



# Integration through Self-Standing European Private Law

Insights from the Internal Point of View to Harmonization in Energy Market

Lucila De Almeida

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute

Florence, 23 May 2017



European University Institute  
**Department of Law**

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“O êxito está em ter êxito, e não em ter condições de êxito.  
Condições de palácio tem qualquer terra larga, mas onde  
está o palácio se não o fizeram ali?” (*Fernando Pessoa*)

Helsinki, Finland  
May 2017

– ABSTRACT –

This thesis analyses the impact of the European Integration Project on private law. While the impact of EU law on private law throughout negative integration created European Private Meta-law, and throughout positive integration evolved to European Private law, this thesis claims that EU law has recently moved a step further in regulated markets by creating self-standing European Private law. Self-standing European Private law is a normative system of rules at supranational level in which its semantically rigid legal norms suggests the intrusion of EU law into the private order of contractual parties with minor divergences within and among national legal systems. This analytical model explains the legal phenomenon of intrusion and substitution, which is different than the phenomenon of divergence, what has so far been the main focus of legal scholars in comparative private law and approaches to Harmonization. To define and identify self-standing European private law, this thesis proposes a systematic understanding of EU law from what H.L.A. Hart conceptualizes as the Internal Point of View. It contextualizes the private law dimension of EU energy law through a discussion of primary and secondary rules and, most importantly, the linguistic framework of analytic philosophy. In so doing, this thesis claims the constitutive element of self-standing European Private law takes shapes when EU law, through governance modes of lawmaking and enforcement at the EU level, creates a set of mandatory rules applied to private relationships, of which the semantic texture of its language leaves minor space for divergent interpretation and implementation by legal official and market actors. To prove the emergence of a self-standing European Private Law, EU energy Law is the blueprint to test the claim. The thesis pursues a socio-legal investigation on how the private law dimension of EU energy law has changed over three decades of market integration and affected two *key* market transactions in energy markets: transmission service contracts in electricity, and natural gas supply contracts.

**Key Words:** Self-Standing European Private Law, Internal Point of View, Language, EU Energy Law



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## – CHAPTER 1 –

### Introduction

This thesis is about the impact of the European Integration Project on private law. It begins from the assumption that EU law has spilled over into private law relationships throughout the Integration Project. Negative integration impacted private law by imposing obligations on Member States to change their national private laws: European private meta-law. Positive integration has advanced by enhancing a set of duty-imposing rules on private relationships: European private law. This thesis claims that the positive integration project has moved a step further in regulated markets, by creating *self-standing* European Private law. EU Energy Law is the blueprint to test and prove this claim.

To shed light on the evolution of self-standing European Private law, this thesis brings H.L.A. Hart's contributions to jurisprudence <sup>1</sup> to the center of the ongoing debate over European Private law. It does so by contextualizing the private law dimension of EU Energy Law through a discussion of primary and secondary rules and, most importantly, a discussion of the linguistic framework introduced in Hart's ideas about the *Internal Point of View*. <sup>2</sup> By bringing Harts' contribution to the center of the debate about European Private law, this thesis will make its own contribution to European Private law.

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<sup>1</sup> Hart, H. L. A. (Herbert Lionel Adolphus). *The Concept of Law*. Clarendon Press, 1961.

<sup>2</sup> This thesis agrees with the proposition that *The Concept of Law* is the most important book in twentieth-century analytic jurisprudence. There is no doubt that Hart's contribution does not lie in his master rule of recognition, which in fact resembles Kelsen's Grundnorm, but indeed the linguistic framework introduced by the idea of the Internal Point of View. To develop Harts' idea about the Internal Point of View, this thesis relies on Hart's theory and postmodern philosophy of law to advance its claim. In terms of the relevance of the "International Point of View", see Patterson, Dennis M. "Explicating the Internal Point of View." *SMU Law Review* 52 (1999); and Shapiro, Scott, *What Is the Internal Point of View?*, 75 *Fordham L. Rev.* 1157 (2006).

*Self-standing* European Private law represents the emergence of a *normative system of semantically rigid rules* that suggests the *intrusion* of EU Law into private relationships and national private law with minor *resistances* or *divergences within and among* national legal systems. This analytical model depicts the legal phenomenon of “intrusion and substitution”.<sup>3</sup> Not all sets of rules in EU Energy Law<sup>4</sup> are *rigid* substantive obligations, but there has been an ongoing phenomenon of stiffening the semantic content of legal norms through revoking and enacting new Packages, where Directives are preempted by Regulations and rules are supplemented with the massive public and private enforcement of administrative bodies with adjudicating powers. To capture this legal phenomenon properly, there is a need to understand EU Law from what Hart calls the *Internal Point of View*.

Hart’s contribution to jurisprudence begins with the claim that law creates reasons for actions that apply to individuals and, therefore, the semantic aspect of primary rules (substantive law) affects both individuals’ behavior and legal officials’ interpretation. In the context of the EU legal system, Hart’s proposition suggests that principles like non-discrimination, either in the Treaty or in secondary legislation, depending on the system of rules surrounding them, trigger different reactions in individuals’ behavior and legal officials’ interpretation. When a provision on non-discrimination is applicable to a private relationship as a vague, general, and isolated obligation, it has a different impact than when it is combined with a set of valid rules with rigid determination about what individuals *ought to do* or *ought not do* to not violate non-discrimination principles in a specific type of private transaction. The linguistic framework approach is even more relevant when the normative system under

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<sup>3</sup> This thesis has been developed within the framework of the European Regulatory Private Law (ERPL) Project: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation. Prof. Hans W-Micklitz is leading the research project with a 60-month European Research Council (ERC) Grant under the European Union’s Seventh Framework Programme (FP/2007-2013) / ERC Grant Agreement n. [26972]. The ERPL project has aimed to develop a normative model to explain the legal phenomenon of “intrusion and substitution” in regulated markets. It departs from the factual claim that the European Private Law has intruded into national systems of private law when it governs private relationships in regulated markets. While the implementation of European private law in non-regulated markets uses to trigger “convergence or divergence” among Member states, or “conflict and resistance” between EU and national legal systems, there has been a distinguishing phenomenon in regulated markets. To explain the legal phenomenon of “intrusion and substitution”, the project was intended to test the hypothesis of “Self-sufficient European Private Law”. This thesis partially proves the theory of “self-sufficiency”, but it embraces the linguistic framework as its constitutive element. This is the reason that justifies the use of the term “self-standing” European Private Law. See Footnote 9.

<sup>4</sup> Kim Talus introduces his book on “EU Energy Law and Policy” with a pertinent question: “Is there such a thing as ‘EU Energy Law’?”. This thesis endorses Kim Talus’s definition of EU Energy Law as a subfield of EU Law, which comprises the impacts of EU Law on energy market for Natural Gas and Electricity. Talus, Kim. *EU Energy Law and Policy: A Critical Account*. New York: Oxford University Press, 2013, p. 1.

investigation is the EU legal system, which overlaps with national systems of private law.<sup>5</sup> The factual claim of this thesis is that EU energy law has advanced a set of rules addressed to private transactions to which the rigidity of obligation – identification of addressees of rights or duties and expected conduct – leaves little space for divergent interpretations by market actors and national authorities. To develop this factual claim, this thesis pursues an investigation based on a socio-legal analysis of how the private law dimension of EU energy law has changed over time, throughout three decades of the positive integration project, and affected two *key* market transactions in energy markets: transmission service contracts in electricity and natural gas supply contracts.

