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Private Law and the Visible Hand of EU Regulation

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Abstract

A question that is central to current debates about the Europeanisation of private law is that of how to conceptualise the relationship between European law and national private law. And a key aspect of that question is the impact on national private law and institutions of the growing corpus of EU regulation of important service sectors of the economy. In that context, are national regulatory authorities, now increasingly networked in EU regulatory networks, an interface between the European and the local, or are they co-opted as arms of European regulatory law? In that context, are their growing interventions in private law relationships a further distancing of law from the control of domestic democratic institutions?

In this paper, I begin with the observation that the sidelining of traditional private law together with adjudication and courts, as its principal institutions, has been a longer-term process, resulting from transformations of society and its knowledge base and the inability of traditional institutions to cope with those transformations. In the post-industrial society of networks, some prominent commentators have foreseen a role for the re-emergence of private law as the institution that mediates or translates various fragmented social rationalities. In this paper, I argue that private law has not risen to this task of orchestrating various stakeholders because, even if such a task of translation were possible, private law institutions are not well-adapted to perform it with traditional tools. By reference to examples from the regulated network sectors, I argue that conceptions of European law as hierarchical “intrusions” into national space may be oversimplified. At the EU level we witness attempts to overcome the limitations of standard interventions through proceduralized mechanisms for joint learning: both between administrators at different levels and between administrators and private actors (both regulated entities and other social stakeholders). The advantage of EU-level interventions is that they are not as steeped in tradition and habitual patterns as national private or public law institutions, so they are more open to experimentation with heterodox approaches. The disadvantage is that EU interventions can self-consciously define their mandate as narrow or their objectives as limited. In such cases, those whose perspectives are excluded by the narrow mandate may, in the absence of other ways of redefining that mandate, seek redress through the national courts. The local and generalist nature of national courts can be their advantage in providing a venue that amplifies the voice of small-scale communities and their apparently small-scale problems.

Keywords

Private law, regulatory regimes, European Union.

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Introduction

Discussion of the Europeanization of private law has in recent times usually focused on the project of drafting a European Code¹. This tendency is understandable, since in most EU member states, the national codes have traditionally been seen as the principal source of national private law. As Micklitz has argued, this was the private law counterpart of the “constitutionalization” of the EU project and serves to shore up the Union’s “state-like” status. Yet a “codification” perspective has a certain “back to the future” quality even in the more traditional state context. This is even more so for the EU, given that it has already heavily intervened in various non-traditional aspects of private law, such as consumer protection, as part of the process of market-making and re-regulation. Thus, the process of intrusion and substitution of local rules can be said to have commenced quite early, beginning with seminal EU cases, such as *Cassis de Dijon*.

More recently, attention has been increasingly focused on the various (EU) regulatory regimes in sectors such as food safety, financial services, energy and transport, increasingly affecting the conduct of private actors and restructuring private relationships. A mixture of competence limitations, subsidiary concerns and the inexistence of “traditional” institutions produces institutional innovation at the EU level, which incorporates member state actors. Does this mean that a self-standing European functional law now governs many if not most key economic activities with little or no reference to national private law and courts? Once eager agents of European integration, by enthusiastically taking up the power afforded by the preliminary reference procedure, have European courts dealt themselves out of the adjudication game? Are there good reasons for such a process of distancing and autonomization to take place?

One common view from private lawyers in the member states might be that this distancing of European law and marginalisation of traditional institutions is driven by the highjacking of the functionalist logic of integration by European institutions, such as principally the Commission and the Parliament, aided and abetted by the ECJ. But the trend away from private law adjudication of disputes had begun much earlier and independently of EU integration, as a combined result of transformations in the economy and society, as well as of an increasingly more encompassing definition of the public interest pursued by the state. While EU integration, and the creation and re-regulation of the common market have exacerbated that process, it bears emphasizing that the EU, even if this were at all feasible, does not have the capacity or resources to act as a formal hierarchy². Instead, EU institutions must engage with (in the sense of “collaborate with” as opposed to “give orders to”) private actors, national administrations and even courts, to achieve their policy goals.

The aim of the paper is both to identify the different dimensions and the reasons for which the European legal order may be becoming “self-sufficient”, situating these developments in on-going debates about European law and governance and exploring the possible residual role that might be played by national private law and courts in that context. Specifically, I am sceptical about whether private law can re-emerge as a mechanism for review and discipline over private self-regulatory systems and for translating and orchestrating various social rationalities. Yet there may be spaces and functions to which the local and general nature of national private law courts can provide them with an advantage so as to be synergistic with European regulatory private law (ERPL) in the EU multi-level order.

Background – private law in the nation state and beyond

National private law is usually seen to comprise contract and tort law as its main pillars, and in most Member States of the EU following the civil law tradition, these bodies of law have traditionally been

¹ See the contribution by Micklitz in the working paper EUI LAW 2012/31.

² Simon, “The Architectures of Complexity”, *Proceedings of the American Philosophical Society*, (1962) 106 (6), pp. 467-482, at 468 (defining a formal hierarchy as “a complex system in which each of the subsystems is subordinated by an authority relation to the system it belongs to”).

realised in the form of a comprehensive codification of general rules.³ Schematising broadly, the principal features of private law rules were that they were general in scope and facilitative in function. Private (civil and common) law is general in scope because it does not typically differentiate between different fields or sectors of activity. Instead, the rules are meant to apply generally (or “horizontally”) across all different kinds of activities and sectors. Moreover, private law can be regarded as facilitative in the sense that it is meant to support the autonomy of private actors. Thus, private law rules ordinarily did not mandate substantive outcomes, but instead aimed to facilitate private ordering, such as for example in economic and commercial affairs. Thus, we might say that contract law provides the background default rules for cooperation, while tort law supplies the default rules for managing the risk from interaction between private parties.

Ladeur points out that the rules of private (as well as public law) were based on what he calls “social knowledge”, which together with “conventions and professional practices” was “enshrined in the public order at large or in social and technical experience”⁴. Thus, from the institutional point of view, these rules could be applied by generalist judges (and even juries), who could easily access this generalised knowledge, rather than having to rely on some form of specialised or functional knowledge. Individual judges could resolve private law disputes through adjudicative means and without the aid of specialised knowledge or decisional machinery, both because of their substance, but also because of their “unicentric” nature⁵. Fuller describes as unicentric those disputes which are individualised, localised and self-contained. In contrast, Fuller terms as “polycentric” those disputes that have broad and disparate ramifications and ripple effects on actors other than the parties to the dispute, which might be difficult to anticipate and resolve by ordinary private law remedies, such as simple injunctions or damages to make good the injured party.

Based on the facilitative conception of private law, principles such as the individual “autonomy” of private individuals, or their “freedom”, or the “equality” implied by the horizontal application of the rules to all different actors in society are sometimes said to be “foundational tenets” of private law, buttressed by philosophical and moral considerations, separate and apart and quite irrespective of any functions those principles might serve⁶. Yet, one ought not to forget Dewey’s observation that such apparently foundational principles become salient at specific junctures as a rallying cry for those pursuing particular (functional) objectives (such as the redistribution of power or economic opportunity from some prior equilibrium)⁷. Thus, Wieacker has argued that the vitality of codes depends “on the social and economic value-judgments which inform them”. While they might appear abstract, the codes were “a result of an alliance between bourgeois society and nation-state”⁸.

