1. The role of the EU in the transnational governance of standards, contracts and codes

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1. INTRODUCTION

In times of worrying nationalism, enquiries into the future of Europe and of EU law often result in arguments about the fragility of the EU to maintain a global leadership role. This edited volume traces the position of the EU (and EU law) in the international arena. In examining the role of the EU in the international regulatory space, we offer an overview of the nature of transnational legal ordering,[2] assuming its central regulatory challenge: to balance the dilemma of global governance, namely how to integrate a political discourse, generally local, into a globalised economy.

There is a contemporary interest in analysing the impact and influence of the EU's substantive, procedural and institutional structures on global governance.[3] However, the scope of analysis here is narrowed down. The book explores questions of transnational private legal theory in the context of the external dimension of EU private law. The emphasis is placed on non-hard forms of normativity that seem to contribute to the shaping of private law glob-

[1] My deep thanks go to all the contributors to the book for making it possible. Special gratitude also for the extremely helpful comments received on earlier drafts of this introductory chapter by Philipp Genschel, Stefan Grundmann, Alexander Somek, Hans-W Micklitz and Rodrigo Vallejo. All mistakes and omissions remain my own.

[2] We use the term 'transnational legal ordering' based on TC Halliday and G Shaffer, in *Transnational Legal Orders*, CUP, 2015, who define TLO as a 'collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions'. Our approach encompasses categories where (1) non-legal organizations are involved, (2) the nation-state can potentially be bypassed, or (3) norms are involved that might not necessarily be produced in 'recognizable legal forms' (i.e. practices). However, overall, we are in search of normativity.

[3] See section 2.

ally. The focus is then private law and private governance. In this way, while the volume joins the increasingly growing trend that focuses on the global reach of EU law, it also contributes to the theoretical debate on transnational legal ordering.

The debate about transnational legal ordering has continued to evolve. Existing literature has largely focused on issues related to the legal validity and legitimacy of global governance, mainly based on private regulatory processes.[4] In this book, we identify commonalities in the substance of transnational legal ordering with a view to illustrating its inward normativity and its outward capacity for regulatory and policy diffusion.

The book brings together different nonlegal sources of normativity within different sectors in order to convey a conceptual space of non-State normativity in which to assess the role and reach of the EU in transnational legal ordering. The different chapters connect the external dimension of EU law with broader trends in transnational legal ordering through in-depth analyses of recent developments across a series of key sectors. The sector analyses cover a broad spectrum of industries with different characteristics that might be expected to illustrate the manifold mechanisms through which the EU participates in transnational legal ordering for regulatory export purposes.

Among the diverse mechanisms for the expansion of EU laws and values, the book's focus is on private mechanisms of transnational legal ordering. The emphasis lies on the interaction between the alleged increased – and increasing – role of the EU in global governance. The interaction between existing theories of transnational ordering and the external reach of European regulatory private law is articulated through examination of what here are found to be the three major agents or, rather, proxies of transnational private ordering: contracts, standards and codes. Examples range from private norms in the food industry, to supply chains, financial services, energy and e-commerce, to the internet more broadly. Our assumption is that international standards, standard contract terms and codes of conduct are part of a global regulatory process. This process operates at the boundaries between private and public law.[5]

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[4] Most notably, see A Moravcsik, 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition* 336, at 336.

[5] Some examples on the blurred public–private distinction have been tested in other fields. See, e.g., IJ Sand, 'Globalization and the Transcendence of the Public/Private Divide – What is Public Law under Conditions of Globalization?' in C Mac Amhlaigh, C Michelon and N Walker (eds), *After Public Law*, OUP, 2013; C Joerges, IJ Sand and G. Teubner (eds), *Transnational Governance and Constitutionalism*, Hart, 2004; and G Teubner and A Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046.

As a hypothesis, *standards, contracts and codes* is offered as both an explanatory and a normative tool to describe and assess different transnational governance mechanisms. Our object of analysis is the external dimension of European (regulatory) private law (ERPL). Between 2011 and 2015, we explored the ways in which ERPL unfolds. As part of that exercise, we found that the same regulatory strategies of the EU within the internal market are being replicated outside EU borders.[6] Within the EU, we observed delegation of lawmaking powers from the legislature to State bureaucracies but also to private parties, including transfer of important regulatory functions.[7] This brought about the demise of the State's monopoly over regulation and the emergence of alternative sector-specific regimes,[8] which, to a considerable extent, function autonomously – from their creation to their enforcement.[9] Moreover, European regulatory private law presents itself in the form of a 'stable practice'.[10] ERPL uses transformed lawmaking and nonjudicial enforcement procedures as part of an emerging practice, often sector-specific. In this manner, the normativity of ERPL flows from the stable practice of each sector that shapes ERPL, and invites reflections on the way this stable practice blurs the lines between procedure and substance. This regulatory approach is mimicked in the external reach of ERPL.

At the same time, the global position of the EU in the new geopolitical landscape, hand in hand with a contemporary attempted return to the nation-State, is being exposed. Notwithstanding this, a core set of legal questions continues to arise: first, why is the role of the EU in the wider world gaining significant scholarly attention? Second, what are the various forms of transnational legal ordering and how is the EU involved in them? Third, where do legitimacy and normativity come from in transnational private ordering and why is there a shift in the source of authority? Fourth, what are the explanatory and normative effects of that shift? The following sections outline answers to these questions.

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6 HW Micklitz, 'The Internal vs. the External Dimension of European Private Law – A Conceptual Design and a Research Agenda', EUI Department of Law Research Paper No 2015/35.

7 HW Micklitz and Y Svetiev (eds), 'A Self-Sufficient European Private Law – A Viable Concept?' EUI Working Paper Series LAW 2012/31.

8 'Regimes' are here understood as context specific sets of norms and contracting practices that encompass their own rules for normsetting and specialised adjudicative bodies.

9 HW Micklitz and Y Svetiev (above n 7).

10 JM Smits, 'Self Sufficiency of European (Regulatory) Private Law: A Discussion Paper' in HW Micklitz and Y Svetiev (above n 7) at 86.