Hart's theory and his linguistic framework matter in terms of twisting the ongoing debate over European private law from a perceptive based way of thinking about law to one based on the argumentative and discursive dimension of law.<sup>6</sup> Perceptiveness has modeled the way of thinking about law of European legal scholars, who have discussed European private law within the analyses of *vertical v. horizontal* effects of the Treaty and Directives, or the supremacy of General Principles of EU law. There is a need to reconnect analytical philosophy with considerations about the EU law. Hart's theory also dialogues with European private lawyers debating over the *convergence* and *divergence* of national legal systems by pointing to a set of rules that are not as vague as the duty of *good faith* in European contract law.<sup>7</sup> How different semantic textures of EU legal norms impacts human behavior in private transactions, as well as legal officials' interpretation in public and private enforcement, is the key question to grasp the *constitutive element* of self-standing European private law. This is a genuine and yet underdeveloped field of research in European constitutional pluralism. To

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<sup>5</sup> The linguistic framework proposed by this thesis aids the understanding of law as a social phenomenon in European Constitutional Pluralism. At the same time that Law governs individuals, it is also made through individual reactions to its commands. Therefore, language matters to understand it. Yet it is important to clarify that this thesis does not have any normative propose or advocates for textualist methods of interpretation. The linguistic framework of norms is not and should not be the final arbiter as is highlighted"? in J.L. Austin's philosophical papers. "(...) a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena". This thesis returns to this clarification in the conclusion. J.L. Austin, *Philosophical Papers*, Oxford University Press, 1961.

<sup>6</sup> Kaarlo Tuori employs the dichotomy "perceptiveness" versus "discursiveness" to criticize European legal scholars and the way in which they approach EU Law. Professor Tuori does not extend this discussion to the private law dimension of EU law. Moreover, Tuori understands law as a phenomenon of legal discourse and, though he embraces the Internal Point of View, he moves beyond the linguistic framework and legal interpretation towards an understanding of how Legal Scholarship endorses certain legal interpretations in legal discourse. Therefore, there are no contradictions in the analyses of the system of rules as legal interpretation or the system of rules as legal discourse, though the latter requires a socio-legal methodology rather than a *purely* doctrinal one. Tuori, Kaarlo. *European Constitutionalism*. Cambridge University Press, 2015.

<sup>7</sup> Zimmermann, Reinhard, and Simon Whittaker. *Good Faith in European Contract Law*. Cambridge University Press, 2000.

unwrap it, there is a need to sharpen the awareness of words in EU law and to sharpen the perception of the phenomenon of law governing market actors' behavior in plural legal systems.

Hart's theory expands the understanding of the phenomenon of European private law in two dimensions. It moves the semantic aspect of legal norms to the center of the debate over European private law and harmonization. It also provides a sociological explanation as to why the decisions of administrative bodies with adjudicating authority are a supplementary source of European private law, which goes beyond conclusive identification of national and European courts. Self-standing European private law becomes evident through the endorsement of these two aspects. In other terms, the analytical argument of this thesis is synthesized in the following sentences. If one considers European Private Law through the conceptual framework of primary and secondary rules, a normative system of rules is revealed in which the rigidity of obligations give little space for divergent interpretations by individuals and legal officials<sup>8</sup> which leads to a phenomenon of "intrusion and substitution" of EU law into national legal systems. On the grounds of this analytical argument, this thesis holds that the *constitutive element* of self-standing European private law is its semantic rigidity. Thus, self-standing European private law consolidates when the EU legal system creates valid rules applied to private transactions that are more rigid. Importantly, considerations about new and old modes of EU governance in lawmaking and law-enforcement, as well as knowledge barriers inherent to energy markets, are thus ancillary features of phenomenon of self-standing European private law.<sup>9</sup>

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<sup>8</sup> In defense of his theory, Hart argued that "if we stand back and consider the structure which has resulted from the combination of primary rules of obligations with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled the jurists". Hart (1961), p. 98.

<sup>9</sup> To develop an analytical model which could depict the legal phenomenon of "intrusion and substitution", the ERPL started testing the hypothesis of self-sufficient European Private Law. Self-sufficient European Private Law is defined as the normative system of rules made and enforced by new modes of Governance (e.g. NRAs) detached from traditional modes of law-making (e.g. legislator) and law-enforcement (e.g. courts) of national systems of private law. The constitutive feature of self-sufficient European Private Law is described as these new Modes of Governance combined with knowledge barriers inherent in regulated markets. This thesis *partially* confirms the hypothesis of self-sufficiency, but it proposes adjustments to the original version, which justifies employing the term "self-standing" to avoid theoretical confusion. Indeed Hans-W. Micklitz was right in pointing out the emergence of new Modes of Governance as a distinct element of European Private Law in regulated markets. The law making of European Private Law is no longer based only on secondary legislation approved by European Parliament and Council, but it is a vast manual of binding legal norms made by a complex governance system that includes the European Commission, ACER, and ENTSO-e (e.g. Network codes in chapter 4). Moreover, it hasn't been supplemented only by speech acts of Courts, but by a complex governance regime with private enforcement (e.g. B2B ADRs in chapter 4) and public enforcement (e.g. commitment-decisions in chapter 6) beyond national and European courts. Yet what provokes the phenomenon

By applying Hart's contribution to jurisprudence to the private dimension of EU energy law, this thesis sharpens the awareness of the phenomenon of European private law. Thus it aims to make *two* contributions to *two* fields. First, this thesis aims to shed light on the linguistic aspect of European private law, so far obscured in the debate among European legal scholars. Second, and as consequence, this thesis reveals the private dimension of EU energy law, which has, up until now, been neglected by energy lawyers. The structure of the argument of this thesis justifies the division of the introduction in three sections. The first section (1) explains why and how this thesis reconciles the European Private Law with Hart's theory. The second section (2) moves on to explain the choice of energy markets, and why enhancing legal consciousness of the private law dimension of EU Energy Law matters. The third section (3) explains the socio-legal methods applied to grasp the impacts of EU law on private law. In particular, it lays out the contextualist approach to understanding the private law dimensions of EU energy law, as well as the choice of two key business-to-business relationships in energy markets as cases: long-term capacity reservation contracts in electricity, and long-term supply contracts in natural gas.

## 1. Reconciling European Private Law with the Internal Point of View

Private law in national legal system has two dimensions. First, it sets power-conferring rules that allow individuals to enforce consensual obligations. Second, it is a set of duty-imposing rules that create *rights and duties* on individuals involved in these private relationships (contracts, joint venture, property, and tort). Private law directs human behavior towards values recognized by national legal systems.<sup>10</sup> EU law is the most advanced epitome

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of "intrusion and substitution" of the normative system of rules of European private law, which distinguishes it from European Private law in non-regulated markets, is *not* necessarily the new modes of governance, nor is it the knowledge barrier, but *in fact* the *semantic* dimension of the substantive obligations. Indeed, new modes of law-making and law-enforcement have contributed as *means* to create a normative system of rules with precise reasons for action addressed to market actors. However, the semantic rigidity of those duties and rights is the key feature that has led to a *high* degree of *intrusion* of rules into national legal systems and a *low* degree of *divergence* between legal systems. This clarification matters in this introduction to justify why this thesis employs the term *self-standing* rather than *self-sufficient*.

<sup>10</sup> Gregory Klass uses the conceptual framework of primary and secondary rules to represent private law. In his threefold account of contracts, he argues that some legal scholars describe private law as a set of power-conferring rules, while others define it as a set of duty-imposing rules. Klass considers private law as both a set of power-conferring and duty-imposing rules, which he classified as the third and best account of private law. This thesis endorses Gregory Klass's account to explain national private law and contract this picture with the

of transnational law. As such, European private law is better depicted by the latter dimension. It is a set of duty-imposing rules creating *rights* and *duties* on individuals and private relationships to foster the values of the EU.

Private lawyers in Europe have long noticed that EU law has been advancing towards substantive areas of private law, traditionally prerogative of member States. There are court decisions that, while enforcing the Treaty's provisions and secondary legislation, spilled over into private relationships. There are also rules in secondary legislation directly regulating the terms and conditions of contracts, or imposing obligations on States to do so. EU legislative acts and court speech acts introducing rules dealing with *strict liability*, *good faith*, *information duties*, *cancelation rights*, *prohibited clauses*, and many other rules governing individuals' behavior while doing transactions, compensating damages, or using their property have caught the attention of private and public lawyers. The emergence and continuous expansion of a distinct set of supranational rules of Contract law, tort law, and property rights makes the existence of European private law indisputable. At the same time, it also puzzles how these supranational rules have interacted with 28 national legal systems of private law. Are there *conflict and resistance*, *convergence or divergence*, *intrusion and substitution*?<sup>11</sup>

Propositions that have puzzled legal scholarship can be summarized in the two following questions: Does EU law spill over into private law by creating rights and duties in private relationships? If so, can those rights be enforced against another individual, or only against Member States?<sup>12</sup> Answers to these two questions are different depending on the subject of the investigation: the *substantive dimension* or the *legal effects of individuals' rights*. On one side of the debate, there are legal scholars looking at the *substantive*

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accounts of private law in transnational legal systems. Klass, Gregory. "Three Pictures of Contract: Duty, Power, and Compound Rule." *New York University Law Review*, 2008, 1726–83.