Whatever their source, the foundational tenets of private law, such as autonomy, its facilitative rather than mandatory nature, and the general horizontal applicability of rules, have come under various pressures over the course of the 20th century. A number of such related pressures have been identified in the literature.

One such pressure was the rise of first the regulatory and even more significantly the welfare state, which had explicit redistributive objectives, coupled with a recognition that the general and facilitative nature of private law nonetheless systematically favoured certain groups, such as for

³ Much has been made of the distinction between the common law and the code legal orders, including the violence that a European code would do to the common law, e.g. Legrand, “Antivonbar”, *Journal of Comparative Law* (2006) 1(1): 13. But this argument may well be overstated from a practical point of view. Even in the common law, private law is systematized in treatises which are not unlike codes and which often provide the first point of reference for practitioners and judges before any search of the case law. In fact, Ladeur argues that codifications can often be viewed as an ex post “stabilization” of emergent practice in any event. Ladeur, *The Emergence of Global Administrative Law and the Evolution of General Administrative Law*, 2010, available at: http://works.bepress.com/karlheinz_ladeur/1 (“Emergence and Evolution”).

⁴ Ladeur, *Emergence and Evolution*.

⁵ Fuller, “The Forms and Limits of Adjudication”, *Harvard Law Review* (1978) 92, pp. 353-409.

⁶ Basedow, “Freedom of Contract in the European Union”, *European Review of Private Law* (2008) 16, pp. 901-923, at 902.

⁷ Dewey, *The Public and Its Problems* (Swallow, 1954).

⁸ Wieacker, *The History of Private Law in Europe* (Clarendon, 1995), p. 365.

instance the “repeat players” in the legal system vis-à-vis the one-shot players⁹ or even the adjudicative institutions. The redistributive objectives were pursued through various instruments, one of which was a regulatory contract law with numerous mandatory provisions protecting various “weaker” parties and thereby restricting the freedom to contract¹⁰. This process obviously introduces greater differentiation or fragmentation within private law, by selecting specific classes of actors (consumers, workers, tenants etc.) to whom special rules and protections apply.

Even more profound differentiation results from the implementation of specialised regulatory regimes pursuing specific substantive outcomes, as a response to problems that might be different in different industries. Such regulatory regimes were often targeted at specific sectors of the economy. This is because the force of the ordoliberal’s preferred disciplining mechanism that undergirds the view of the economy and economic law as autonomous, namely competition, is considerably weakened. As Adolf Berle, the bard of the modern theory of the corporate form, recognised, writing in 1954, “the supporters of capitalism have to recognize that the economic check of competition through the market has weakened and in some cases disappeared. Yet if that check is re-moved, the modern corporation becomes something very close to a centre of absolute economic and hence of political power”¹¹. Thus, for example, the public service utilities in most European nations were treated as natural monopolies subject to ownership and/or strict regulation by the state.

It was not just the increasing state involvement that diminished the role of private law, but also the capacity of courts, as the principal adjudicative institutions, to handle the problems thrown up as legal disputes. Ladeur describes a transition from a society of individuals to a “society of organisations”, whereby individual relationships to the state and the law are mediated via organisations that dominated in production settings, though not only those¹². These organisations are the “repeat players”, who enjoy an informational advantage both vis-à-vis their customers and the courts and can systematically use that advantage. In such a setting, the use by the adjudicative institutions of “experience as the common societal knowledge basis was no longer sufficient”. In other words, Ladeur identifies a fragmentation between the “continuity of the self-reproduction of general experience distributed over the whole of society, and ... the advanced knowledge which is generated by the big organisations both in the economic and the broader sense (including political parties, unions etc.)”¹³.

To be able to regulate comprehensively in an organization-dominated landscape, the state itself must pool expertise in bureaucratic structures mimicking the large organisations, to intervene through planning, organised decisions and rules that apply prospectively. Through such interventions, to take the public utilities as an example, the administration could seek to regulate prices charged to final customers. Such an approach could be used to achieve – or balance – both technical efficiency and distributional public policy objectives, although it requires the ability to access information from deep within the regulated organisations and to remain attentive to the possibility of capture and the risk of stifling dynamic change. While this expansion of the role of the state made public law more important as a control mechanism in society, in effect (as Ladeur recognises) the emergence of an expertise-based administration led to an overall effective “reduction of judicial control” over substantive decision-making. This is largely for institutional reasons: courts and judges do not have institutional capabilities to access the knowledge generated either by organised firms or organised

⁹ Galanter, Why The “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, *Law and Society Review* (1974) 9(1), p. 95.

¹⁰ The extent to which this regulatory turn in contract law actually had protective or redistributive effects may be subject to considerable doubt, given the sporadic and unpredictable ways in which individuals could access the courts, the ability of courts to balance individual considerations (of the case at hand) with unpredictable follow-on effects (on other similar cases, such as with mass-produced goods or widely available services) as well as the relative cost and length of court proceedings.

¹¹ Berle, *The 20th Century Capitalist Revolution* (Harcourt, Grace & Co. 1954).

¹² Ladeur, *Emergence and Evolution*.

¹³ Ladeur, *Emergence and Evolution*.

bureaucracies to engage in substantive oversight or comprehensive planning¹⁴. Given the intermediation of relationships through large organisations in all different spheres, disputes tend to become polycentric, according to Fuller's taxonomy. Both private law and judicial institutions are thus under pressure in such an environment. Moreover, the emergence of sectoral regulatory agencies and regimes leads to a further fragmentation of the once cohesive source of law (whether common law or code) and a distancing of the traditional legal institutions (courts) from the substantive regulation of conduct.

The important point to note from our perspective is that these processes largely preceded the onset of European integration and the resulting considerable expansion of European regulatory law. This, perhaps unremarkable, observation serves as an antidote to two common tendencies, or fallacies, in scholarship on the interaction between supranational and national law as identified by Ladeur. One is the assumption that globalisation somehow "invades" a "stable domestic administrative or private legal system from outside". This, in turn, leads to a second tendency to both over ascribe responsibility to supranational processes and to romanticise the efficacy and legitimacy of the national legal order and institutions.

European Integration: going beyond the state

It is in this landscape of a growing relative importance of the administration vis-à-vis private law and judicial institutions more generally, that European integration began to take shape "through law", thereby influencing national legal orders. It bears emphasis that since EU-level lawmaking is of limited competence, this imposes an additional constraint on the process and the resulting forms of the law. Formally, the EU does not have competence over private law, and codes are sometimes sentimentally seen as a mark of nationhood and a reflection of domestic social norms and customs or culture (despite a considerable degree of similarity of principles across national codes and the fact that many jurisdictions used transnational ("imperial") templates as a basis for codification). Moreover, in virtually every sphere of legal intervention, the EU faced an enforcement challenge, given the limitations of administrative enforcement institutions at EU level, the inexistence of EU primary courts and the relative unfamiliarity of EU law to individuals and legal practitioners in the member states.

Given these limitations, the most commonly used basis for European legislation in the regulatory sphere was the integration or creation of the common market through the removal of restrictions on cross-border trade. Given the deregulatory tendencies at the national level produced by early cases such as *Dassonville* and *Cassis*, this produced an oft-cited need to reregulate at the EU level. As might be expected, the EU regulatory efforts initially mimicked the national formats of regulation that they were supplanting, such as through the introduction of horizontal regimes for consumer protection, including regulatory contract law¹⁵ type provisions, such as cooling off periods, cancelation rights and so on.