2. THE ROLE OF THE EU IN TRANSNATIONAL LEGAL ORDERING

The EU has sought to spread its internal rules, norms and standards beyond EU borders through different mechanisms during the past two decades. In parallel, research on the role of the EU in the global arena has been gaining momentum. Overall there is a growing interest from political science and legal scholarship in surveying manifestations of the EU in the global regulatory and governance sphere. The way in which the EU uses its external powers to place itself as an actor in the international landscape, thereby expanding the reach of EU law, is being extensively discussed.[11] This increasing attention to the external dimension of EU law has come about especially since the expansion of EU external competences with the Lisbon Treaty.

Exporting EU rules and regulations to the wider world has long been on the agenda of the European Commission.[12] The aspiration was to expand the regulatory space of the single market – European norms were meant to become 'a reference for global standards'.[13] The principle underpinning this approach was not the mere export of EU rules but the promotion of 'high quality rules and *values* around the world' to serve as a 'reference point' for third countries.[14] In the view of the European Commission, a leading role performed by the EU in the global scene would result in a 'convergence to the top' rather than a 'race to the bottom' in the international regulatory space.[15] One of the latest examples of this trend is found in the well-known EU General Data Protection Regulation ('GDPR'), which has set a global standard for more stringent data protection rules throughout the world since its entry into force

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[11] Most notably, A Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1; B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension*, OUP, 2013; 'The New EU "Extraterritoriality"' (2014) 51 CMLR 1343; 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 American Journal of Comparative Law 1; E Fahey, *The Global Reach of EU Law*, Taylor & Francis, 2016; M Cremona and J Scott, *The Global Reach of EU Law*, European University Institute, 2019; and M Cremona and H-W Micklitz, *Private Law in the External Relations of the EU*, OUP, 2016.

[12] See European Commission, 'Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy', COM(2006) 567 final, 4 October.

[13] European Commission, 'The External Dimension of the Single Market Review', SEC(2007) 1519, 20 November; at 3.

[14] Ibid at 5 (emphasis added).

[15] Ibid at 7.

last year.[16] It is to be noted, however, that the export of EU rules to the wider world is not always the result of a purposive decision by EU lawmakers.

Regulatory export takes place as a result of EU action at three closely interlinked levels: the global level; the levels of bilateral and regional policy dialogues; and the level of economic cooperation. A wide array of institutional and procedural channels has been more specifically identified, as well as modes of governance. Joanne Scott's 'extraterritoriality' and 'territorial extension' and Anu Bradford's 'Brussels effect' are the most representative contemporary theories in legal scholarship on this 'EU law spillover phenomenon'. For political theorists, the mechanisms for extending EU law beyond the market include processes of experimental governance. Building on his cooperation with Charles Sabel, Jonathan Zeitlin refers to the 'Union's efforts to extend its internal regulations and governance processes to third countries and the wider world', promoting the expansion of modes of intra-EU governance to the outer world.[17] For us, the contribution of private law to this process of regulatory export has been largely ignored. We focus on how the EU uses the capacity of standards, contracts and codes to expand its regulatory reach.

3. WHY STANDARDS, CONTRACTS AND CODES?

In the age of globalisation and digitisation, normativity takes different shapes – perhaps as a consequence of these two phenomena taking place in an unsystematic and fast changing environment without a global identity or global legal culture. The lack of a State-like figure in the transnational landscape has resulted in a situation where power has shifted from public to private rulemakers. Hence, in the absence of a 'public counterpart' or 'legitimating' transnational actor endowing authority and legal accountability, transnational regulation has been largely – but not only – developed in the form of voluntary or soft law norms,[18] including phenomena as diverse as international (often technical) standards, standard contract terms often integrated in supply chains and a wide array of self-regulatory mechanisms that feature as part of corporate social responsibility ('CSR'). The latter two overlap in the debate on contract

[16] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. OJ L 119, 4.5.2016, 1–88.

[17] J Zeitlin, *Extending Experimentalist Governance? The European Union and Transnational Regulation*, OUP, 2015; at 17.

[18] F Cafaggi, *Reframing Self-Regulation in European Private Law*, Kluwer International, 2006.

and corporate governance. As a result, what we have today is an intensification of transnational private ordering that touches upon public goods.[19]

Transnational legal ordering is generally characterised by soft rather than hard norms, by epistemic communities rather than States.[20] However, those features do not deprive them of their coercive power,[21] especially where they are introduced into contracts to be interpreted by the judiciary. Existing literature has made important contributions to the normativity of the different categories of non-State normativity, or the possible conditions under which manifold nonlegal instruments, broadly speaking, can be regarded as 'law'. But, in doing so, the predominant approach tends towards verticality, side-stepping the commonalities that exist between these vertical categories of transnational private regulation.

3.1 Overcoming Verticalisation

Transnational private ordering takes place on a sector by sector basis – most transnational private ordering activities are organised along industry lines. There are frameworks, such as transnational private regulation or, respectively, contract and corporate governance, that have the potential for a crosscutting theoretical and conceptual analysis.[22] However, at some point the debate falls back on using examples of the three different categories of transnational legal ordering (standards, contracts and codes), without systematically connecting them. Accordingly, there is often a lack of multidisciplinary approaches that make full use of the abundant material which is available from the various fields and that comes in the form of standards, contracts or codes. Political scientists in particular, as well as sector-specific experts, have been dealing with questions related to the transnational arena, sometimes related to one of the three phenomena under consideration, sometimes focusing on particular business sectors.

This deficit is visible within the two identified levels of verticalisation. First, within the different sources there is a strong sector-specific component

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[19] F Cafaggi and DD Caron, 'Symposium Global Public Goods and the Plurality of Legal Orders', Special Issue of the International Journal of European Law, 23 (2012) 3, 643 et seq.

[20] 'Epistemic communities' are to be understood here as communities who share a common practice. See E Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations*, Routledge, 2005.

[21] P Weil, 'Towards Relative Normativity?' (1983) 77 *The American Journal of International Law* 413.

[22] S Grundmann, F Möslein and K Riesenhuber (eds), *Contract Governance*, OUP, 2015.

that portrays *functional differentiation*.[23] Transnational legal ordering can be identified with activities performed by what has been described as 'governance communities' or 'global law communities',[24] based on a sector-specific logic. The phenomenon of global lawmaking via regulatory coordination and the provision of a global framework have been already addressed in sector-specific works, such as telecommunications, finance and trade investment.[25] The resulting private legal regimes are responsive to the rationality of the sector-specific community. These communities are portrayed as 'functionally differentiated societies organised for mutual benefit for specific objectives'.[26] They do not necessarily mirror the characteristics of the nation-State, and they 'can include groups, institutions and networks'[27] where unity and hierarchy are no longer paradigmatic.[28] Second, and perhaps of most significance for our undertaking, we have identified a vertical approach in the treatment of the different sources of transnational normativity. The phenomenon of transnational ordering broadly understood is not new. Over recent years we have experienced a revival of the new *lex mercatoria*,[29] transnational private regulation,[30] and contracts as transnational regulatory tools.[31] Contemporary legal thought has

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[23] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003) 25 *Michigan Journal of International Law* 999.