<sup>11</sup> Hans-W Micklitz identifies four normative modes of interaction: convergence or divergence, conflict and resistance, intrusion and substitution, and hybridization. These were normative modes of interaction tested by researches conducted by the ERPL Project. Micklitz, Hans-W. "The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation." *Yearbook of European Law* 28, no. 1 (2009): 3–59.

<sup>12</sup> Besides these two propositions, there is a third question that refers to the Moral Ethics of European Private Law. Chapter 2 introduces Moral Ethics as an inherent feature of Law, Private Law and also of European Private Law. It identifies the Moral ethics of consent based on autonomous (moral), utilitarian, moral, and social values. Picturing private law as a set of power-conferring and duty-imposing rules overweighed the description of law as *means*, but not law also as *ends* or the *ends* of the law. Nevertheless, it is important to emphasize that this is a methodological choice. Therefore, the methodological choice *could not* be inferred as an acquiescent position that Private Law, or European Private Law, is neutral, apolitical, or technical system of normative rules, which goes against the concept of private law endorsed in this thesis.

*dimensions* of EU Law and questioning whether there is indeed a European private law regulating private relationships, or whether it is no more than European private meta-law, setting out obligations for States to change national private laws.<sup>13</sup> On the other side of the debate, there is the discussion over the *effects of individuals' rights* in Treaty and Directives and the limits of private enforcement of EU Law: a *horizontal direct effect* or nothing more than a *vertical direct effect*. In addition, scholars raise these questions with regard to the application of general principles of EU law.

In spite of the undeniable relevance of propositions carried out in these debates, European legal scholarship seems stuck. There are the CJEU's judgments, both confirming and rejecting horizontal direct effect in different contexts,<sup>14</sup> which provides some food for thought when it comes to theorizing the legal reasoning of the CJEU's judges<sup>15</sup> Above all, there is little or no quantitative research investigating whether national judges are receptive of *horizontal direct effect*, or to what extent Directives indirectly influence the legal reasoning of national judges. While scholars devote their time and minds to solve the puzzle of vertical v. horizontal direct effects, the positive integration project has boosted profound market (and social) changes *through* European private law that do not reach the courtrooms in Luxemburg. Most of these vigorous European Private Law and market changes are witnessed in sector-specific regulatory frameworks, where business-to-business relationships are mostly *relational contracts* with disputes solved through negotiations, arbitration,<sup>16</sup> or B2B ADRs

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<sup>13</sup> Hugh Collins claims that EU Contract Law is a Meta-law. For him, "it does not usually regulate contracts directly, but rather regulates national contract law that regulates contract". Hugo Collins, 5<sup>th</sup> ERPL Annual Conference, May 2016.

<sup>14</sup> The *Viking* and *Courage cases* illustrate the recognition of the horizontal direct effect of the General Principles of EU Law. *Mangold* and *Kücüdeveci* are cases that puzzle private lawyers with regard to the lack of the horizontal effect of Directives. The General Principle of EU Law was invoked to ground the legal reasoning of the Court.

<sup>15</sup> Michael Dougan correctly stresses the problem of analyzing judgments where even the Court seems to be unsure or unclear about the legal matters. "In particular, the Court sometimes appears unsure (at best) and inconsistent (at worst) about when to treat a situation as falling within the scope of the Primary Treaty provisions and/or when to consider the application of the general principles of the Union to situations that do clearly fall within the scope of the Treaties", Dougan, Michael. "The Impact of the General Principles of Union Law upon Private Relationships." In *The Involvement of EU Law in Private Law Relationships*, edited by Dorota Leczykiewicz and Stephen Weatherill. Oxford: Hart Publishing, 2013, p. 76.

<sup>16</sup> Most of the business-to-business transactions in the Energy Market are still relational contacts with long-term relationships, where disputes between parties tend to be solved through negotiations, mediation or arbitration, instead of through Courts. Therefore, the private enforcement of EU Law through private remedies with claims in law based on the rules of EU Energy Law (e.g. the breach of mandatory rules of Regulation, or a formation-based defense) rarely reach Courts. There is a vast amount of literature discussing the non-economic incentives of contractual parties in relational contracts to bring disputes to Court. Propositions that relational contracts are rarely brought to Court are incontestable. Williamson, Oliver E. *The Economic Institutions of Capitalism: Firms, Markets and Relational Contracting*. New York: Free Press, 1985. Daintith, Terence. *The Design and*

Bodies;<sup>17</sup> and where business-to-consumer transactions have been solved in B2C ADRs Bodies.<sup>18</sup> Moreover, these social changes can be seen by the naked eye. If today consumers in Europe can choose electricity suppliers, be informed about contractual changes in advance, and be assured that disputes won't be adjudicated under public regimes, it is thanks to the private dimension of EU energy law (or European private law) creating mandatory and default rules for contracts between consumers and suppliers.

While market (and social) changes *through* European private law can be noticed in everyday life, theories about European private law do not say much about the role of the growing number of adjudicating authorities outside Courts, which circumvent legal questions such as direct v. horizontal effect. Neither do they have words to explain the *dynamic* changes to the regulatory framework, revoking and enacting new sets of rules with more Regulations than Directives. The impact of semantically rigid substantive obligations in terms of *mandatory rules* in private transactions and private disputes has long been consigned to a sort of parallel universe, despite being an issue that sits at the heart of the European private law. It seems then Legal Scholarship is mired in perceptiveness: Legal analyses are based on the categorical identification of sources of law and the subsequent systematization of the Court's output into Legal Doctrine. There is a lack of understanding of law as a social phenomenon made *by* and *through* legal interpretation and legal discourses determining legalities and illegalities of human behavior.

The diagnoses of the shortsighted view about European Private Law are sequels of a *formalist* way of thinking law. This thesis is not the first piece of academic work to claim so. Formalism does not incorporate analytic philosophy. Words have plenty of meanings. Even

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*Performance of Long-Term Contracts*. European University Institute, 1985. Scott, Robert E. "Conflict and Cooperation in Long-Term Contracts." *California Law Review* 75, no. 6 (1987). Grundmann, Stefan, Fabrizio Cafaggi, and Giuseppe Vettori. *The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law*. Markets and the Law. Burlington: Ashgate Publishing Company, 2014.

<sup>17</sup> If the private enforcement of EU Energy Law through private remedies in business-to-business relationships does not reach Courts, the same tends to be true in private enforcement through public remedies, but for other reasons. Thanks to EU procedure Law in Gas and Electricity Directives, NRAs have to grant access to ADR Bodies to solve disputes between undertakings and TSOs with regard to access to networks.

<sup>18</sup> EU Lawmakers have had an active attitude towards boosting ADR bodies for solving disputes between consumers in regulated markets. In Energy markets, Member States have been obliged to provide alternative methods of dispute resolution for consumers since the 1<sup>st</sup> Package in electricity and gas markets entered into force (in the late 1990s). The ERPL Project and the Florence School of Regulation jointly organized a Conference at the European University Institute on 20 February 2015, where we gathered representatives from *six* ADR Bodies specialized in solving energy disputes between Consumers and Energy Suppliers in *six* different Member States (France, Belgium, Denmark, UK, Italy, Czech Republic). Two common features were identified

modern modes of formalism, which agree that the vagueness and ambiguity of legal norms could lead to divergent interpretations, used to dismiss or neglect what this thesis considers the constitutive element of law: law is a social phenomenon, just as much as its rules of recognition are social norms and its impact in society and on human behavior. *Formalist thought* faces severe challenges in comprehending law in modern society because of its *conclusive identification* of what law is:<sup>19</sup> in national legal systems, the source of law is what Constitutions say it is. When this proposition is transplanted in transnational legal systems, it is even more problematic. In the context of EU Legal Systems, formalists consider EU Law what the Treaties categorically identify as such: CJEU decisions, and Article 288 TFEU. Hence, legal formalism has trouble depicting dynamic changes in Governance within European constitutional pluralism. Putting it into context again, *a formalist's mind* is not aware of the emergence of multi-level authorities like those conferring powers to make and adjudicate EU Energy Law, the latter of which includes both public and private enforcement of either public and, sometime, private remedies. Therefore, the normative system of rules derived from those authorities is overlooked by those legal scholarship, but not by market actors and society. This is true because power-conferring rules validating legislative and decision acts of new law-making and law-enforcement authorities are not in the Treaty, but in secondary legislation. Trying to understand European private law, scholars have already claimed that it is imperative to perceive law beyond the boxes of formalism.<sup>20</sup> When European private law under scrutiny regulates private relationships in regulated markets, this thesis goes further and claims that the phenomenon has to be perceived from the *Internal Point of View*.