The domain of public service utilities does not appear to be one where much activity by the EU might have been expected, particularly given the perception of their localised monopoly nature and the fact that they were heavily regulated nationally and expected to perform a variety of social functions. However, a number of authors have pointed out the "output" legitimacy that the EU derives from pushing through successful projects that ultimately benefit the citizens of the Member States¹⁶. The aim of using market-making powers to break open national monopolies to competition, to allow new entry and lower prices for consumers can be viewed through that lens. However, the combination of limited competences and the use of market integration powers can produce a tendency to focus on a narrow mandate in designing and implementing EU regulatory intervention. In particular, the focus

¹⁴ The administrative law discourse in this era focuses on the ideas of deference and controls on procedure, neither of which guarantees either the accountability or the efficacy of regulatory decision-making, conceptually or in actual practice.

¹⁵ Braucher, "Contract versus Contractarianism: The Regulatory Role of Contract Law", *Washington and Lee Law Review* (1990) 47(4), pp. 697-739.

¹⁶ Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the EU* (Harvard University Press, 2011) ("Eurolegalism").

would be on the opening up of domestic markets to competition or liberalisation of entry either at all levels of supply or through vertical disintegration. This does not mean that interventions would be light or limited, given that in many of these markets competitive structures essentially have to be created. Nonetheless, the objectives pursued within a legal regime can provide another dimension of autonomy; a narrow mandate regime may tend towards self-sufficiency so as to achieve that mandate more effectively.

Yet, the mere fact of privatising or liberalising and opening up these markets does not guarantee that the ultimate outcomes will be beneficial to either consumers or other social groups and that public policy goals will be met without regulatory intervention. There may well be intermediate periods during which regulatory intervention to protect consumers or to enable them to learn and to take advantage of more competitive structures (to make adequate price comparisons, to switch providers) would be necessary. Moreover, in the medium to long term there may also be unintended consequences or unpredictable shocks that impede the achievement of the objectives of the reforms or that may even require substantial re-regulation.

In a number of contributions, Teubner has argued that there is an opening within the increasingly globalised environment for private law to re-emerge as an institution (in the broad sense) that plays a key role in the achievement of social order, including specifically in the newly privatised sectors. This, in his view, would “transform private law itself into the constitutional law of diverse private governance regimes, which will amount to its far-reaching fragmentation and hybridization”¹⁷.

More specifically, Teubner has suggested that the combination of social or functional “differentiation” and processes of globalisation leads to the emergence of autonomous regimes of norm-production that are transnational and quite separate from the state and ordinary politics:

The economy, not just the economy but other social sectors such as science, technology, the mass media, medicine, education or transport are, on their specific path to globalization, developing a massive requirement for norms that is met not by governmental and intergovernmental institutions but by themselves in direct action upon the law. Increasingly, global private regimes are producing substantive law without the state, without national legislation or international treaties.¹⁸

Moreover, to be effective, according to Teubner, these private regimes build an institutional support frame, including “quasi-private bodies” for dispute resolution, often without prior infrastructure supplied by states: “autonomous global law is increasingly basing itself on its own resources”¹⁹. He views these regimes as relatively effective at self-organisation, despite the fact that they are largely spontaneous, thereby turning many of the hierarchical aspects of traditional law on their head.

There are two important underlying ideas that lead to Teubner’s observations cited above. One is the recognition that the emergence of networked architectures in production and in economic and social relationships enables channels of communication that connect normative communities, whereby these are no longer mediated through the state or state institutions²⁰ or other formal hierarchies. Ladeur notes that the emergence of a “society of networks” is a “reaction to a further rise in complexity of the knowledge base of society”, given “the importance of information as the principal resource of production” and the fact that technological knowledge “is no longer concentrated in stable expert communities, but is distributed in overlapping project-oriented ‘epistemic communities’ which combine general and specific knowledge production in hybrid forms of communication”.

A second and related recognition is that this transformation in the “knowledge base of society” enhances the capacity of private actors, economic and social, to self-organise to solve common problems and thereby create normative communities. Moreover they can and they do do so across

¹⁷ Teubner, “After Privatization: The Many Autonomies of Private Law”, *Current Legal Problems* (1998) 51, p. 393, at 394 (“After Privatization”).

¹⁸ Teubner, “Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors”, in *Public Governance in the Age of Globalization* (Ladeur, ed, Ashgate, 2004), p. 73 (“Global Private Regimes”).

¹⁹ Teubner, *Global Private Regimes*, at 74.

²⁰ Eg, Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).

state borders so that such communities can be sources of global normativity even in the absence of a world state or relevant international organizations or treaties. Since these are private “regimes” unmediated by the state, this form of self-organisation could provide the basis for a renaissance of an autonomy-based (and autonomy-protecting) private law²¹, thus far sidelined by the growing intervention by the state through hierarchical action and expertise-based agencies.

Teubner envisages that private law will need to “undergo massive transformation”²² in the process of recapturing its role as a tool for facilitating self-organisation in the new society of networks. First, the law must recognise the interrelatedness of relationships in networked regimes, rather than treating them as a multiplicity of bilateral arrangements²³. Second, he suggests that private law should facilitate the self-constitution of these regimes with the appropriate mixture of a “spontaneous” and an “organized” sector²⁴, but also “develop criteria for their legal review”²⁵. Finally, and perhaps more controversially, in performing this role, law must maintain the autonomy of the various “spheres” to pursue their own “rationality”²⁶, while at the same time maintaining the law’s own autonomy. While this does not mean law should completely ignore, or not seek to incorporate, the knowledge generated in such systems, nonetheless it must do so on its own terms and within the pursuit of its own rationality²⁷.

Private law and European institutions

While not stated explicitly in the works cited, traditional (though reformed) private law could be the legal order that plays this facilitative function. Teubner’s views have triggered a rich research programme into private regulatory regimes, examining the tools through which private entities self-organise in regimes that regulate their interactions and the mechanisms through which they enforce such arrangements²⁸.

There are two variables that are either missing from or require further elaboration in the foregoing discussion. One is the question of guarding the public interest, since private regulatory regimes can easily be subverted to the interests of some or all of the participants. Another aspect that requires further exploration is the role of supranational institutions, both administrative and legal, such as the EU, both vis-à-vis the private regimes and vis-à-vis the private law that constitutes and regulates them.

Specifically, Teubner does not appear to envisage any explicit role for the institutions of the EU or European law in the process of facilitating the self-organisation of these trans-border networks of actors. Presumably, based on the idea that regimes are capable of more or less spontaneous self-organisation, at best any role of the EU institutions is unnecessary. At worst, it could be harmful since it might reintroduce (supranational) hierarchy, which might ensnare the spontaneous processes, rigidify them and instrumentalise them to its own purposes (or its own “rationality”).

Yet, considering the appropriate role of EU institutions, it is worth observing that the logic of linking the capabilities of actors in network architectures has been recently manifested in the trend

²¹ There are similarities in this argument to the underlying tenor of the work of Lisa Bernstein, “Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions”, *Michigan Law Review* (2001) 99, pp. 1724-1790 and Robert Scott, “The Case for Formalism in Relational Contract”, *Northwestern University Law Review* (2000) 94, pp. 847-876.