[24] LC Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity' in S Musa and E de Volder (eds), *Reflections on Global Law*, Martinus Nijhoff Publishers, 2012.

[25] To mention a few: K Rodine-Hardy, *Global Markets and Government Regulation in Telecommunications*, CUP, 2013; L Quaglia, *The European Union and Global Financial Regulation*, OUP, 2014; and L Pantaleo and M Andenas, 'Introduction: The European Union as a Global (Legal) Role Model for Trade and Investment?' (2017) 28 *European Business Law Review* 99.

[26] Backer, above n 24.

[27] Ibid. Backer cites four characteristics that somehow represent the opposition to the law of the nation-state, namely fracture, fluidity, permeability and polycentricity. Although subject constraints require setting aside analysis of these features, it is important to note that there is a fracture with regard to the unity that long exemplified the law of the nation-state in terms of supremacy and authority.

[28] K-H Ladeur, 'The Emergence of Global Administrative Law and the Evolution of General Administrative Law' (2012) 16 *Comparative Research in Law & Political Economy* 243. See also N MacCormick, 'Beyond the Sovereign State' (2013) 56 *Modern Law Review* 1.

[29] R Michaels, 'The True Lex Mercatoria: Law beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies* 447.

[30] F Cafaggi most notably.

[31] AC Cutler and T Dietz (eds), *The Politics of Private Transnational Governance by Contract*, Routledge, 2017. See also collected works in (2015) 9 *Regulation*

extensively paid attention to governance and soft law,[32] decentring regulation,[33] informal regulation,[34] private governance,[35] and standardisation,[36] as well as self-regulation,[37] to mention a few. The following characterisation – grouping them into international standardisation, transnational private regulation and CSR – offers a summarised overview of the present state of the art.

3.1.1 International standardisation (standards)

Standardisation has been studied by disciplines other than law. Economists and engineers have focused on competition and institutional transformation issues.[38] Political scientists have largely paid attention to the shift in regulatory power.[39] Normative enquiries are concerned with responsibilities and

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and Governance (Special issue: The Distributional Consequences of Transnational Regulation: The Capability Approach).

[32] G Shaffer and MA Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706. DM Trubek and LG Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination' (2005) 11 *European Law Journal* 343.

[33] J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103.

[34] J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking*, OUP, 2012.

[35] H Schepel, *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets*, Hart Publishing, 2005.

[36] P Delimatsis (ed), *The Law, Economics and Politics of International Standardisation*, CUP, 2015.

[37] G-P Callies and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, Hart Publishing, 2010.

[38] By way of example, the standardisation of telecommunications has been generally addressed in the literature by telecoms engineers. To mention a few: JL Funk, 'Competition between Regional Standards and the Success and Failure of Firms in the World-Wide Mobile Communication Market' (1998) 22 *Telecommunications Policy* 419–41; JL Funk and DT Methe, 'Market- and Committee-Based Mechanisms in the Creation and Diffusion of Global Industry Standards: The Case of Mobile Communication' (2001) 30 *Research Policy* 589; PA David and M Shurmer, 'Formal Standards-Setting for Global Telecommunications and Information Services: Towards an Institutional Regime Transformation?' (1996) 20 *Telecommunications Policy* 789–815; T Ali-Vehmas and TR Casey, 'Evolution of Wireless Access Provisioning: A Systems Thinking Approach' (2012) 13 *Competition & Regulation in Network Industries* 333.

[39] KW Abbott and D Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in W Mattli and N Woods (eds) *The Politics of Global Regulation*, Princeton University Press, 2009, 44ff; KW Abbott and D Snidal, 'International Regulation without International Government: Improving IO Performance through Orchestration' (2010) 5 *The Review of International Organizations* 315–44; HJ De Vries, *Standardization: A Business Approach to the Role of National Standardization Organizations*, Springer Science & Business Media, 2013.

procedures.[40] Lawyers have lately succumbed to the study of standardisation. They have focused on the legal effect of standards;[41] private versus public standard-making;[42] intellectual property (patents);[43] democratic accountability and legitimacy concerns;[44] judicial control;[45] conceptual questions related to global legal order and authority;[46] and standardisation of goods vis-à-vis services standards,[47] among others. Still, there are issues that remain under-scrutinised. By way of example, standardisation of services has been a largely neglected field of study among legal scholars.[48] At the same time, there is limited empirical evidence of standard-setting processes.[49]

3.1.2 Transnational private regulation (standard form contracts)

Literature on transnational private regulation is mainly concerned with the question of transnational ordering from the perspective of social normativity

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[40] T Büthe and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press, 2011.

[41] H Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 12(4) *Maastricht Journal of European and Comparative Law* 521.

[42] M Gnes, 'Do Administrative Law Principles Apply to European Standardization: Agencification or Privatization?' (2017) 44(4) *Legal Issues of Economic Integration* 367–80.

[43] P Larouche and G van Overwalle, 'Interoperability standards, patents and competition policy' in P Delimatsis, above n 36; see also B Lundqvist, 'European Harmonized Standards as "Part of EU Law": The Implications of the James Elliott Case for Copyright Protection and, Possibly, for EU Competition Law' (2017) 44(4) *Legal Issues of Economic Integration* 421–35.

[44] L Senden, 'The Constitutional Fit of European Standardization Put to the Test' (2017) 44(4) *Legal Issues of Economic Integration* 337–52; see also M Kallestrup, 'Stakeholder Participation in European Standardization: A Mapping and an Assessment of Three Categories of Regulation' in the same issue.

[45] RAJ Van Gestel and H-W Micklitz, 'European Integration through Standardisation: How Judicial Review is Breaking down the Club House of Private Standardisation Bodies' (2013) 50 *Common Marker Law Review* 145; see also M Eliantonio, 'Judicial Control of the EU Harmonized Standards: Entering a Black Hole?' (2017) 44 *Legal Issues of Economic Integration* 4: 395–407.