Understanding law as a social phenomenon in European constitutionalism is hard from the traditional perspective of the judge deciding a controversy. This perspective is too limited. A sounder starting point is that of contractual parties. This is the first step in getting into the

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throughout all presentations and further discussions: the degree of specialization about sector-specific technical and legal issues related to energy markets, and the high number of disputes solved by these Bodies.

<sup>19</sup> Hart calls “conclusive identification” of law in Constitutions and Treaties as the most simplistic type of secondary rule. See Hart (1961), p. 95.

<sup>20</sup> See Caruso, Daniela. “The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration.” *European Law Journal* 3, no. 1 (1997); Caruso, Daniela. “The Baby and the Bath Water: The American Critique of European Contract Law.” *American Journal of Comparative Law* 61 (2013): 479–506.; Kennedy, Duncan. “The Paradox of American Critical Legalism.” *European Law Journal* 3, no. 4 (1997): 359–77. See also the historical account by Letto-Vanamo, Pia. “Fragmentation and Coherence of Law - a Historical Approach.” In *Coherence and Fragmentation in European Private Law*, edited by Pia Letto-Vanamo and Jan M. Smits. Sellier European Law Publishers, 2012.

Internal Point of View, which is particularly easy in regulated markets, as long as we are all consumers of utility services such as gas and electricity, the Internet, and bank services. Suppose the Italian NRA, whose powers are granted in an Electricity Directive, fines an electricity supplier for charging an unreasonable termination penalty for end customers. Moreover, it justifies its administrative actions on the basis of rights to choose and switch suppliers for end customers granted in the same Directive.<sup>21</sup> By releasing the NRA's decisions in official reports, on the regulator's website, or sometimes in non-official press, it releases information and enhances *legal consciousness* among competitors and end-customers about what the quantum of an excessive termination penalty is. The Internal Point of View accounts for the intelligibility of legal practices and legal discourses. In this circumstance, the NRA's decision would become a reference for monetary limits of termination clauses within the Italian jurisdiction. What would validate the NRA's administrative act as a source of law would be the common acceptance of the adjudicating authority of NRAs. Legal consciousness about the decision and its incorporation in legal practice and legal discourse is what gives effectiveness to the legal system. If so, the Italian NRA's decision would become an *authoritative determination* for termination clauses in electricity supply contracts thereon, which could ground complaints against electricity suppliers through private enforcement mechanisms or legal defenses in action for breach of contract. Even if the Italian electricity supplier submitted the administrative act for judicial review, the NRA's decision would continue to be a supplementary source of EU energy law unless (and until) a court nullifies the fine – which would then create a new dynamic change in the national normative system. The same *dynamic* exists at the EU level, where the Commission enforces competition rules, or ACER adjudicates disputes between NRAs. If one steps back from formalism to understand the hypothetical case of the Italian NRA, law as a social phenomenon from the *Internal Point of View* would be revealed. Thinking about law from the Internal Point of View was Hart's contribution to modern jurisprudence. He reconciled law with analytic philosophy and, by doing so, switched legal thinking from perspectivism to the genuine discursive and argumentative side of law.

This thesis holds that Hart's theory is a powerful tool, which allows to better grasp the phenomenon of European private law in regulated markets.<sup>22</sup> But to do so, Hart's theory must be understood in its entirety: its rule of recognition, the combination of primary and

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<sup>21</sup> Electricity Directive 2009/72/EC, Article 3 and Annex I.

<sup>22</sup> Hart (1961), see footnote 8.

secondary rules, and Hart's great contribution to jurisprudence regarding the Internal Point of View. The latter contribution is largely recognized for bringing the linguistic framework to the center of legal studies which sharpened the awareness of the phenomenon of law within society.<sup>23</sup> Hence, Hart's theory matters for explaining why profound changes in the internal market have passed unnoticed by the ongoing debate over European Private Law, although the Integration Project has strongly relied on private law. This is what justifies the choice of this thesis title: *Integration through Private Law*. This thesis is *based on* and *developed through* Hart's theory to shed light on the distinguishing features of self-standing European Private Law. By bringing Hart's contribution to the center of the debate over European Private Law, this thesis claims to set out its own contribution.

Using H.L.A. Hart and his theory of law to illuminate aspects of European Private Law could raise some eyebrows. Some of the critics could be foreseen; others were raised during the writing process of this manuscript. This thesis will reply to some of these reactions, which can be divided in two groups: "Hart, no!", and "Why Hart?".

The first reaction tends to be dismissive. It argues that *The Concept of Law* is a theory that explains Law in national legal systems and, if so, it *does not* and *cannot* capture the phenomenon of law in plural legal systems such as that of EU. Notwithstanding the fact that Hart himself defended his theory as a general account to the phenomenon of law in any legal system,<sup>24</sup> this reaction is recurrently raised among International and European Lawyers. Indeed, Hart did not develop any analytical framework to explain normative modes of conflict among overlapping legal systems, but this fact does not invalidate his theory about understanding plural legal systems. On the contrary, legal scholars have endorsed Hart's theory to explain plural legal systems precisely because of the *Internal Point of View*, which shifted the rule of recognition (or *grundnorm*) from States to individuals. This justifies the

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<sup>23</sup> In the book "Law and Language" edited by Michael Freeman and Fiona Smith, Richard Nobles and David Schiff's contribution bridges the discussion of legal pluralism with system theory and, moreover, they propose to approach pluralism through "language, translation, and Communication". Noble and Schiff speak about the impact of language as a multiplicity of idioms in legal pluralism and to what extent they distort the code of law – legality/illegality. Therefore, Noble and Schiff's project is different from this thesis' enterprises, which is to approach pluralism (more specifically, Europe pluralism) through the philosophy of language and the postmodern turned into semantics. Nobles, Richard, and David Schiff. "Legal Pluralism: A Systems Theory Approach to Language, Translation, and Communication." In *Law and Language*, edited by Freeman Michael and Fiona Smith. Oxford: Oxford University Press, 2013.

<sup>24</sup> H.L.A. Hart dedicated the last chapter of his book to apply his Theory to International Law, besides references to *Lex Mercatoria* throughout his book.

endorsement of Hart's ideas by scholars ranging from Joseph Raz,<sup>25</sup> whose explanation of social movements against legality based on unconformities between first- and second-orders (the pre-emption's thesis); to socio-legal scholar Denis Galligan, who holds Hart's system of rule to describe Law in Modern Societies.<sup>26</sup> Above all, thanks to European constitutional pluralism, some of the arguments usually raised against the application of Hart's theory beyond States have to be weighed in accordance with the principle of supremacy and the direct effect of EU Law.

Yet there is an important clarification. This thesis does not claim that Hart's theory gives the *best* account of the EU legal system. Such a claim would have requested investigations far beyond this thesis and far beyond the capacities of this candidate.<sup>27</sup> What this thesis claims is that Hart's theory sheds light on legal phenomena so far disregarded by legal scholarship on European Private Law. Moreover, Hart's theory provides a conceptual framework that opposes to the *formalistic* understanding of law an argumentative-based theories of law. This latter clarification introduces the answers to the second type of reaction: "Why Hart?".