²² Teubner, *After Privatization*, at 394

²³ E.g. Teubner, “*Coincidentia Oppositorum*: Hybrid Networks Beyond Contract and Organisation”, in *Networks. Legal Issues of Multilateral Cooperation* (Amstutz/ Teubner, eds, Hart, 2009) (“*Coincidentia Oppositorum*”).

²⁴ See Teubner, *Global Private Regimes*, at 84-86 (“For law there accordingly arises a new role of institutionalizing a dual constitution in the various sectors.”); Teubner, *After Privatisation*, at 394 (“to transform private law itself into the constitutional law of diverse private governance regimes”).

²⁵ Teubner, *Global Private Regimes*, at 80.

²⁶ Teubner, *After Privatisation*, at 394 (“make private law responsive to a plurality of diverse ‘private’ autonomies in civil society”).

²⁷ Teubner, *Coincidentia Oppositorum*.

²⁸ E.g. Caffagi, “New Foundations of Transnational Private Regulation”, *Journal of Law and Society*, (2011) 38, pp. 20-49.

towards the creation of European networks of regulatory bodies across a number of important regulated economic sectors²⁹. Perhaps an early example of this practice can be found in the European Competition Network (ECN), which was formalised as a network in 2004, though reflected practices that had developed previously. The ECN was set up as part of the Modernization process for competition enforcement, which decentralised enforcement responsibility for EU law to the authorities of the Member States. As Ottow has pointed out, this model or approach has been extended to other sectors, including financial services, insurance, communications, energy, consumer protection. The common design appears to be to link the member state authorities, as well as the Commission, in a common discursive and/or enforcement network, rather than to completely centralise supervision and enforcement through a classical hierarchical European agency³⁰.

There may well be legal competence as well as political constraints in going down the path of forming a European agency in various sectors. Whatever the reason for the choice, this approach towards building regulatory architectures has resulted in a range of hybrid or “mixed administration” forms whereby responsibilities are “shared to differing degrees between the European Commission, new European regulators and national regulatory authorities”³¹. The European regulatory networks follow the logic of the networked linking of capabilities of actors across borders. In other words, one could argue that a regime is created which links the entities that seek to promote and protect the public interest in the broadest sense.

Importantly, the national agencies that form the networks operate both on the domestic and the European planes; sometimes (as in the case of the ECN) they are charged with enforcing both EU and national law. Two crucial factors in understanding the potential functioning and the outcomes of these networked regulatory regimes in the EU are their “constitution” and their relationship with other stakeholders in the sectors that they regulate, including the regulated entities, customers in general and those with specific characteristics (vulnerable, disabled etc.), labour, groups affected by environmental pollution or organised to pursue environmental goals.

Regulatory Network Constitutions: Formal and Informal

By the constitution of the networks I mean the constituting document of the network, the way in which it defines the mandate of the specific network (and the policy or public interest they are meant to pursue) and the relationships between the network members, as well as the relationship with the European Commission and other EU or national institutions. In considering these “constitutive” issues, attention needs to be paid of course not only to the constitutive document, but also the informal dynamics and practices that emerge and perhaps become stabilised within the agency networks.

Within the network

To begin with the relationship between the EU Commission and national agencies, formally, none of the sectoral networks appear to follow a typical hierarchical model in which either the network or the Commission has the power to determine or to reverse the action of a national agency. Instead, they are discursive fora that aim to stimulate cooperation between agencies in their efforts to implement the law.

Even within networks that have a degree of centralisation in the hands of the Commission, this discursive principle appears to be important. For instance, in the ECN, the Commission can relieve national authorities of the responsibility for a particular case and take up the case itself (Art 11(6)). However, such a decision could require justification before the Advisory Committee on Anticompetitive Practices and Dominant Positions (Art 14(7)). Case allocation is an important

²⁹ Ottow, “Europeanisation of the Supervision of Competitive Markets”, *European Public Law*, (2012) 18 (1), pp. 191-221 (“Europeanisation”).

³⁰ Even where a European agency is created, such as EFSA (the European Food Safety Agency), the design involves a networked Advisory Forum, involving the national agencies in the relevant field. Vos, “Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation”, in *Experimentalist Governance in the European Union: Towards a New Architecture* (Sabel/Zeitlin, eds, Oxford University Press, 2010), pp. 159-160.

³¹ Ottow, Europeanisation.

determinant of the network dynamics in an enforcement network such as the ECN as well as in setting policy direction. On the issue of allocation, the determination is based on a flexible standard of the authority best placed to decide a case, which despite its flexibility has not led to considerable disputes or turf battles.

Within the ECN, members “are subject to an obligation to offer persuasive justifications for their actions and positions” to other network members; “further deliberation, not hierarchical action provides the only dispute resolution mechanism”³². However, given the privileged role of the Commission both historically and within the ECN, the informal internal dynamics may tell a different story.

In the ECN Regulation, a requirement is imposed on national actors (agencies or courts) to not take decisions contrary to or conflicting with a decision of the Commission (Art 16). Again, to the extent this is meant to prevent the imposition of conflicting injunctions on undertakings in specific circumstances, it makes sense. Beyond that, however, it simply invites the ordinary tool of distinguishing: in other words, offering a persuasive justification for the course pursued which also offers an explanation of any apparent departures from prior practice³³.

Apart from formal rules for interaction within the regulatory networks, another key consideration is the informal dynamics in the actual operation of the networks, both when deciding cases and formulating policy or filling out the details of legislation in general terms. We might call this the “informal” constitution: are the networks and their members delegates of the Commission aiming to propagate a monolithic view? Or are they being used to stimulate and encourage divergent approaches, so as to promote collective learning from pursuing different reasonable courses?

Informal dynamics are important because of the dominant position of the Commission in some regulatory settings due to its past functions or due to its relative capacity, but also due to predilections for mimicry and copying, the public tendency for maintaining surface-level consensus³⁴. Such dynamics cannot always be captured by looking at the formal rules of engagement of networked regulators (for instance, if employment with the Commission is perceived as prestigious, national officials may be of the view that their prospects of joining the Commission staff would be promoted by manifesting agreement).

On the one hand, pursuing a monolithic vision enhances the likelihood of achieving it, but greatly increases the resulting damage if the original vision was wrong or incomplete. On the other hand, as Steinmo has argued, variation in the characteristics of actors and their settings in the various member states would be likely to lead them to choose from different menus of policy responses³⁵. However, to the extent that there are general pressures for conformity, such an outcome may require a demonstrated commitment to allowing diversity by the actors present. Moreover, such an approach may be inconsistent with having a narrow mandate regime: there may be one best way to pursue a single objective, if it is being pursued without regard to the constraints imposed by other policy goals or by interaction with neighbouring regimes and systems³⁶.

Relationship with EU courts

In two important respects, decision-making within the regulated sectors, both of a regulatory (rule-making) nature and where it impacts and restructures a horizontal relationship between private parties, has been significantly isolated from court review even at the EU level.

³² Svetiev, “Networked Competition Governance in the EU: Delegation, Decentralisation, or Experimentalist Architecture, in *Experimentalist Governance in the European Union: Towards a New Architecture* (Sabel/Zeitlin, eds, Oxford University Press 2010), at p.112.

³³ This is at least how some national courts have described the relationship. Svetiev, *supra* n. 32, p. 113-114 (n. 21).

³⁴ Goffman, *The Presentation of Self In Everyday Life* (Anchor Books, 1959), p. 9.

³⁵ Steinmo, *The Evolution of Modern States: Sweden, Japan and the United States* (Cambridge University Press, 2010).