[46] H Lindahl, 'ISO Standards and Authoritative Collective Action' in P Delimatis, above n 36.

[47] P Mavroidis, 'Standardising Trade in Services?' in P Delimatsis, above n 36.

[48] With a few exceptions: see P Delimatsis, 'Standardisation in Services – European Ambitions and Sectoral Realities' (2016) 41 *European Law Review* 513 and B Van Leeuwen, *European Standardisation of Services and Its Impact on Private Law: Paradoxes of Convergence*, Hart Publishing, 2017.

[49] Delimatsis (n 36): see Introduction and Conclusions.

beyond the State[50, 51] and its regulatory function[52] and how emerging transnational regulation has an impact on private relationships.[53] Hence, while transnational private regulation is of particular interest in our context, the concept is meant to structure the debate; 'transnational private regulation' must be understood as a variant of verticalisation.

Private regulation – in US terminology, 'private ordering' – was introduced by Fabrizio Cafaggi, under the influence of the increasing role of private regulation in the EU.[54] While there is a remarkable and ever growing interest in the phenomenon of transnational law, there is no common language, no common concept or design. If one goes back to the origins, one easily ends up with *lex mercatoria*, a much debated and until today highly controversial category. Jessup then laid the ground for transnational law in his seminal Storrs Lecture in 1956.[55] For quite some time, transnational law remained a residual category, a subject for insiders. It took the fall of the Berlin Wall, the collapse of communism and what is diffusely called globalisation to revitalise interest in transnational phenomena. Shaffer has provided a useful overview on the strands of discussion,[56] distinguishing between: (1) transnational legal ordering as private legal ordering; (2) transnational legal ordering as transnational construction, flow and settlement of legal norms; and (3) transnational legal ordering and the concept of law.[57] Cafaggi's transnational private regulation would come under the first category. Under the second category, it is found that, as a transnational construction, there is no point in differentiating between public and private law-making in transnational legal ordering. Private law regimes created by standard form contracts also perform a regulatory function.[58]

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[50] G-P Callies and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 2 *Ratio Juris* 260.

[51] R Michaels and N Jansen, 'Private Law beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *The American Journal of Comparative Law* 843.

[52] F Cafaggi and H Muir Watt (eds), *The Regulatory Function of Private Law*, Edward Elgar, 2009, and *Making European Private Law Governance Design*, Edward Elgar, 2008.

[53] F Cafaggi, 'Transnational Private Regulation: Regulating Private Regulators', in S Cassese, *Research Handbook on Global Administrative Law*, Edward Elgar, 2016.

[54] F Cafaggi, 'Private Regulation in European Private Law', in A Hartkamp, M Hesselink, E Hondius, C Mak and C du Perron (eds), *Towards a European Civil Code*, Wolters Kluwer, 2011.

[55] PC Jessup, *Transnational Law*, Yale University Press, 1956.

[56] Gregory Shaffer, 'Theorizing Transnational Legal Ordering', Annual Review of Law and Social Science, Vol. 12, pp 231–253, 2016.

[57] Halliday and Shaffer, above n 2.

[58] D Wielsch, 'Global Law's Toolbox: How Standards Form Contracts' in H Eidenmüller, *Regulatory Competition in Contract Law and Dispute Resolution*, Nomos Verlagsgesellschaft mbH & Co. KG, 2013.

3.1.3 Corporate social responsibility (codes)

Corporate social responsibility (CSR) has received attention as a means of global self-regulation and on how it is received by national regimes of private law.[59] The enforcement of the resulting commitments arising from 'global corporate self-regulation' has been explored not only from the perspective of courts but also from that of international arbitral tribunals,[60] and even contract governance.[61] Yet the analysis is again fragmented.

The origins of CSR lie in the early forms of industrialisation, where a certain level of social responsibility from businesses was expected.[62] The decisive step took place through CSR, with the development of a business strategy that involves good conduct in the shape of institutional self-regulation. Companies started to impose codes of good conduct and best practices on themselves, as a unilateral initiative to protect social interests. Private law becomes the applicable legal framework for obligations assumed under privately created and self-imposed CSR codes.[63] The OECD, the EU and the UN discovered CSR as a prominent field of political action. While economists focused on the question as to whether the new business strategy with an emphasis on ethically correct behaviour would be reflected in higher business returns, the legal and legal–theoretical discussion concentrated on the regulatory nature of CSR: are social or legal provisions involved?[64] Is it possible to enforce the standards of CSR in the outside world and, if so, under what conditions?[65] Less spectacular, but no less important, are efforts by companies that try to enforce CSR stand-

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[59] A Beckers, *Enforcing Corporate Codes: On Global Self-Regulation and National Private Law*, Hart Publishing, 2015.

[60] A Beckers, 'Legalization under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes' (2017) 24 *Indiana Journal of Global Legal Studies* 15.

[61] Grundmann, Möslein and Riesenhuber (above n 22).

[62] AB Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38 *Business & Society* 268.

[63] A Beckers, 'Corporate Codes of Conduct and Contract Law: A Doctrinal and Normative Perspective' in R Brownsword, R Van Gestel and HW Micklitz (eds), *Research Handbook on Contract and Regulation*, Edward Elgar, 2017.

[64] ME Porter and R Kramer, 'Strategy and Society: The Link between Competitive Advantage and CSR' (2006) *Harvard Business Review* 78; A Carroll and K Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12 *International Journal of Management Reviews* 85–105; M Herberg, 'Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making', in O Dilling, M Herberg and G Winter (eds) *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, Hart Publishing, 2008.

[65] Beckers (above n 58).

ards using contract law in so-called supply chains.[66] Here CSR and contract governance are coming together.[67] Yet again, much of the existing empirical research is focusing either on human rights issues or on particular sectors.

3.2 Juridification of Standards, Contracts and Codes

How does transnational private law compete with public-made law? It is pretty much axiomatic that public-made law enjoys unlimited authority within its constituent jurisdiction, naturally subject to the constraints of existing procedural rules to be followed for lawmaking purposes. In contrast, the output of transnational legal ordering is commonly a norm of voluntary adoption and, not being subject to any jurisdictional procedural boundary, can freely travel across borders. However, transnational private rule-making has traditionally posed a challenge to the legitimacy and axiom of public-made rules and regulations. Attempts at creating a governance regime for transnational private regulation are the common denominator that holds standards, contracts and codes together.