The second type of reaction inquires to what extent Hart's theory aids the arguments of this thesis. One of these reactions arises from the association of Hart's theory only to its rule of recognition. This is why this introduction began by stressing a proviso: Hart's theory must be endorsed in its full account including his concepts of primary and secondary rules and, most important, his ideas with regard to the Internal Point of View. Detaching the rule of recognition from the overall ideas in linguistic phenomenology runs the risk of diminishing the most prized work in jurisprudence to a sort of validity test. Dividing the code of law in

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<sup>25</sup> In the pre-emption thesis, Joseph Raz explains how second-order of norms could justify reasons for action to individuals *qua* individuals when there are evident conflict between the second-order (e.g. international law) with the first-order (e.g. national law). The pre-emption thesis justifies social movements within national legal systems where States violates Human Rights. Though legality of acts within national jurisdictions, individuals obey the second-order. In the EU legal System, the pre-emption thesis is even easier to hold thanks European Constitutionalism. Raz, Joseph. *The Morality of Freedom*. Oxford University Press, p. 53.

<sup>26</sup> Denis Gilligan also analyses Hart's Theory through the works of Max Weber, Émile Durkheim, and Niklas Luhmann. Besides Denis Gilligan, two other scholars deserve attention: Brian Tamanaha has long explained pluralism taking Hart's system of rules as a starting-point; and Jean d'Aspremont who endorses legal positivism to assess the system of International Law in the 21<sup>st</sup> century. Galligan, Denis, ed. *Law in Modern Society*. Oxford: Oxford University Press, 2016. Tamanaha, Brian Z. *A General Jurisprudence of Law and Society*. Oxford University Press, 2001, p. 132; Aspremont, Jean d'. "Herbert Hart in Today's International Legal Scholarship." In *International Legal Positivism in a Post-Modern World*, edited by Jörg Kammerhofer and Jean d'Aspremont. Cambridge University Press, 2014.

legality/illegality is one element of legal systems,<sup>28</sup> but it is not the constitutive element of legal systems. The constitutive element lies in the massive and persuasive agreement of what law is among members of the society. Furthermore, scholars who reduce Hart's theory to its rule of recognition commonly characterize it as a strict separation of Law and Morality endorsing the semantic sting argument.<sup>29</sup> Rather than *characterizing* Hart's theory, such a description tends to *caricaturizing* it. This description does so by having no words for the decades of debate between *exclusive* and *inclusive positivists*,<sup>30</sup> even though Hart himself explained his theory in line with inclusive positivism.<sup>31</sup>

Defending Hart's theory is a way of defending the theoretical foundations of this thesis. It does so to set common ground before moving a step further, towards arguments about why Hart's positivism matters: "Hart, yes!". There are *two* reasons that justify the purpose of assessing European private law through Hart's theory and those reasons go beyond the concept of rule recognition. One refers to the analytical tool provided by the concept of secondary rules of change and secondary rules of adjudication to identify valid legal norms in *dynamic* and *plural* legal systems. The other falls into the linguistic phenomenology given to legal norms. These two aspects of Hart's theory are valuable in terms of illuminating the recent legal phenomenon in European private law: *self-standing European private law*. These two aspects are also intertwined with the idea of the Internal Point of View in Hart's Theory.

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<sup>27</sup> Propositions that Hart's theory cannot fully picture legal systems from a Global Perspective could not be categorically applied to invalidate the arguments in this.. See for example Twining, William. *General Jurisprudence: Understanding Law from a Global Perspective*. Cambridge: Cambridge University Press, 2009.

<sup>28</sup> Gunther Teubner offered the system theory to explain how postmodern society organizes itself to include distinct legal system in the era of pluralism. In different societies, law generates and maintains its separate identity through the application of a unique code: legality/illegality. The unique code of law is what Hart calls the rule of recognition, and what Kelsen calls "Grundnorm". Gunther Teubner, "Two faces of Janus: Re-thinking Legal Pluralism", *Cardozo Law Review* (1991-2).

<sup>29</sup> This proposition is commonly associated with Ronald Dworkin's seminal criticism of Hart's theory, labeling it a pedigree thesis. Thereon, the criticism has motivated decades of debate on what Dworkin himself called a "Theoretical Disagreement". Dworkin, Ronald. *Law's Empire*. Hart, 1986. See Brian Leiter's answer to Dworkin's criticism in his chapter "Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence" in Leiter, Brian. *Naturalizing Jurisprudence*. Oxford University Press, 2007. See also Leiter's reply to Scott Shapiro in Leiter, Brian. "Explaining Theoretical Disagreement." *University of Chicago Law Review* 76, no. 3 (June 1, 2009). <http://chicagounbound.uchicago.edu/uclrev/vol76/iss3/5>.

<sup>30</sup> Raz, Joseph. "Two Views of the Nature of the Theory of Law A Partial Comparison." In *Hart's Postscript Essays on the Postscript to "The Concept of Law"*, edited by Jules L. Coleman. Oxford University Press, 2001.

<sup>31</sup> Hart endorses inclusive positivism in his Postscript. See also Coleman, Jules L. "Incorporationism, Conventionality, and the Practical Difference Thesis." In *Hart's Postscript Essays on the Postscript to "The Concept of Law"*, edited by Jules L. Coleman. Oxford University Press, 2001; MacCormick, Neil. *H.L.A. Hart*. Second edition. Stanford University Press, 2008. Tasioulas, John. "Hart on Justice and Morality." In *Reading HLA Hart's The Concept of Law*, edited by Luis Duarte d'Almeida, James Edwards, and Andrea Dolcetti. Hart, 2013.

The first reason lies in the conceptual framework derived from the combination of primary rules of obligation with secondary rules of recognition, change and adjudication. Similar to what this thesis suggests above, describing the case of NRAs, *The Concept of Law* advances the same account to explain legal systems, but in 1961.<sup>32</sup> It begins by explaining the structure of legal systems from the analogy of the system of power within a family before advancing to the high complexity of legal systems. By doing so, Hart defines legal systems as systems of rules whose validation relies on massive and persuasive agreement recognized by the legal community; more precisely, a massive agreement of source of Law with power-conferring rules and duty-imposing rules. Duty-imposing rules provide special reasons for actions. These are primary rules which determine what individuals, States, or legal officials ought to do and ought not do. Power-conferring rules are provisions identifying legal officials empowered to make primary rules through legislating general rules (secondary rules of chance) or adjudicating them case-by-case (secondary rules of adjudication). These analytical tools matter in the EU Legal System as a guide through the “conceptual confusion” embedded in the term *hybridity*.<sup>33</sup>

EU Law is perceived as a hybrid legal system. Indeed, it is not systematized in private and public law categories,<sup>34</sup> nor is it systematized in sources of substantive or procedural law. This hybridity is even more tangible in regulated sectors. In a single Directive, measures can comprise delegated powers for making and adjudicating EU law, public and private enforcement mechanisms through public and private remedies, and also duty-imposing rules determining obligations to a State or a State’s legal official, to the EU’s legal officials, to individuals and private relationships. All these rules are then labeled a hybrid legal order, which does not say much about individuals’ rights and duties in transactions, restrictions in the use of property rights, or private enforcement through private remedies. So far, concepts employed by EU Legal Scholarship have not solved the “conceptual confusion”. Identifying

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<sup>32</sup> See footnote 22.

<sup>33</sup> Micklitz, Hans-W. “Rethinking the Public/Private Divide.” In *Transnational Law: Rethinking European Law and Legal Thinking*, edited by Miguel Maduro, Kaarlo Tuori, and Suvi Sankari. Cambridge: Cambridge University Press, 2014.