³⁶ Steinmo argues that one of the sources of variability is the fact that different sub-systems are affected differently by globalizing forces, which in turn means that they respond differently and in turn affect (or transform?) sub-systems with which they interact differently.

First, as already alluded to, the constitutive arrangements for the various regulatory networks ordinarily do not appear to envisage disputes between network members being referred to judicial review by the EU courts. On the contrary, these networks to some extent embody the principle of peer review, even if it is sometimes imperfectly implemented.

Second, even where regulatory decision-making impacts or seriously restructures private party relationships, the tendency away from court review can be observed through a preference for non-adversarial resolution of disputes. One notable aspect of enforcement practice by the Commission in the exercise of its powers under the new Competition Regulation has been its use of commitment decisions under Art. 9³⁷. Following the Commission's expression of concerns with respect to the competitive impact of conduct, this provision allows the parties to restructure their own economic relationship so as to address or attenuate those concerns in an administrative conversation with the Commission. In a 2006 case, one undertaking (DeBeers) provided a commitment to the Commission to cease purchases from another undertaking (ALROSA) pursuant to a 2001 contract and a preceding purchasing relationship dating from 1959³⁸. ALROSA, which was essentially faced with a breach of the 2001 contract, the termination of a long-term purchasing relationship and the need to build an alternative effective distribution system sought judicial review of the commitment decisions from the EU courts. Emphasising the "voluntary" nature of this type of resolution, whereby the party proposed the commitment to the Commission, the ECJ has opted for minimal judicial review of this increasingly common type of resolution mode. The Court, in refusing to take up the invitation to exercise judicial review in such a case, declines to take on an important private law function to essentially decide whether it was appropriate for DeBeers to breach its purchase contract to address the Commission's concerns, subject to a three year "transitional period ... necessary [for ALROSA] to build an efficient distribution system".

One of the areas in which the Commission has used this flexible power to affect private relationships and reshape markets is in the utility sectors. Specifically, it has used the Art. 9 procedure on a number of occasions to intervene in the energy sector. In one case, through a negotiated Art. 9 procedure, it obtained commitments from E.ON, a key player in the electricity generation and wholesale market in Germany, to divest itself of about one fifth of its generating capacity³⁹. This approach has left the Commission open to the charge that it is pursuing wider policy objectives, such as liberalization of the energy market, through the latitude allowed in the competition mechanisms, particularly in light of the "German government's opposition towards the 3rd energy liberalization package" and in particular of "ownership unbundling"⁴⁰. The Commission used a similar procedure with respect to the unbundling of RWE's gas distribution network⁴¹. No doubt, the ECJ would have been aware of the Commission's extensive use of the Art. 9 procedure to basically restructure essential utility markets at the time of its decision in *Al Rosa*, yet it did not claim a power of review for the EU courts of such decisions, even in a complaint from concerned third parties (rather than the party offering the commitments itself).

³⁷ Schweitzer, "Commitment decisions under Art. 9 of Regulation 1/2003: The developing EC practice and case law", in *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Ehlermann/Marquis, eds, Hart 2009), pp. 547-580; Georgiev (2007) "Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law", *Utah Law Review* (2007) 4: p. 971; Svetiev, "Beyond Law versus Economics: A Learning Platform for EU Competition Policy", 2011. mimeo.

³⁸

See

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/90&format=HTML&aged=0&language=EN&guiLanguage=fr>

³⁹ Sadowska, Energy Liberalization in Antitrust Straitjacket: A Plant Too Far?, EUJ RSCAS Working Paper 2011/34, p. 9 ("Energy Liberalization").

⁴⁰ Sadowska, Energy Liberalization, at 10.

⁴¹ Hellström et al "Remedies in European Antitrust Law", *Antitrust Law Journal* (2009) 76, p. 43. According to Sadowska, the Commission launched at least "fourteen antitrust investigations in the aftermath of the energy sector inquiry", Energy Liberalization, at 1.

Defining the mandate

The question of how the mandate of EU regulatory networks and actors is defined is quite an important issue when considering the relationship between European regulation and national private law and institutions. EU regulation has often been justified formally and based substantively on the criterion of creating the internal market. Even competition law enforcement was largely subservient to the internal market dimension from its very outset and has continued to be so for much of its history in the EU. Thus, not only have EU regulatory regimes favoured competition, but in fact they have favoured one specific type of competition, that is cross-border competition. This, in turn, means focusing on liberalisation (i.e. the removal of government restrictions on entry to an industry) or unbundling so as to introduce additional scope and entry points for foreign operators.

A narrowing of the mandate can of course be one way in which an EU regulatory regime can become autonomous or “self-sufficient”, in the sense that it is charged with pursuing a focused limited objective: removing barriers to cross-border competition, while other objectives are pursued through other EU interventions (e.g. consumer protection) or national private law. At the same time, however, this may reduce the scope for learning from diversity⁴² and from the productive, even conflict-generating interaction of different policy instruments and objectives⁴³. Even more importantly, narrowing the mandate to focus regulatory activity on intermediate policy goals can sometimes obscure the relationship between regulatory interventions and the ultimate outcomes that are of interest presumably to policy-makers, economic actors and citizens.

The case of the competition network discussed earlier is important in this context, both because it is a policy in which competence at the EU level is undisputed and in which the Commission has traditionally played a dominant role. Moreover, it is a policy area that cuts across all of the other sectoral regimes: as part of the ECN, there are working groups around the various sectors, such as energy, telecommunications, financial services, transport, food and pharmaceuticals, and there is an emergent view that sectoral regulation should be undertaken on the basis of “antitrust principles”. In at least one of the member states, the Netherlands, there is an on-going move to combine all of the sectoral regulators of the networked utilities (telecommunications, energy, transport) together with the competition authority into a single agency. This horizontal focus on competition may undermine the self-sufficiency of the different vertical regimes from each other. At the same time, however, it may underscore the view of the autonomy of the mandate (or objectives) being pursued through EU intervention.

Focusing on the energy sector regulation regime, the objectives of the creation of the internal energy market are said to be “to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities, and more cross-border trade, so as to achieve efficiency gains competitive prices, and higher standards of service, and to contribute to security of supply and sustainability”⁴⁴. Thus, from the perspective of consumers, Lavrijssen, Bordei and Kooij distinguish three principal interests: “affordable energy prices achieved by effective competition; sustainable development of energy production, transport, and consumption and security of supply”⁴⁵. The Agency for the Cooperation of Energy Regulators (ACER) is a “connection between the Commission and the NRAs” and aims to promote “cooperation between national regulatory authorities, within a formalized context”⁴⁶. Yet ACER’s tasks and powers “have the potential of promoting and/or affecting the level of investments in cross-border energy infrastructure, the promotion of cross-border trade and competition on the wholesale markets”⁴⁷. In other words, they

⁴² Sabel/Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, *European Law Journal* (2008) 14(3), pp. 271-327.

⁴³ Azoulai, “The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization”, *Common Market Law Review* (2008) 45, pp. 1335-1356 (“ECJ and Social Market Economy”) (with reference to the ECJ’s decisions in *Viking/Laval*).

⁴⁴ Lavrijssen/Bordei/Kooij, “The Role of ACER: A consumer perspective”, 2012, mimeo, p. 1 (“ACER”).

⁴⁵ Lavrijssen et al, ACER, at 1.