In the face of a perceived de-juridification of transnational law,[68] we find the emergence of a process of re-juridification that not only provides a solution to the traditional legitimacy problems of private regulation but also functions as a driver of regulatory export. Juridification functions as a means of impelling the normativity of standards, contracts and codes through the transformation of minority practices into legally binding rules.[69] The qualification of private regimes (such as those embedded in standard form contracts, in CSR or as part of technical standards) as *legal* rules would displace the rule of recognition from public to private regimes. Here, the shift in the rule of recognition occurs 'bottom up'. Through their incorporation into contracts, they become binding on the contracting parties or the signatories of the organisation where they were created.[70] Domestic courts, through interpreting these contracts, contribute to a process of legal transplant of transnational private regimes.[71]

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[66] F Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 *Fordham International Law Journal* 1557.

[67] Grundmann, Möslein and Riesenhuber (above n 22).

[68] G Teubner (ed) *Global Law Without a State*, Dartmouth, 1997; GP Calliess and P Zumbansen, *Rough Consensus and Running Code: A theory of Transnational Private Law*, Hart Publishing, 2010.

[69] Schepel, above n 35; Cafaggi, above n 53; and P Pattberg, 'The Institutionalization of Private Governance: How Business and Nonprofit Organizations Agree on Transnational Rules' (2005) 18 *Governance* 4: 589–610.

[70] Wielsch (above n 57).

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

Moreover, international standards, contracts and codes can also amplify their normativity as a result of their endorsement by international organisations. Therefore, bottom up or incorporation into contracts only partially explains why standards, contracts and codes have become binding. We must also pay attention to how *juridification* can function as a 'top down' strategy through which international standards, contracts and codes can produce effects even on those who originally were not subject to them. As part of this process of juridification, institutional complementarity plays a significant role – that is, the more a transnational private body reproduces the procedures of publicly made law, the more likely it is that the State uses that body to pursue its interests.[72] Thus, through the juridification of transnational private governance, private regulation can be used for the attainment of regulatory outcomes.[73]

Notably, transnational legal ordering has not developed generally binding common principles for the normativity of the rules resulting therefrom. Instead, regulatory processes have been organised along industry lines. In this volume, Rodrigo Vallejo develops the idea that it is precisely juridification – in the form of what he terms 'private administrative law' – that binds standards, contracts and codes together.[74]

A horizontal perspective which breaks down verticalisation requires engagement with the search for common denominators. Juridification and the patterns behind it are key to escaping from the case study trap, the belief that ever more case studies can help to overcome the juridical deficit.[75] The different chapters in this volume illustrate the institutional design and the environmental conditions within which international standards, contracts and codes are created and enforced. Here is where the book reaches beyond the current state of affairs and where it looks for common denominators behind the perceived juridification.

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[72] M Aoki, *Toward a Comparative Institutional Analysis*, MIT Press, 2001. See also M Mataija in this volume.

[73] Zeitlin (above n 17 at 325ff). For an example from the food industry, see F Cafaggi, 'Transnational Governance by Contract: Private Regulation and Contractual Networks' in A Marx and M Maertens (eds), *Private Standards and Global Governance: Economic, Legal and Political Perspectives*, Edward Elgar, 2012.

[74] Chapter 13 in this volume.

[75] RAJ Van Gestel and H-W Micklitz, above n 45.

4. THE BOOK: A TENTATIVE TYPOLOGY OF THE ROLE OF THE EU IN THE TRANSNATIONAL GOVERNANCE OF STANDARDS, CONTRACTS AND CODES

One of the most noteworthy features of non-State normativities is that they may serve as a proxy for regulatory and policy diffusion.[76] The contributions in this volume describe the impact that EU rules and policies have had across different sectors through private actors. To account for that reach, the focus is placed on the role of the EU in the transnational governance of standards, contracts and codes. The book unites authors from a wide range of backgrounds to document trends and developments in different sectors. This includes national and/or comparative case studies on developments within standards, codes or contracts used as a benchmark for EU best practices addressed to the world at large. Here we are back to the role and function that the EU, through the European Commission, would like to play in the international arena – the 'good' regulator, the 'grand civiliser' – as an alternative to other dominating economies.[77]

With a view to articulating the ways in which the EU engages in good practices to set a global benchmark, we propose the following typology around which the contributions to this book can be grouped horizontally: (1) 'EU governance through EU institutions', concerning the institutional framework of private governance in the EU; (2) '(EU) governance through epistemic communities', where proceduralisation and juridification function as a mechanism for steering private parties' behaviour and where the role of the EU institutions is less visible; (3) 'EU governance through substance', which uses contract law as an instrument for steering behaviour and for achieving regulatory goals; and (4) 'EU governance through privately set procedures', which uses contractual frameworks for private transactions.

4.1 EU Governance beyond the EU through EU Institutions

The first part of the book examines the role of EU norm production processes and their institutional design. The analysis of the inner world of the EU is taken as the benchmark; in fact, it is the role the EU plays in relation to the Member

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[76] D Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The Annals of the American Academy of Political and Social Science* 1: 12–32.

[77] G De Burca, 'Europe's Raison D'Etre' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order*, CUP, 2013. See Hans-W Micklitz in this volume, Epilogue.

States and not the role of the EU in the outside world what is at stake here. While 'New Governance' has been used as a mechanism for articulating the relationship between EU Member States, we observe that the EU uses a similar approach in the global arena. Here the focus is to be placed on the transformation from law-making to European governance that is taking place *inside* the EU and that can be replicated *beyond* it.[78] The analysis we use corresponds to the identified transformation from formal law-making to governance.[79] Here, the emphasis is placed on existing institutional and procedural arrangements around the described forms of 'soft/informal governance', while concerned with the analysis of the blurring distinction between making and enforcing the rules.

The EU has long relied on harmonisation via secondary EU legislation to bring national legal orders closer. This contrasts to GATT/WTO, where standards played a key role as a softer means of approximation not only in the TBT agreement but later in the SPS agreement. Over time and starting with the 1985 New Approach the EU has developed its own policy on standardisation, later on refined in the Lamfalussy process and now in the Banking Union. The much deeper question is whether and to what extent standard-making is gradually replacing law-making, with attendant dramatic consequences on its legitimacy and adjudication.

