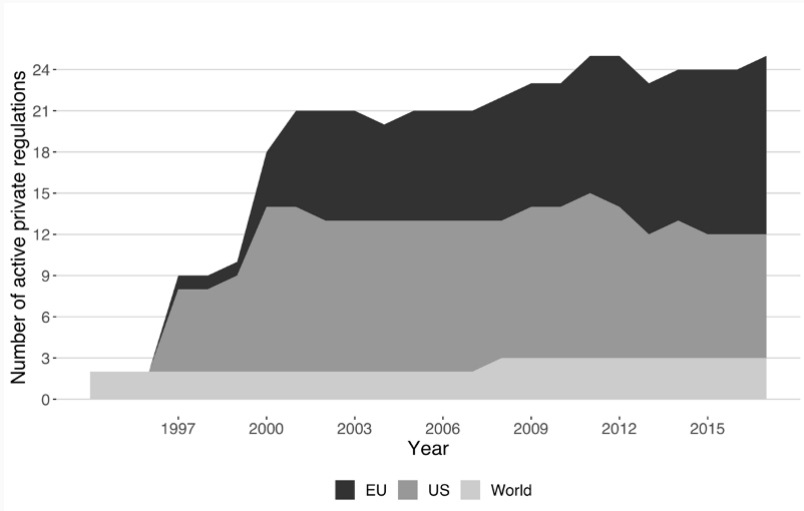
Yet, this only explains the potential *supply* of regulatory novelty. Private regulations may simply reiterate requirements previously enunciated by other public or private actors.

My argument : The inclusion of regulatory novelty will vary according to the demand for private regulation.

Private actors may demand private regulations to achieve three benefits :

1. Reduce transaction costs
2. First-mover advantage
3. Reputation gains

European and American Data Privacy Regulations



I use two sources of data :

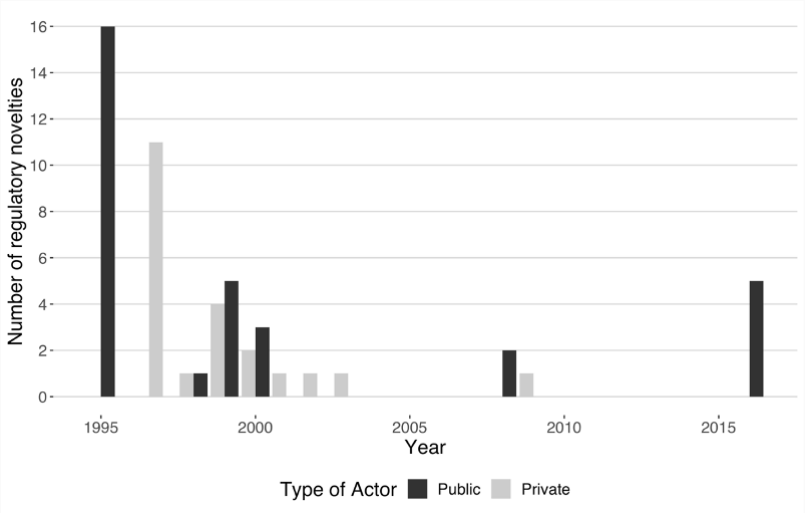
1. Data privacy regulations

- 126 public and private regulations adopted from 1995 to 2016
- Manually coded 14 principles and 73 rules
- Principle 1 : Transparency and Rule 1.1 Obligation to maintain a privacy policy

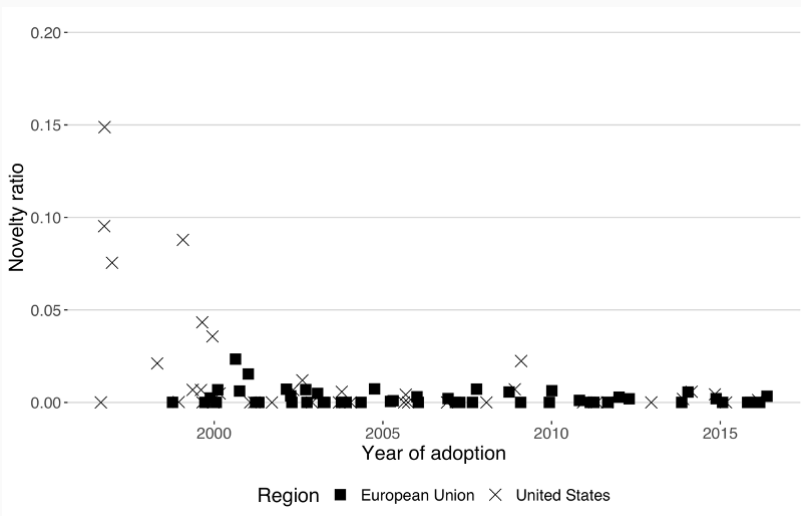
2. Interviews

- 35 representatives from public and private organizations in Europe and the United States
- All interviewees were asked about the role of private regulations and their interactions between public and other private regulations