⁴⁶ Lavrijssen et al, ACER, at 2.

⁴⁷ Lavrijssen et al, ACER, at 6.

are more imminently connected to the intermediate goal of the completion of an integrated market, and their effect on the promotion and protection of the identified interests of final consumers is more “indirect”⁴⁸. Wholesale competition may or may not lead to affordable final prices, depending on both cost changes and the competitive structures in retail markets. Investments in cross-border infrastructure may improve reliability of supply while increasing reliance on current fuel sources (e.g. gas), while investments in renewable generating sources may promote sustainability, environmental goals and reliability of supply.

Relationships with other stakeholders in the regulatory process: an entry point for private law?

Apart from the constitution and the relationships within networked regulatory regimes and other governmental or EU actors, the process of elaborating and enforcing EU rules also involves receiving and appropriating input from various stakeholders in the regulatory setting, each potentially holding a different perspective on the regulatory problem. Thus, in describing the role of ACER, Lavrijssen et al note that in the process of regulation, supervision and creation of industry codes ACER must work closely with “the new European transmission bodies; the European Network of Transmission System Operators for Electricity (ENTSOE) and the European Network Transmission System Operators for Gas (ENTSOG)”, which are the cooperation platforms at EU level for transmission system operators⁴⁹, as well as consulting “other relevant stakeholders”. But of course, the multiplicity of rationalities of various social groups or movements can also be manifested in different ways, such as Lindahl’s example of the “occupation of the Brent Spar oil storage and tanker loading buoy by Green Peace activists, and the associated consumer boycott of Shell service stations”⁵⁰.

Therefore, the second key issue to consider is how to integrate these various perspectives in formulating and protecting the public interest in general.

In elaborating the law’s role in structuring the “relationship of the subsystems to each other”⁵¹, Teubner has argued for private law to become “responsive to a plurality of diverse ‘private’ autonomies in civil society”⁵². The “social spheres of autonomy” are spontaneous and self-regulated collectives, which interact with each other and precisely this mutual interaction constrains each regime’s pursuit of its own rationality.

[T]he main attention of global law would then have to be directed towards underpinning the duality of social autonomy in the subsystems, i.e. a mutual control dynamic of spontaneous sector and organized sector...⁵³

In some way, this appears to be an attempt to mimic the ordoliberal disciplining mechanism of arms-length competition in a world where arms-length relationships are no longer possible, either because of the size of the organizations involved or because of the need to cooperate. By maintaining their autonomy both from the economy and from institutionalised politics, the separate social spheres can exercise a private constraint on economic actors in the newly privatised public services:

Here, in the resistance of social practices to their new economic regime is the source of all kinds of new quasi-political conflicts which now take place within the ‘private’ spheres. A good indicator for this change is the growing intensity of political fights between regulatory agencies, consumer groups, regulated companies and their shareholders which we are experiencing today...⁵⁴

⁴⁸ Lavrijssen et al, ACER, at 8.

⁴⁹ Lavrijssen et al, ACER, at 3

⁵⁰ Lindahl, “A-Legality: Postnationalism and the Question of Legal Boundaries”, *Modern Law Review* (2010) 73(1), pp. 30-56, at 38 (“A-Legality”).

⁵¹ Teubner, *Global Private Regimes*, at 84

⁵² Teubner, *After Privatization*, at 394.

⁵³ Teubner, *Global Private Regimes*, at 87.

⁵⁴ Teubner, *After Privatization*, at 423.

Teubner views such conflicts as being reflected, at least in part, in private litigation and he foresees an active role of private law in the resolution of these emergent conflicts in the newly privatized settings. But to be able to perform this task successfully, in his view, both private law doctrines and procedures may need to change:

For the future of private law it is crucial that not just its doctrinal-conceptual structures are prepared for such conflicts. Also different litigation procedures, among other rules of standing for groups, collective representation, multilateralization of the adversary two-party process, and elements of public interest litigation, would need to be introduced to make private law responsive to the new conflictuality caused by privatization itself.⁵⁵

However, in managing or mediating such conflict, according to Teubner, private law too must maintain its autonomy both at a conceptual (doctrinal?) and procedural level, to be able to play this mediating role⁵⁶. In particular, as a consequence of social fragmentation a “multitude of social sectors require a multitude of perspectives of self-description” and the resulting “multiplicity of social perspectives” needs to be “simultaneously reflected” or “translated” into the law⁵⁷. He has elsewhere described this idea of “translation” into private law as “an autonomous legal reconstruction of normative social orientations” and a “legal mode of dealing with the collision between different social rationalities”⁵⁸. Lobel, drawing upon Teubner’s ideas, has spoken of the emergent role of law as one of “orchestration”⁵⁹.

Private law – orchestrator or concertmaster?

In considering the role of private law in the process of European integration, it is worth noting that national private law and national courts do not appear to have emerged as principal actors in the process of either ensuring discipline or coordinating various functionally differentiated autonomous regimes.

In addition, as part of the re-regulation of essential service provision in the EU, there may even be tendencies to reduce further the reliance on national private law courts even for purposes of dispute resolution in regulated sectors. For instance, there is a push to implement alternative dispute resolution schemes, whereby all kinds of consumer-related disputes would be channelled through non-court fora, including online platforms for dispute resolution. At national level, the independent sectoral regulators provide information on out-of-court dispute resolution procedures and sometimes provide the (sector-specific) dispute resolution services themselves⁶⁰. While parties may well have a preference to not channel their disputes via the courts, it also appears that EU intervention facilitates, and even encourages, non-court venues for dispute resolution⁶¹.

If this does indeed signal a wider trend away from the use of national courts as dispute-resolution institutions, it also makes it less likely that private law will be the institution through which we will mediate the conflicts that ultimately define the public interest. Which in turn leads us to the question of why we might observe a trend away from relying on the courts.

⁵⁵ Teubner, *After Privatization*, at 424.

⁵⁶ Teubner, *Coincidentia Oppositorum*.

⁵⁷ Teubner, *After Privatisation*, at 396.

⁵⁸ Teubner, *Coincidentia Oppositorum*.

⁵⁹ Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought”, *Minnesota Law Review* (2004) 89, pp. 342-470.

⁶⁰ Cantero-Gamito, in the working paper EUI LAW 2012/31, citing Nihoul/Rodford, *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (Oxford University Press, 2nd ed., 2011).

⁶¹ Press Release,

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1461&format=HTML&aged=1&language=EN&guiLanguage=en>

The EU as a vertically integrated regime

One possible answer might be that the interposition of the EU as a supranational hierarchy encouraging such a trend is denying this new role of private law. In other words, the EU is following the logic of vertical integration in the implementation of regulatory law, even where it wishes to rely on the potentially powerful horizontal direct effect between private parties as an enforcement tool⁶². If both lawmaking and law enforcement proceed through integrated (i.e. EU) institutions, it is more likely to be seamless and less likely to be impeded by local peculiarities or interests.

The EU (and in particular the Commission) might find it easier to refashion national administrative agencies into “European” ones through close engagement in various European networks. If the national agencies “internalize” the EU mandate and perspective, they can become delegates of the Commission even in cases where the Commission does not engage in heavy oversight⁶³. National courts, by contrast, are a more challenging site for intervention for EU institutions, such as the Commission. The sites for interaction with national court judiciaries are more limited. This is to a large extent because of the principle of independence (autonomy) of judicial institutions, which forms part of the constitutional ideology of all the Member States of the EU. As a result, EU intervention in national courts must always proceed more cautiously. Despite the heterogeneity in the organization, make-up and even general quality of judicial institutions across the different MS, the EU formally treats the 27 legal orders as equal or at least equivalent. There may be softer approaches through programmes for “judicial education”, particularly in the more specialized areas of competition or sectoral regulation, but again the formal independence of judicial institutions may make it difficult to compare outcomes or to assess the efficacy of such education programmes.