While standards remained largely outside the adjudication of courts, recent case law shows a considerable increase in litigation over the legal quality of standards and the liability of standard-making bodies. To understand the dimensions of the shift, it suffices to refer to the key judgments of the Court of Justice of the European Union in *Fra.bo*,[80] in *Elliott*,[81] and in *TÜV*.[82] Standards no longer seem to be 'sacrosanct'. Courts are ready to interfere with the closed box of standard-setting.[83] What does this mean for the New Approach in particular and for standards more generally? Focusing on these questions, Rob van Gestel and Peter van Lochem examine the transfer of legitimacy from the parliament via delegation to non-elected bodies, asking whether norm production is acting as a replacement for law-making in private law. Is the Court

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[78] H-W Micklitz, 'The Internal vs. the External Dimension of European Private Law – A Conceptual Design and a Research Agenda', EUI Department of Law Research Paper No 2015/35.

[79] Ibid. at 5.

[80] Judgment of the Court (Fourth Chamber), 12 July 2012; ECLI:EU:C:2012:453.

[81] Judgment of the Court (Third Chamber), 27 October 2016; ECLI:EU:C:2016:821.

[82] Judgment of the Court (First Chamber), 16 February 2017;ECLI:EU:C:2017:128.

[83] Van Gestel and Micklitz (above n 45).

of Justice of the European Union, as a consequence of the ruling in *Elliott*,[84] curbing such a comeback – namely from regulation to governance and back again? The authors argue that this move would take place at the expense of the 'effectiveness' of private regulation.

Using the example of private food standards, Paul Verbruggen argues that the EU is engaged with the 'constitutionalisation' of private food standards by encouraging and requiring adherence to good governance norms. Compliance with procedural norms is ensured internally through incorporating international standards as part of EU law. Verbruggen conveys the message that the resulting 'proceduralisation' of private regulation (standard-setting) not only provides a constitutional framework for standard-setting as a response to legitimacy concerns (participation and representation, most notably) but also demonstrates the EU involvement in the proceduralisation of transnational private standards.

Barbara Warwas adds the layer of enforcement to the analysis. Her chapter explores the ways in which the increasing power of the EU operates in the governance and standardisation of dispute settlement in international economic law. This analysis is a manifestation of how procedural structures might serve to convey EU goals in international trade. The chapter offers a timely overview of issues related to international arbitration procedures. Using the example of the shift from arbitration to the Investment Court System (ICS), Warwas finds that the European Commission's support for adoption of the ICS stands as a global governance tool that contributes to shaping the transnational legal order.

4.2 (EU) Governance through Epistemic Communities beyond the EU

This part examines the role of the EU in the world, but not the world through the lenses of the EU. Under this model, communities have created their own contractual framework. This framework contains the necessary institutional and substantive elements for the community to function, providing an autonomous supplement to the existing legal framework. Contracts stand as a mechanism through which a particular sector governs itself while pursuing regulatory objectives. Communities feature at the centre in this model. Here, the role of the EU is not that apparent.

Gerald Spindler deals with standards in e-commerce and the internet more generally. Given the relevance of technology nowadays and, in particular, the

[84] Judgment of the Court (Third Chamber), 27 October 2016; ECLI:EU:C:2016: 821.

borderless nature of the internet, whose norms and governance arrangements have been privately developed, it is traditional to pay attention to internet governance when examining transnational private regulation. However, the author goes beyond the well-known examples on internet governance and brings to the fore other instances where private regulation is a cornerstone in the development of a particular technology or process, such as electronic platforms and their role as standard-setters, machine-to-machine ('M2M') communication, and blockchain. The chapter also touches IP issues where copyright works as automated (standardised) transactions. Spindler finds that the technical standardisation of electronic commerce is responsive to the very features that characterise the internet and its governance, particularly decentralisation.

Christoph Busch draws attention to the two-fold role performed by digital platforms as providers of governance mechanisms and as regulatory intermediaries. His chapter deals with platform regulation more generally, and in particular with the way in which platforms can act as regulatory intermediaries. As shown in the chapter, platforms provide their own regulatory conditions. In some instances, these platforms are already performing the role of regulatory intermediaries, in the sense described by Abbott et al. (2017). The chapter lays down a set of examples where platforms contribute to the enforcement of certain local rules. Most interestingly, Busch also refers to the different taxonomy of self-regulatory techniques to be used by these platforms, their terms and conditions (remote-controlled contracts), community guidelines and reputation mechanisms. The chapter concludes that the legislator can effectively use platforms to achieve regulatory goals. Busch suggests that, as regulatory intermediaries, platform regulation, in combination with coregulation, may provide a template for a future EU regulatory policy for the platform economy.

Mislav Mataija brings the issue of recognition to the front. His chapter is divided around two main arguments. These two arguments are construed around the question as to how the use of private standard-setting may function as a tool in the pursuit of regulatory objectives, with a particular focus on the role to be adopted by the WTO either as a promoter or opponent of such practice. Pay attention to the adequacy of private standard-setting within the framework of the WTO and especially the Agreement on Technical Barriers to Trade ('TBT Agreement'), he explores how the use of private standard-setting could serve as a tool in the pursuit of public regulatory objectives. The key is the proceduralisation of the international standardisation activity by the WTO. Mataija's chapter evidences the existing symbiosis between private standard-setting organisations and the States in terms of recognition of standards. In general, the chapter illustrates how WTO law, in particular TBT, stands as a limit as well as the 'certification' system for private standards to be globally diffused.

4.3 EU Governance through Steering and Promoting EU Substantive Rules beyond the EU

A third group of case studies engages directly with the role of the EU in international rule-setting. Here the focus is placed on use of EU regulatory contract rules that serve as an institutional template for private transactions outside the EU. The most visible examples are to be found in regulated markets. Unlike the previous model, here it is the EU legislator who uses contract law for regulatory purposes, influencing private behaviour. This representation features a prominent role for sector-specific societies or epistemic communities. The driver for standardisation is not only the substance but also – and largely – the procedural framework in which substantive rules operate.

Lucila de Almeida explores how and why the EU advances rules to regulate standard contracts in international transactions with third countries. In her chapter, she uses standardisation as the approach through which the EU harmonises these standard form contracts. The chapter further inquires into justifications for the EU's interest in the regulation of international contracts. De Almeida finds that the terms and conditions of standard agreements of energy exchange platforms provide an example of the 'standardisation of standard contracts'. Such standardisation mirrors substantive EU law rules. Using the example of the European Power Exchange (EPEX) Spot Rules and Regulations, her chapter empirically demonstrates how standard agreements of energy exchanges incorporate elements of the EU regulatory framework law into their terms and conditions. Through 'codification', she concludes, EU law imposes changes on market participants' behaviour.