<sup>34</sup> Kaarlo Tuori has defined hybridity as a sign of conceptual confusion. The preciseness of his diagnosis deserves to be quoted in its entirety: “There are no legal hybrids as such but only as seen from the perspective of a particular conceptual and systematizing framework. What we today call legal hybridity is a sign of our conceptual confusion: new conceptual and systematizing grids are needed, but our legal mind-set is still in many respects attached to the state-sovereignties of the black-box model and the distinctions of the traditional systematization. See Tuori, Kaarlo. “On Legal Hybrids.” In *A Self-Sufficient European Private Law: A Viable Concept?*, edited by Hans W. Micklitz and Yane Svetiev. EUI Working Paper 2012/31, ERC-ERPL 01/2012. p. 73.

sources of EU Law as EU Primary Law, EU Secondary Law, and Case Law of National and European Courts *could* correspond to a simplistic criterion of validity if further considerations are not taken into account. Such an approach risks omitting dynamic changes in governance not referred in the Treaty, as the result of the exercise of power-conferring rules for making and adjudicating EU law beyond Parliaments and Courts.<sup>35</sup> Regulation and Competition are also recurrent concepts in the EU interdisciplinary environment, but these terms *could* be associated to Regulatory Theories that channel law in three functional phases at a very surface level: setting standards, monitoring compliance, and correcting non-compliance. *At worst*, this could be turned into a bad translation of *formalistic thinking of Law*.<sup>36</sup> The consequence of such “conceptual confusion” is the alienation of “Law in books with Law in Action” or, *at worst*, the alienation of Law in Books with the negative impact of Law in Action.<sup>37</sup>

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<sup>35</sup> If one considers the sources of EU Law to be limited to EU Primary Law, EU Secondary Law, and Court’s decisions without further considerations, it could lead to two misrepresentations of the EU Legal System: one in law-making, the other in law-enforcement. If EU Primary Law is the Treaty and Secondary Law is Legislative acts identified in the Treaty, the latter being approved by the EU Parliament and Council, this concept doesn’t capture power-conferring rules delegating authority to the Commission and Council to issue Implementing and Delegated Acts. In the Energy Market, power-conferring rules to issue Implementing Acts (e.g. Network codes) are not in the Treaty, but in Legislative acts. The categorical identification of the source of EU law as those identified in the Treaty (or Constitutions) does not depict the growing number of statutory acts approved through the delegation of power to the Commission. The second issue of this categorical identification is related to the supplementary sources of EU Law such as national and European Courts. It does not consider power-conferring rules to enforce EU Law through the public enforcement of Administrative Bodies, or the power to adjudicate disputes between private parties outside Courts. Even if these decisions could still be submitted for judicial review, Courts are ancillary mechanisms of control introduced in national legal systems in modern history. The case of the Italian NRA above illustrates the reason why categorical identifications of supplementary sources such as Courts are contingent on a certain time in history and could get detached from reality. It has been the case, where adjudicating authority starts being decentralized from Courts to Out-of-Courts Methods in Postmodern Society. This is the legal framework of EU Energy Law.

<sup>36</sup> As a matter of clarification, this thesis is not inferring that all scholars who employ the terms Regulation and/or Competition are replicating formalistic thought of Law. This thesis itself uses these two categories to systematize EU Energy Law. However, there are Regulatory Theories that use these terms to read legal norms in an over simplistic, and at worst harmful, version of what law is. They do so if not considering the open-texture of “standards”, the intelligibility of law as a phenomenon made *by* and *through* legal argumentation and legal discourse, and law as means to accomplish moral ethical values. The use of the terms Competition and Regulation has been an important conceptual tool to build a fruitful interdisciplinary dialogue crossing fields of Law, Economics, and Political Science, but diminishing Law to an instrument of setting, monitoring, and correcting failures in compliance without further consideration distorts the Concept of Law within the field of law. Concerning the three functional stages of Law in Regulatory Theory can be seen in Brownsword, Roger. “Lost in Translation: Legality, Regularity Margins and Technological Management.” *Berkeley Technology Law Journal* 26, no. 3 (2011). See also the conclusive (and pertinent) remarks of Bronwen Morgan and Karen Yeung in their chapter on “Theories of Regulation”. Morgan, Bronwen, and Karen Yeung. *An Introduction to Law and Regulation: Text and Materials*. Cambridge: Cambridge University Press, 2007, pp. 75-6.

<sup>37</sup> “Law in books and Law in Action” is an expression associated with the legal realism of Homes Oliver Wendell. Homes’s work is referred to as the first move to deconstruct *Formalist Legal Thinking* in the US, pointing out the disconnection between Theories of Law in books and Law in legal practice. This thesis goes further than Homes’s proposition and suggests that the detachment of Law on the books and Law in Action is more problematic than academic talk, and that it potentially affects practice in Modern Society as it hampers effectiveness through private enforcement of EU Law. See Homes, Oliver Wendell. “The Path of Law.” *Harvard Law Review* 10 (1897): 457.

Normative systems of rules govern individuals while exchanging revenues. Markets are patchworks of revenue transactions, transactions are contracts, and a substantial part of EU sector-regulation governs transactions by establishing mandatory and default rules, which are non-negotiable rights and obligations for contracts. If the EU legal system creates default or mandatory rules for contracts or right to contract, regardless of whether publicly enforced by States or privately enforced by contractual parties, these rules represents the private dimensions of EU Law that (must) dialogue with national systems of private Law when private remedies reach national Civil Courts, or when lawyers draft contracts.

Hart's contribution to jurisprudence – *The Concept of Law* – is useful to shed light on an environment immersed in “conceptual confusion”. Hart's conceptual distinction between primary rules, secondary rules of change, and secondary rules of adjudication, brings awareness to identify the substantive dimension of European private law. When those concepts are introduced into the hybrid system of rules of EU energy law, they reveal a set of rules governing individuals' behavior in private transactions *to the achievement of the four freedoms*, rather than power-conferring rules *for freedom*.<sup>38</sup> Yet there are very important clarifications. This thesis has no purpose in pushing forward normative claims about what is the *best* conceptual framework to identify the private dimension of EU Law. Neither does it suggest replacing analytical tools with deep roots in EU Legal Scholarship such as EU Primary and Secondary Law or Competition and Regulation. In fact, this thesis applies the latter category throughout its own research. Above all, it does not propose a (re)systematization of European (Private) Law within categories of public and private law aligned with traditional categories in national Legal Systems. What this thesis does indeed argue is that Hart's conceptual framework sheds light on the *hybrid* system of rules of EU energy law, particularly its positive integration provisions impacting private relationships. It reinforces the idea that EU substantive law comprises duty-imposing rules governing human acts; humans who could either be legal officials representing member States and also private parties in transactions. It also strengthens awareness of EU Law as a guide of human behavior in different contexts and, most importantly, different legal cultures.<sup>39</sup> As such, it could have a

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<sup>38</sup> See footnote 10.

<sup>39</sup> The proposition about how “legal cultures” among national legal systems interfere in legal interpretation has long attracted legal scholars to the field of Comparative Law. It is indisputable that legal culture is reflected in the way national Courts, legal officials in general, and individuals interpret the same provision or principle of Law. The EU Legal System, as the most advanced transnational Law, has been the blueprint for qualitative investigations. This thesis does not develop comparative methods to distinguish legal discourse in different legal systems. However, it departs from the same assumption. See Zimmermann, Reinhard. “Comparative Law and

different interpretation and social effect within and among national legal systems. To better explain the proposition that Hart's theory could bring insight to studies of comparative law about European Private Law, there is a need to introduce the second reason why his positivism account of law matters for the development of the claim of this thesis. The idea of the Internal Point of View is again shifted to the center of the analyses to explain the linguistic framework of Hart's theory.

The second reason that justifies the reliance on Hart's theory considers his insights from the philosophy of language in 20<sup>th</sup> century. The great contribution of Hart's theory was to *reconcile* jurisprudence with analytic philosophy without distorting prior accepted features of law: the code of law – legality/illegality – or *Grundnorm* as a social norm. The key proposition is to explain how a linguistic framework could indeed shed light on black spots not yet explored by comparative studies. If a theory of legal argumentation has been used to prove “divergence”, this thesis then aims to argue that a linguistic framework matters to prove “intrusion and substitution” if studies look beyond Courts.