If intervention in national judicial institutions is difficult and if the establishment of a comprehensive system of European courts is impossible (for political reasons), the European legal order may be more effective if it becomes self-sufficient even at the level of enforcement and dispute resolution. Private parties can be given EU rights vis-à-vis other private actors and those rights can be enforced through European dispute resolution platforms.

But this “vertical integration” perspective, namely that European regulatory objectives are likely to be impeded, both by less than seamless communication and by hold-up, if channelled through national private law courts, may in fact be overstated for a number of reasons.

First, national courts were key protagonists in the emergence of EU law as we know it today. Most key cases establishing the foundational principles of EU law resulted from preliminary references from national courts. National courts fairly enthusiastically took up the invitation extended to them through the preliminary reference procedure⁶⁴. This provision was a mere “invitation” to national judiciaries, precisely because there is no judicial review or other procedure that can force national courts to make a reference and there are many escape routes through which to avoid such a reference⁶⁵. Even after the apparently extensive expansion of the scope of EU law in sometimes quite strong and unexpected ECJ rulings, MS courts have continued to make preliminary references to the EU courts.

Second, in a number of fields, the Commission has sought to include actions in private law courts as an aspect of enforcement of EU regulatory law in a number of areas, including consumer protection law and competition law. The Commission’s push for the expansion of rights of action in antitrust cases in private litigation before national courts was a reason for one of the recent major

⁶² Kelemen, Eurolegalism.

⁶³ Slaughter, *The New World Order* (Princeton University Press, 2005), advances a view that socialization in transnational regulatory networks can lead to informal norm enforcement, but see Svetiev, “The Limits of Informal Law-Making: Enforcement, Norm-generation and Learning in the ICN”, in *Informal International Law-Making* (Pauwelyn/Wouters/Wessel, eds, Oxford University Press, forthcoming 2012).

⁶⁴ Caruso, “The Missing View of the Cathedral: The Private Law Paradigm of European Integration”, *European Law Journal* (1997) 3(1), pp. 3-32.

⁶⁵ Comparato, in the working paper EUI LAW 2012/31.

political conflicts between itself and the MS governments⁶⁶

Yet in other fields, the regulatory purpose that is being pursued by EU intervention may well be frustrated if channelled through formalised court proceedings, because they aim to produce quick local (i.e. on the spot) problem solving. One example might be the rights granted to airline passengers vis-à-vis airlines in cases of delays and cancellation⁶⁷. The aim of such a regulatory regime would be to offer speedy arrangements for alternative travel and for the intervening period, not to stimulate litigation. Such a regulatory purpose might be relevant in a variety of consumer protection contexts.

Finally, in recent times we have seen innovative ways in which the Commission has sought to establish a more deliberative, or collaborative, relationship with national courts in areas where there is significant EU law intervention. Thus, Article 15(1) of the Modernization Regulation for competition enforcement (1/2003) provides that “courts of the Member States may ask the Commission to transmit to them information ... or its opinion on questions concerning the application of the Community competition rules.” In addition, under Article 15 (3) the Commission can act on its own initiative, “[w]here the coherent application of [Art 81 or 82] so requires,” to “submit written observations to courts of Member States” and also to make oral submissions with the permission of the local court. There is some evidence⁶⁸ that national courts have understood this as a relationship not of subservience to the Commission, but as one of dialogue⁶⁹.

The limits of law’s capacity for translation

To the extent that national private law and institutions are not re-emerging as key players in the new environment, this may not have anything to do with their being sidelined by EU regulatory law. Instead, in the world of functional and social differentiation as well as epistemic fragmentation, the traditional private (or public for that matter) law institutions may be limited by their own capacity to play the adaptive role of “orchestration”. Precisely the “autonomy” and the “rationality” of law and legal institutions may stand in the way of traditional private law playing such a role. The need for closure, the logic of procedural formality (as opposed to the proceduralisation of problem-solving), the translation and subdivision of problems presented into questions that can be answered in a binary way (e.g. yes/no), the limited set of judicial remedies; all of these might impede the law’s capacity to mediate social conflict and translate different social rationalities and public purposes.

The story of courts incorporating the knowledge generated by other systems of knowledge is not necessarily a happy one. In the context of the adoption by US courts of economic analysis in antitrust cases, Lopatka and Page have argued that courts rely only to a limited extent on expert assistance in order to acquire the economic knowledge necessary to resolve antitrust disputes presented to them⁷⁰. Instead, under the logic of preserving the law’s autonomy or rationality, courts are said to develop “economic authority” through an unstructured method of “pragmatically examining the scholarly literature in the context of existing case law and adopting the most persuasive and plausible accounts” available at the time of decision⁷¹. Lopatka and Page explain that this process of selection is influenced by “intuitions”, “social visions”, and “ideologies”⁷² of the judiciary, as well as legal process considerations about the institutional capacity of courts to process highly fact-specific expert testimony⁷³. The expert knowledge that courts have to incorporate is itself partial and likely to change

⁶⁶ Micklitz, Administrative Enforcement of European Private Law, in *The Foundations of European Private Law* (Brownsword/Micklitz/Niglia/Weatherill, eds, Hart, 2011); Micklitz, “Private Rights of Action in Antitrust and Consumer Protection”, 2011, mimeo.

⁶⁷ Kelemen, Eurolegalism.

⁶⁸ Svetiev, supra n.32.

⁶⁹ Eg, Thomas Merrill, “Judicial Deference to Executive Precedent”, *Yale Law Journal* (1992) 101, pp. 969-1041.

⁷⁰ Lopatka/Page, “Economic Authority and the Limits of Expertise in Antitrust Cases”, *Cornell Law Review* (2005) 90, p. 617, at 631.

⁷¹ Lopatka/Page, at 632.

⁷² Lopatka/Page, at 636.

⁷³ Lopatka/Page, at 640–41.

over time. Yet following its own rationality (such as for example, the notion of the balance of proof for a proposition), the law ordinarily will seek a level of certainty and coherence that eludes knowledge communities, particularly in cases where the environment is unstable and rapidly changing.

As a result, the translated “economic authority” considered by Lopatka and Page is recoded in legal-procedural categories of a motion to dismiss a complaint for insufficiency or a summary judgment granted based on an assessment that the available evidence shows no substantial or material dispute. Such an approach forecloses “further inquiry to both develop new learning and to incorporate it into decision-making”⁷⁴.

While one might object that the foregoing discussion is based on evidence from the US, arguably it is quite salient in the present context for a number of reasons. First, in the US tradition there has been a much greater openness towards reliance on courts for the resolution of social problems (including in private disputes, such as the antitrust disputes on which the above observations are based). Moreover, there has also been a relatively high level of trust in the integrity and capacity of courts, at least at the US federal level. Second, US law and judicial doctrine is said to be relatively open to the incorporation of “extra-legal” knowledge, and nowhere has this been more the case than with respect to economic knowledge in antitrust cases over the past few decades. Thirdly, the above example is based on an attempt to incorporate only a single rationality into judicial decision-making, namely only upholding the value of competition, and this understood very narrowly as allocative efficiency (or short-run effects on consumer prices). In fact, US courts have emphatically disclaimed any possibility that in the context of antitrust cases judges might pursue other social or policy objectives apart from competition, precisely because these different dimensions of the public interest may appear *ex ante* incommensurate, and due to legitimacy concerns about the judiciary performing such substantive balancing. We might suspect that any attempt at translation into law of multiple (and incomplete) social rationalities would be all the more challenging.