Teemu Juutilainen examines EU securitisation rules as an example of transnational private governance. Focusing on the 2017 EU Securitisation Regulation, he describes a symbiotic relationship between the EU and different transnational bodies, in particular, the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO). He uses further examples of global harmonisation of securities, such as the Basel STC criteria, as the result of the activity of an epistemic community. In particular, Juutilainen finds that, although originally intended for intra-EU application, the EU Securitisation Regulation holds potential for extra-EU effects, which eventually leads to the 'export of its provisions, policy choices and underlying values'. The chapter also introduces the potential adoption of an EU equivalence regime for third country securitisers as a means of illustrating another way in which the EU exports its policy choices and values, in this case those underpinning the EU Securitisation Regulation, showing how the Securitisation Regulation becomes a regulatory benchmark for other jurisdictions.

In view of the foregoing, we might ask: are internal processes of financial institutions experiencing a certain degree of standardisation at transnational level? Antonio Marcacci addresses the question as to how IOSCO standards/principles inform EU rules on product governance and vice versa. This question is crucial in order to understand the role of the EU in the setting of globally applicable standards. The chapter's main claim is that European principles are, through EU participation in this international organisation, incorporated into the IOSCO global regime. In addition, Marcacci finds that hard and soft law rules affect intra-firm processes. The resulting formalisation of intra-firm processes is a corollary of product governance, where MiFID has played a considerable role. The examination of the rules reveals a private law dimension as these rules are enforced via private law mechanisms and remedies.

4.4 EU Governance through Promotion of Privately Set Procedures beyond the EU

Under this hypothesised model, the EU fosters – or even capitalises on – existing best practices, often privately developed, to serve as a framework that contributes to achieving its own regulatory objectives. While contract law still fulfils a 'facilitative' or 'enabling' function, it is private actors who freely cooperate and craft their own framework for private transactions.[85] Here, once again, the role of the EU needs to be assessed against the global adoption of good practices that, while not specifically created by the EU as such in the shape of the legislator or even by EU-delegated actors, instil and embed EU preferences and values. This model shows the use of hybrid forms of regulatory structures (substance–procedure).

María Paz de la Cuesta provides an overview of the transformations of trading practices alongside (transnational) supply chains, in particular those related to the inclusion of SMEs. De la Cuesta illustrates the emergence of a set of innovative regulatory mechanisms aimed at increasing the 'inclusiveness' of supply chains, including standard form contracts, supply chain codes of conduct and certification systems, such as private labels for 'fair trading'. Moreover, regulatory innovation reaches enforcement, where she observes an increasing reliance on mediation mechanisms, certification regimes and collective contracts in dedicated supply chains. In sum, her chapter explores the transformation of the regulatory approach from traditional regulatory tools to standard contract terms and privately developed standards whose enforcement

[85] This model resembles the 'governance of contracts' hypothesised by F Möslein and K Riesenhuber in 'Contract Governance – A Draft Research Agenda' (2009) 5 *European Review of Contract Law* 3: 248–89 at 268.

is performed by complex transnational networks. De la Cuesta claims that such transformation emerges as a new paradigm for assessing the EU's performance in transnational governance.

Kinanya Pijl offers an examination of the Dutch Banking Agreement on Human Rights (DBA) as an illustration of the ways in which EU values 'could-should-might' be exported to the rest of the world. In her chapter, Pijl explores the extent to which the DBA serves as a 'blueprint for regulating – at the EU level – corporate behaviour that has an impact on people beyond the EU territory'. The chapter inverts the perspective followed in previous contributions: instead of looking for 'EU-made' instruments, the idea is to test whether a national agreement can inspire or even convey the export of EU values internationally. The viewpoint is therefore national. She proposes that the EU adoption of the DBA governance model could democratically enrich the EU multistakeholder governance. Such a model, she argues, could stand as a successful device for exporting EU values to the rest of the world.

Although the occurrence of these models does not take place in a coherent fashion, and while variations and overlaps exist, we believe that the four models cover the spectrum of the different varieties in which EU private governance unfolds and operates globally.

5. SOME NOTES ON THE IMPLICATIONS OF THE EU IN TRANSNATIONAL GOVERNANCE OF STANDARDS, CONTRACTS AND CODES

The EU transnational *private* governance here hypothesised pursues not only a regulatory but also an axiological goal. The regulatory effects derived from this phenomenon are contextualised within legal pluralism – the EU is partaking in global regulatory competition. The public dimension of international standards, contracts and codes is perhaps less obvious. Through transnational private governance, the EU is trying to set a normative benchmark. Therefore, this introductory chapter concludes by pointing out some normative effects of the increasing role of the EU in transnational private governance and regulation.

5.1 Regulatory Competition: From Law as a Product to Legal Transplant

Regulatory competition is often a compulsory corollary of transnational regulation. Here, the choice is not among the alternatives resulting from different jurisdictions but between public and private regulation. The choice between a particular international standard, standard form contract or code of conduct stands as an example of regulatory competition. Seen from this perspective,

law can be perceived as a commodity – not only private actors but also States can choose which private rule to apply. This has an impact on harmonisation through – and of – private law. Through the adoption of a particular transnational privately produced rule, the private law of the country of reception is affected too. This means that the EU has an interest in exporting its rules and values indirectly advances the global harmonisation of private law.[86] As demonstrated throughout the different chapters of this volume, standards, contracts and codes, where interpreted by the judge, may also contribute to the enforcement of EU values.

The content of these standards, contracts and codes is not only what is being transplanted into other non-EU jurisdictions. Eventually, as a result of 'self-constitutionalisation' processes, the epistemic communities in transnational governance may also adopt the EU's preferred regulatory approach.[87] There is a trade-off, however, between constitutionalisation and efficiency of transnational private governance. The usual reluctance towards privately created rules comes in the form of an asserted lack of political discourse and of democratic credentials, where the resulting rules tend to respond better to the market rather than to societal needs.