At the beginning of this introduction, this thesis started with a brief inquiry into how general rules of non-discrimination in the Treaty and Directives would affect human behavior, legal interpretation, and legal discourse *within* and *among* national legal systems. The EU advanced the quintessential system of transnational law, as European scholarship advanced the quintessential study of comparative law. There are massive and persuasive comparative studies concluding that transposition, implementation, and interpretations of EU Law *could* lead to *divergences* among (and within) national Legal Systems. This is an indisputable general claim about Law, EU Law, and European Private Law. This is particularly true in light of Reinhard Zimmermann and Simon Whittaker's study of the way in which 15 European Legal Systems would treat 30 *Good Faith* hypotheses.<sup>40</sup>

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the Europeanization of Private Law.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 1st ed. Oxford University Press, 2006. Roher, Cotterrell. “Comparative Law and Legal Culture.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 1st ed. Oxford University Press, 2006.

<sup>40</sup> Reinhard Zimmermann and Simon Whittaker's study began right after Gunther Teubner raised the argument that English Courts had interpreted the principle of Good Faith differently than Germans. It supported Teubner's claim that enacting rules of Private Law at the EU Level was not leading to Harmonization among legal systems. On the contrary, it was creating more divergences between national legal systems and “legal irritation” within those normative systems. Legal Irritants. Teubner, Gunther. “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies.” *The Modern Law Review* 61, no. 1 (January 1, 1998). Zimmermann, Reinhard, and Simon Whittaker. *Good Faith in European Contract Law*. Cambridge University Press, 2000.

Yet this thesis aims to draw attention to the conditional element that “could lead to” divergence rather than to the conclusion about “divergence”. To do so, this thesis brings the linguistic phenomenology as developed by Hart to challenge categorical and general conclusions about the “divergence” effect of European private law. It does so by raising the following question: to what extent the impact of European private law upon legal interpretation would indeed diverge if, instead of vague rules like the principle of non-discrimination and good faith in unfair contract term, duty-imposing rules were surrounded by a set of more detailed rules establishing rigid commands about what market actors in private transactions ought to do or ought not do. The answer to this question requires some contextualization.

In the context of natural gas markets, the 1<sup>st</sup> Directive started to open national markets for competition and integration by granting rights for certain large industries to choose between two or more suppliers, called “eligible final customers”. Stepping back in time, when there were few cross-border supply contracts in downstream, large firms were seen as potential gas buyers with economic incentives to purchase gas beyond borders and boost cross-border trade. The Directive established that Member States had to decide which final customers were considered “eligible”, but it established a very objective threshold. Rather than addressing rights to “large industries”, EU Law granted rights to all “final customers consuming more than 25 million cubic meters of gas per year”. The addressees of the rights were not identified as large firms, where concepts such as “large” or “firm” would require an interpretation according to national legal discourses of what could be large, middle, and small enterprises. Precise numbers – 25 *mcm* and 1 *year* consumption – preempted “large industries”. Germans could have a different perception of what is a “large industry” than Finns, or Greeks. The 1<sup>st</sup> Gas Directive thus illuminates a peculiarity of the European private law in regulated markets. It is a normative system with some precise and rigid rules.<sup>41</sup> Following *two* decades and *two* Packages, there have been other sources of EU energy law shrinking the autonomy of contractual parties. By enforcing competition rules, the

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<sup>41</sup> Following the brief description of the regulatory framework in the EU Gas Market, one could ask whether “eligible customers” could be considered a rule of private Law or not; whether it is part integrant of the contract or not. In chapter 2 his thesis addresses the various concepts of Private Law to argue that this measures of EU Energy Law did indeed intersect with the field of European Private Law.

Commission has established a sort of *black list* of prohibited clauses for gas supply contracts: no long-term clauses over 5 years, no use restraint, and no tacit renewal clauses.<sup>42</sup>

If one *steps back* and observes EU energy law, circumventing the “conceptual confusions” of hybridity and combining two conceptual pieces of primary and secondary rules, they will see a wide set of rules creating rights and duties to parties engaged in transactions: rights to contracts, mandatory and default rules regarding time-clause, or compensation duties. On the contrary, if one *steps in* and observes EU energy law from the Internal Point of View, they will see a set of rigid and precise rules which are not captured by samples based on Court decisions, even though Energy and Competition Lawyers would all agree that there is a *black list* of prohibited clauses created through the adjudicative authority of a non-judicial body: the Commission. One of the plausible reasons why this set of rigid rules does not appear in comparative studies based on national case law is exactly because of the rigidity of these rules. The insight that *private disputes* are most likely to happen when rules are vague or ambiguous suggests that violations of rigid and mandatory rules of EU law, when applied to private transactions, tend to be solved through private settlements between parties, public enforcement by NRAs, or even private enforcement in ADRs.

This thesis began its investigation with the ambition to capture the reasons why European private law in regulated markets unleashed the phenomenon of “intrusion and substitutions”. Unlike the phenomenon of “divergence”, reported in non-regulated markets, EU energy law creates a set of rules impacting private contracts and property rights and, moreover, these duties and rights have intruded on national legal systems with minor or few counter-reactions from national legal systems. Why? What is the distinguishing feature of the private dimension of EU energy law? This thesis claims that the distinguishing feature of EU energy law relies on a distinct set of semantically rigid rules. When the objective and precise rules apply to private relationships, there are minor chances of divergent interpretations *within* and *among* legal systems. Semantic rigidity reduces the role of adjudication to a mere

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<sup>42</sup> In chapter 6, this thesis analyses how the Commission has regulated contracts through enforcing competition law and, as such, creating a long list of prohibited clauses. With regards to these prohibited clauses cited above, see De Hauteclocque, Adrien. *Market Building through Antitrust: Long-Term Contract Regulation in EU Electricity Markets*. Edward Elgar Publishing, 2013, p. 94.

application of the law, where adjudicating authorities only have to check facts: Does a final customer of natural gas have an annual consumption of 25 mcm? Yes-or-no? Checked!<sup>43</sup>

To capture the ongoing and dynamic process of changing and tightening up EU substantive Law, where the semantic legal content of vague rules are shrunk by old and new modes of law-making, and old and new modes of law-enforcement, there is a need to expand the awareness of the private dimension of EU Energy Law. At this point, this thesis aims to reconcile EU energy law with private law, highlighting its intersections with the field of European private law.

## **2. Reconciling European Private Law and EU Energy Law**

Conducting research into the private law dimension of EU energy law is fascinating and the reason lies on the fact that it has either been disregarded or neglected by legal scholarship. Neither European private lawyers nor energy lawyers seem to have given enough attention to the rampant number of private transactions in energy markets, as well as the growing set of rules regulating these transactions, which fall both into the fields of EU energy law and European private law. Despite nearly 500 keywords of “The Max Planck Encyclopedia of European Private Law”, covering Railway transportation, and several areas in Finance and Bank Regulation, there is no reference to Energy, Electricity, or Natural gas.<sup>44</sup> Private Law also has a timid voice among energy lawyers, given that little scholarship acknowledges the impact of EU energy law on contract and property rights and that, where it does, the spotlight is shone solely on long-term or consumer contracts.<sup>45</sup> This thesis finds a vast field of

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<sup>43</sup> Joseph Raz distinguishes “application of law” from “interpretation of law” in his account of “Law and Value of Adjudication”, the former of which merely requires verification of facts. See Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Clarendon, 1979.

<sup>44</sup> Basedow, Jürgen, Klaus J. Hopt, Reinhard Zimmermann, Andreas Stier, and Max Planck Institute for Comparative and International Private Law. *Max Planck Encyclopedia of European Private Law*. Oxford University Press, 2012.

<sup>45</sup> With some exceptions, such as Piet Jan Slot, Angus Johnston, Kim Talus, and Giuseppe Bellantuono, there are few legal scholars who have dedicated their work to study the impact of Market Integration on private law. Yet even among these works, there is still a bias to the investigation of Consumer Contracts and Long-Term Contracts, which in part includes this thesis. Early Liberalization and more recent consolidation of Market Integration has shifted business-to-business transactions to OTC Markets and Exchanges. As such, EU Energy Law has also advanced a set of rules regulating Wholesale Markets and other types of Transactions. Network Codes include a wide set of rules regulating short and long-term capacity contracts in transmission systems,

underdeveloped research in the intersection between European private law and EU energy law.