This might give us reason to doubt the capacity of private law and its traditional dispute resolution institutions to both guarantee the autonomy of various regimes in the pursuit of their rationality or mandate and at the same time “orchestrate” them in a way that balances their various contributions to the common or public interest.

Conclusions and ways forward: Recapturing Private Law

Teubner’s reemphasis on autonomy is an important shift and is part of a growing literature that entertains considerable doubt about traditional legal and administrative tools of law-making and law enforcement. Instead this literature advocates alternative mechanisms that can provide a way of (re)accessing the deeply local knowledge of parties interdependent and interlinked in networked architectures, so that it can be used as an input into social and economic innovations. Private governance regimes are certainly one way of accessing such knowledge and structuring collaboration among interdependent parties. However, in light of the foregoing discussion about the limits of law, the question still remains of how to ensure that private networked regimes are not subverted entirely to the (short-run) private interests of (some or all of) their participants and what is the role, if any, for law and legal institutions?

One response might be that even if national private law does not rise to the occasion, European courts might step in to play this role. Yet European judicial institutions are subject to similar constraints as national judiciaries and even other ones. Thus, European courts are even more distant from private actors and have to decide across many different contexts to be able to effectively elicit knowledge and translate or recode it into law that then has to also be applied across many different settings. The ECJ’s refusal to claim a more searching mandate of review for the negotiated resolution of competition complaints by the Commission may be treated as one manifestation of the European courts’ self-doubt in their capacity to perform such a function.

Nonetheless, the ECJ’s decisions in cases such as *Viking/Laval* point to a more modest role

⁷⁴ Svetiev, “Antitrust Governance: The New Wave of Antitrust”, *Loyola University of Chicago Law Review*, (2007) 38(3), pp. 593-569, at 622.

that European courts could play in seeking to include various dimensions of the public interest⁷⁵, neither completely re-judicialising nor attempting to mediate or translate different social rationalities into law. The decision recognizes that the EU has “not only an economic, but also a social purpose”⁷⁶ and as such serves to emancipate social actors by giving them a seat at the table vis-à-vis economic operators who have benefited from European negative integration. As Azoulai has recognized, the “practical problem” relates to the “technical methods” for realizing this⁷⁷. But the ECJ does not anoint itself as the actor that mediates between these different purposes across different contexts, turning the tables on the private parties: they cannot act to take drastic self-help or national legal remedies without taking into account the interests of the other parties involved⁷⁸. But this, in itself, may be insufficient – just as judicial institutions have a limited capacity for translation, they also have a limited capacity to engage in broad oversight and monitoring. Moreover, EU court interventions are sporadic. Both of these limitations lead to the problem of how to ensure that the possibilities created by the emancipation of different aspects of the public interests are being taken up and effectuated by private actors?

A second response might be that the involvement of the administration would be sufficient to fulfil the function of guarding the broader interests of the public; after all, we saw earlier from the discussion of the ACER example that the administration often needs to collaborate with private actor networks to be able to perform its regulatory functions⁷⁹. In addition, in the EU administrations are increasingly networked, they can rely on each other’s capabilities and they can also engage in learning from each other. They also increasingly exercise a review function over each other’s activities.

One concern might be that there may be tendencies to re-establish the logic of hierarchy in the networked administration regimes. Rigid hierarchies are both an inadequate response to the environment and are easier to capture. They may in fact be impossible as a response⁸⁰, but this does not exclude the possibility that mimicking the logic of hierarchy may take place in administrative networks.

There is some reason to believe that this is not likely to be the case. As Lavrijssen et al point out, while the Commission can treat the network codes developed by ACER as recommendations only, in practice the Commission is likely to adopt them, given that their preparation requires “extended technical knowledge” unavailable to the Commission, based on deep consultation which the Commission would be unable to replicate⁸¹. Yet these are not designed (in the sense of fully-specified) regulatory systems and they cannot be, which often implies reliance on ad hoc provisional arrangements. By good fortune, this may result in an effective solution, but this is not necessarily going to always be the case⁸².

A further concern about over-reliance upon the administration is that of capture. While a networked multi-level administration would be more difficult to capture, this is not impossible. But a subtler, and somewhat analogous problem has already been alluded to earlier. This is the problem of

⁷⁵ Azoulai, ECJ and Social Market Economy.

⁷⁶ Case C-438/05 *Viking* [2007] ECR I-10779-10840 at [79].

⁷⁷ Azoulai, ECJ and Social Market Economy, at 1338.

⁷⁸ Azoulai, ECJ and Social Market Economy, at 1343.

⁷⁹ According to Lavrijssen et al, the first experiences of the operation of ACER in developing non-binding frameworks and guidelines have led to “substantial impact on market parties”, including with respect to capacity allocation in gas, for example, “giving more flexibility to the seller in deciding how to meet his contractual obligations”, ACER, at 5.

⁸⁰ See Brousseau/Glachant, “Reflexive Market Regulation: Cognitive Cooperation in Competitive Information Fora”, in *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, (De Schutter/Lenoble, eds, Hart, 2010) (“What is feasible, thanks to information revelation mechanisms and learning in a (relatively) stable world, becomes impossible to implement in an innovation-based economy. ... The government and regulator can no longer calculate the costs and benefits of alternatives. They also cannot access in time the information requested to implement incentives.”)

⁸¹ Lavrijssen et al, ACER, at 3.

⁸² The Commission’s tendency to rely on expert consultancy input for data gathering may be one such example. Micklitz, supra n. 66.

the narrow definition of the mandate of administrative networked regimes⁸³, or more specifically the interest or interests they seek to promote, including a focus on intermediate goals rather than the ultimate objectives of policy. Sometimes this can be the unintended consequence of excessive fragmentation, whereby certain policies are assigned to different regulatory instruments.

Such an approach can have the effect of restricting the interests that fall within the purview of the regulation and the regulatory regime⁸⁴: by defining the boundaries of intervention, they exclude a particular group or perspective from the decision-making processes.

In such circumstances, the generalist jurisdiction, the breadth of the rules and principles, and the proximity of national private law institutions can serve a useful counterpoint function for national actors. They provide a place to which those unrepresented in the administrative “mandate” can turn in order to seek to redefine “in whose name” and for whose interests the regime acts⁸⁵. The story of consumers turning to the local courts in Hamburg to seek relief from the ultimate effects of gas liberalization at the EU level may provide an example of such a use of national institutions, in a situation where they can neither impose their will upon, nor be ignored by, EU actors.

⁸³ As Van Hoecke argues “the higher the systemic autonomy, the lower the autonomy as to content”. Van Hoecke, “Legal Orders Between Autonomy and Intertwinement, in *Public Governance in the Age of Globalization* (Ladeur, ed, Ashgate, 2004), at 185.

⁸⁴ Lindahl, A-Legality.

⁸⁵ Lindahl, A-Legality.