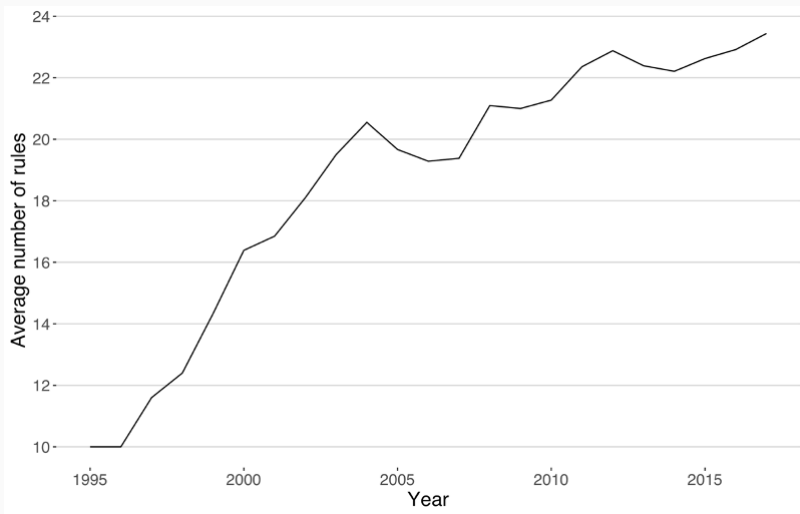
Regulatory novelties in public and private regulations over time



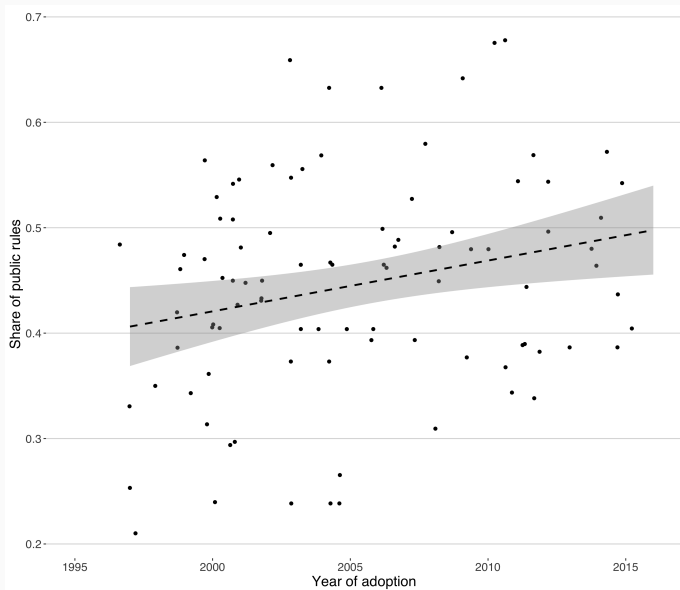
Regulatory novelties in private regulations in the United States and the European Union



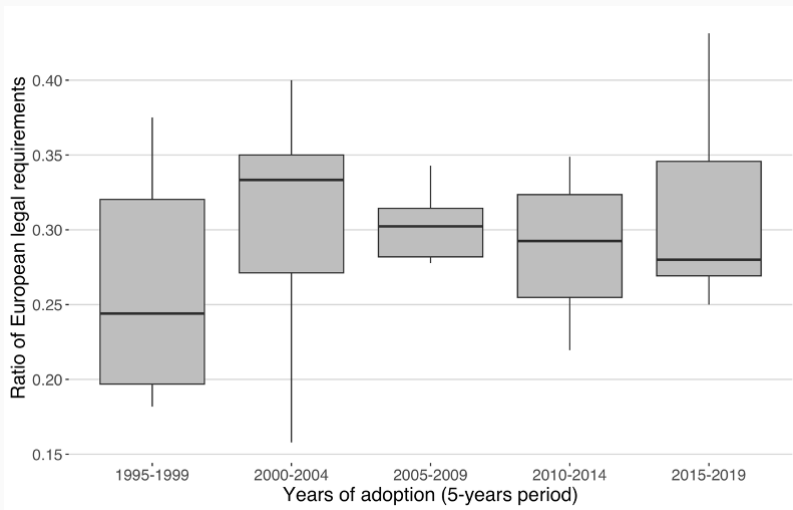
Growth in complexity of private regulations over time



Where did new rules come from ?