From the rationale of private governance, its self-constitutionalisation involves the emergence of suboptimal consequences – for example, the institutionalisation of private rulemaking procedures takes place at the expense of their own efficiency.[88] Accordingly, in the context of a process of legal (and procedural) transplant, the key is to identify the right balance between desirable constitutionalisation and expected efficiency of rulemaking procedures. Following the 'law as a product' narrative,[89] the most attractive product to 'buy' will be one that satisfies market needs while preserving fundamental democratic features that guarantee their incorporation into legal regimes.

Within a particular sector or industry, the widespread adoption of a standard, harmonised contract or code of conduct usually results in the emergence of a social practice within the sector considered. Network externalities work as a strong incentive in this process. This social practice provides a more tailored and perhaps more efficient framework for the parties to conduct their trans-

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[86] For an example in telecommunications and ICT, see M Cantero Gamito, 'Europeanization through Standardization: ICT and Telecommunications' (2018) 37 *Yearbook of European Law* 395–423.

[87] Zeitlin (above n 17) and J Karton, 'Sectoral Fragmentation in Transnational Contract Law' (2019) 21 *University of Pennsylvania Journal of Business Law* 142.

[88] See R Van Gestel and Van Lochem in this volume.

[89] R Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 *Journal of Law, Economics and Organization* 225.

actions aside from public law or legal considerations.[90] Accordingly, public regulation incorporating this type of private regulation will have to be responsive to this particular setting. This accommodation of public law to the needs of private actors stands at odds with the institutional complementarity theory,[91] which suggests that public regulators will be more sensitive to incorporating private regulation produced through rulemaking procedures that replicate procedures for the creation of publicly made rules. A legitimacy 'retrofit',[92] although suboptimal in efficiency terms, could provide a balanced solution to the dilemma of global governance.

5.2 Public Dimension of Standards, Contracts and Codes

Revealing the public dimension of any set of rules that is non-publicly produced requires introspection about the effects of incorporating public interests into private governance. Therefore, the public dimension gives rise to a set of normative questions. First, is it for standards, contracts and codes to pursue regulatory objectives? In other words, is private law an adequate instrument for attaining (public) regulatory outcomes? Second, what values is the EU actually exporting to the wider world? Third, what are the reasons driving the EU to lead a process of global regulatory harmonisation?

Among the main concerns in terms of private regulation is not only the lack of political dialogue or democratic credentials but also the responsiveness of domestic legislators to the demands of global private actors. Formal contract law now incorporates elements of private governance.[93] While public regulation is adopting a responsive role to private standards, contracts and codes, contract law is being remodelled by these same actors who participate in private governance.[94] Against this background, the adequacy of private law for regulatory purposes is put to the test. Constitutionalisation could contribute to overcoming the seeming inadequacy of private law to achieve regulatory purposes. After all, private regulation strives for its own self-constitutionalisation with a view to becoming its own source of authority.[95]

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[90] L Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *The Journal of Legal Studies* 115–57.

[91] Aoki (above n 72). See also T Büthe and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press, 2011.

[92] P Cuccuru, 'Regulating by Request: On the Role and Status of the "Standardisation Mandate" under the New Approach' in M Eliantonio and C Caufmann (eds), *The Legitimacy of Standardization as a Regulatory Technique in the EU*, Edward Elgar, forthcoming.

[93] Karton (above n 87).

[94] Ibid.

[95] Cf. G Teubner, *Law as an Autopoietic System*, Blackwell Publishers, 1993.

Second, EU law is asserting its own capacity to provide a 'reference point' for third countries. This resembles the failed *law and development* (first and second) movement initiated in the USA back in the 1960s. The failure of this endeavour resulted in discrediting rule export.[96] From a normative point of view, the shortcoming of this type of movement is their alleged rigidity, as a consequence of their reliance on a 'one-size-fits-all' approach. With variations, what the EU is exporting to the world at large is its 'single market framework and the wider EU economic and social model'.[97] More specifically, it is exporting a 'modern and innovative regulatory and supervisory framework in many areas' based on a competitive advantage that results from its own 'solid scientific ground' in technical fields.[98] Recently, for instance, we find the global aspirations in the European Commission's approach towards Artificial Intelligence (AI). The EU (Commission) proposes a contribution to the worldwide debate on AI based on its values and fundamental rights. EU law stands as a 'strong and balanced regulatory framework to build on', which could serve as a benchmark for establishing a 'sustainable approach' to AI.[99]

Lastly, we need to reflect on the reasons that enabled the EU to lead the global regulatory process.[100] The purpose of the EU in the wider world is to become a global rulemaker. EU law, rules and values would stand as a *high-quality* regulatory device. This volume serves as an example of how the EU participates in transnational ordering by adopting different regulatory approaches. A critical reflection is made as a means of conclusions, posing pressing questions about the role of the EU in transnational governance.

The volume concludes with Rodrigo Vallejo's voyage through standards, contracts and codes. He adds that the contribution of the EU to transnational private regulation is its proceduralisation, giving rise to the emergence of 'private administrative law'. Significant in Vallejo's observation is the normative stance of the external dimension of European private law. As part of this claim, he suggests that this is a meaningful phenomenon that requires a critical examination of the external dimension of European private law project itself.

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[96] R Michaels, 'Make or Buy – A Public Market for Legal Transplants?' in H Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution*, Nomos Verlagsgesellschaft mbH & Co. KG, 2013.

[97] European Commission, *External Dimension* (above n 13) at 5.

[98] Ibid.

[99] European Commission, 'Communication on Artificial Intelligence for Europe', COM(2018) 237 final.

[100] I owe this to the pertinent questions of Rodrigo Vallejo, as well as the team members of the FiDiPro project with whom we were discussing the normative implications of the process of regulatory export. The discussions were so stimulating as to trigger the preparation of an event dedicated to addressing solely this issue which took place in Helsinki 17–18 October 2019.

The risk of conducting a project that selectively focuses on the role of the EU in transnational governance, without paying attention to its normative consequences, may result from its own 'blindness' to what is outside the EU world. Vallejo signals two significant perspectives. The first, of a comparative nature, proposes to identify what is genuinely European. The second, a more critical enquiry, calls for more reflectivity concerning this endeavour.

In his epilogue, Hans-W. Micklitz invites reflections on the reasons for the EU to expand the reach of EU law. The examination of latent motivations for this regulatory export is a deeper exercise that is inevitably connected to the own validation of the integration project; is the EU model a better, a more social and a more just one? What role is the EU performing in the world outside the EU? These are indeed the questions that, more implicitly than not, characterise the contributions to this book. There are no unequivocal answers.