The progressive inclusion of European data privacy rules in American private regulations



In sum, my textual analysis shows :

1. Private regulations did not include more novelties than public ones.
2. Regulatory novelties in private regulations were almost all created before 2000.
3. They mostly came from private regulations adopted in the United States
4. Since 2000, private regulations reiterated their legal requirements
5. In the United States, it notably reflected the growing adoption of 'European' rules

The demand for private regulations in the European Union

1. The early adoption of the Data Privacy Directive in Europe removed the possibility to gain a first-mover advantage :
 - “Nobody wanted to make the jump without knowing what [public regulators] actually wanted. People feared it could quickly become useless. At the same time, they did not want to go too far if it was not needed.” - Interview with an European business representative
2. Private companies neither expected their regulations to provide them with a reputation boost :
 - “There were too many logos. Was it helping? Not that much. It was confusing for the consumers.” - Interview with an European business representative
3. Instead, private regulations were primarily seen as a way to reduce transaction costs :
 - “All the industry was complaining that rules applicable to data protection were applied in a fragmented way.” - Interview with an European business representative
 - “Businesses look[ed] for clarifications on how to implement the regulation.” - Interview with an European business representative

The demand for private regulations in the European Union (Cont.)

This was actively reinforced by the European Union :

- “We try to drive them to include what we think should be in [a] code.” - Representative from the European Commission
- The European Commission wanted an expert “holding the pen for private actors.” - European Business representative
- The European Commission “recommend[ed] us to look at specific issues and [told us] key questions they would like them to answer.” - European Business representative
- “If you are asking questions, it means that you are trying to go around the law and this is problematic” - European Business representative
- This reflects the belief in Europe that private regulations “are there to help compliance” - Representative from the European Commission

The demand for private regulations in the United States

In contrast to Europe, the United States has yet to adopt a federal privacy law and private regulations could help achieve a first-mover advantage

- The Individual Reference Services Group (IRSG) case
- “Sometimes, ethical requirements come before legal ones. We had requirements to protect children’s data before COPPA.” - American business representative

And yet, private regulations entirely stopped experimenting with new rules after 2000.

- “My role is to implement, not to create rules” - American business representative
- “We aim to help our members to respect their [legal] requirements” - American business representative

The demand for private regulations in the United States (Cont.)

This broadly reflects a change in private regulation to reduce transaction costs in an international context :

- Private regulations “have changed and now want to be global privacy compliance companies. They follow more than they set the path. They don't create new guidelines as much as they certify against public regulations” - American business representative
- “We hope to establish a single standard that allows any organization to say that their data governance system respects privacy regulations like COPPA, the privacy shield, GDPR and CBPR system.” - American business representative
- “A company that only works in the US might not need to fulfill all the requirements of the APEC framework for example. However, we do try to build them so that it would be easy for a company to fulfill two or more of our programs at the same time.” - American business representative

The demand for private regulations in the United States (Cont.)

At the same time, private regulations did not seem to offer significant reputational gains :

- No interviewees from the United States mentioned reputation as one of the reason why their organizations created a private regulations.
- A previous study found that the end of one private regulation was related to its inability to offer reputational gains, while imposing higher implementation costs (Boulianne and Cho 2009)

“I think that we have developed requirements that go beyond what is required in the law, but our ability to do so is limited by the fact that at the end of the day it is a **voluntary program**. Not only voluntary, but that **company pay to use**. There is thus a limit to what we can ask.” - American business representative

Conclusion

- Private regulations are often presented as *flexible* and *low-cost* institutions that can more easily adapt to new and quickly evolving problems
- By fostering the creation of regulatory novelty, some hope they can help increase “the soup of policy ideas” and thereby foster a more experimentalist form of governance.
- In this paper, I emphasize the importance of considering why private actors self-regulate.
- I also highlight how public actors can actively shape the content of private regulations through direct interactions in their design.
- This may however limit the potential for private experimentalism.

Thank you !