Different from other regulated sectors such as Financial service, where transactions have long been discerned as activities with “economic interest” and contracts governed by private regimes, energy markets have had a different path. Until the 1980s, operations in energy markets were considered activities of “no economic interest”.<sup>46</sup> Even the expression “Energy market” had no meaning at that time as long as there was no “Market” for energy. Neither electricity nor natural gas had a clear status as tangible goods in commercial agreements. Downstream, utility services were indisputably governed through public regimes.<sup>47</sup> Back then, the negative integration project of the EU did not impact on any national laws governing the “energy sector” and “energy policies”, except trade agreements in coal and nuclear energy. By contrast, legal discourse, until then dominant, started to be challenged in 1980s during the transition from negative to positive European integration. Concomitantly,

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while the Energy Union proposes an *avant-garde* set of rules regulating several “new” market transactions like smart meter services and data protection management.

<sup>46</sup> The perception of the Energy Industry as activities of “non-economic interest” represented the dominant legal discourse between the 1950s and 1980s regarding Utility Services. The consolidation of the legal discourse at a certain moment in time can be found in the landmark judgment of the CJEU in *Costa v. ENEL*. Though they accepted the *direct effect claim*, the judges dismissed Mr. Costa’s proposition that the nationalization of ENEL, until then a private firm with private contracts, was a violation of the Treaty. The *Costa v. ENEL case* began from the refusal to pay a household electricity invoice. Mr. Costa’s claim in law could be read as a contractual remedy: promisors cannot transfer obligations to a third party without the consent of promises; the lack of this consent contaminated the formation of the subsequent contract. The construction of legal discourse of utility service contracts is reinforced in Wolfgang Friedman’s 1964 book “Law in a Changing Society” See the footnote below.

<sup>47</sup> In 1964, Wolfgang Friedman described how French Law distinguished utility services as public relationships between public authorities and citizens. Back then, Wolfgang Friedman considered these relationships administrative contracts that could not be “simply disposed of as species of ordinary contract” of private law in Civil Codes. Wolfgang Friedman’s book was entitled “Law in Changing Society” and his statement has an explicitly normative tone. He is not only describing utility services as *contrat administratif*, but he is also proposing it as such. In previous lines and further chapters, this thesis argues that the Law is a social phenomenon reproducing dynamic legal discourses within Legal Systems. As such, law changes societies, as much as society changes legal discourses. Wolfgang Friedman’s book illustrates the fact that that legal discourses are dynamic and change throughout history, though the Constitutive Element of Law does not. Coincidentally (or not) Wolfgang Friedman’s book was published the same year the preliminary reference of the *Costa v. ENEL case* reached the CJEU. In 1964, for Wolfgang Friedman, “what is important in the institution of the *contrat administratif* is not this or that subtlety of distinction in the borderlines cases but the open recognition and careful elaboration of the principle that typical contacts between public authority and private citizen cannot be simply disposed of as species of ordinary contract (as they still are, at least in theory, in the common law), but that they have distinct characteristic springing from the very nature of the administrative functions. The fundamental characteristic of a *contrat administratif* is the recognition of certain unilateral powers of control by the administration in the public interest. (...) To ensure this continuity of execution the administration has certain unilateral powers: to suspend, vary or rescind the contract, to transfer it to another party, or to take it over itself (*mise en régie*). Not only does the administration has the duty to interfere in the contract; it has the duty to do so, because it is responsible for the public service”. Friedmann, Wolfgang. *Law in a Changing Society*. Abridged edition. Penguin Books, 1964, p. 373

the academic project *Integration through Law* was important in terms of expanding awareness about the “yes-economic interest” in energy industries and why these industries *were not and could not* continue to be perceived as activities of “no-economic interest”. Back in time, it reconciled EU law with economic theory in market regulation. At this time, this thesis aims to shed light on the private dimension of EU Energy Law and reconcile European private law with EU energy law. The ambitions of this project justify this title of this thesis: *Integration through Private Law*.

About 30 years ago, the European University Institute hosted the Project *Integration through Law*. The European Legal Integration Project set out to examine the role of Community law in European Integration and granted separate treatment to “energy policies”, as one of the substantive areas motivating the Integrations Project: *vis* the European *Coal and Steel Community*.<sup>48</sup> At the time, two volumes were released. Rather than focusing on traditional and more obvious energy policies of the Integration Project – agreements concerning the importation of oil, coal and nuclear energy – Terence Daintith, together with Stephen F. Williams and Leigh Hancher, switched the spotlight into the “yes-economic interest” of upstream and downstream operations in natural gas. They contributed to draw the attention of legal scholars and officials to the “Legal Integration of the Energy *Market*”.<sup>49</sup> The provocative thought was already stated in the book’s title, “Energy Market” rather than “Energy Policy”.

At that time in Europe and worldwide, energy industry operated activities mostly through vertically integrated firms under the benefits of exclusive rights: back then *legal monopolies*. Electricity was generated, transmitted, distributed, and provided to final customers by the State or local firms. The natural gas industry had a similar production

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<sup>48</sup> About 30 years ago the European University Institute hosted the Legal Integration Project (or *Integration through Law*) which set out to examine the role of law, and the legal impact of the EU’s rules of integration in Europe. Under the coordination Prof. Mauro Cappeletti, Monica Seccombe and JHH Weiler, the project was conceived in two parts, the second of which investigated in great detail substantive areas already addressed by EU Law. In addition to Energy Policies, Environmental and Consumer Policies were subject to deep investigation on the legal effects (and non-effects) of the Legal Integration compared with the Federal Policies of United States.

<sup>49</sup> Terence Daintith, and Stephen F. Williams, divided the legal concerns into two categories. Export restrictions, monopolies, taxation of natural resources fell into concerns related to State Redistribution Interventions law; while the inappropriate specification of property rights were addressed as market failures. By the time, unconformities between national laws and the four freedoms were identified as issues of public and private law. Within the Framework of the *Integration through Law*, Terence Daintith, together with Leigh Hancher and Stephen F. Williams, published two path-breaking volumes in the European University Series. Daintith, Terence, and Stephen F. Williams. *The Legal Integration of Energy Markets*. Walter de Gruyter, 1987. Daintith, Terence, and Leigh Hancher. *Energy Strategy in Europe: The Legal Framework*. W. de Gruyter, 1986.

structure downstream, following the importation of natural gas by importer States. The public regime-based production began to collapse worldwide when economists challenged the non-economic interest of these activities and called legal monopolies legal barriers for market, competition, and economic efficiency.<sup>50</sup> In Europe, there was rampant endorsement of an economic and legal discourse favoring privatization and liberalization. Particularly in the EU, the CJEU's speech acts reviewed prior positions about the "non-economic interest" of utility services after new preliminary references questioned the legal issue. The change of the CJEU's position from perceiving utility services as activities of "no economic" interest to "maybe or yes, economic" signaled to the Commission a green light for the first Green and White Papers in the Regulation of Energy Markets. The positive integration project in the Energy Market flourished in the early 1990s. This thesis argues that the private dimension of EU Energy Law can be found since the first years of Positive Integration and has enlarged through the years. This is a normative system of rules that aims to promote *Integration through Private Law in Property*, and *Integration through Private Law in Contract*.

Since the early 1990s, the Treaty provisions on Four Freedoms and Non-discrimination has been applied to Member States and national laws, while duty-imposing rules of Competition targets market actors in electricity and natural gas. Provisions of the Treaty gained effectiveness with EU secondary legislation. Since the late 1990s, EU secondary legislation has been the main instrument for governing the action of States and private persons in favor of achieving the competitive, secure, and integrated energy market. Combining duty-imposing rules applied to Member States and duty-imposing rules on individuals and private transaction, EU Energy Law has intersected with *European Administrative Law* and *European Private Law*.

Intersecting with European Administrative Law, Cross-sector Regulation imposed the obligation of non-discrimination in Public Procurements on Member States. Duty-imposing rules govern Public authorizations and concessions and impact on the Administrative Law of Member States. In parallel, Sector-Regulation imposed obligations on States to change their Governance for making and enforcing EU Law within their jurisdictions. Besides obligations on Member States, which are commonly acknowledges, EU Energy Law has created a wide

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<sup>50</sup> This change in Legal Discourse was influenced by the massive endorsement of *Libertarian* economic and political thought of the Chicago School of Economics, which later evolved into a debate between Liberal and Social Liberal economists in the area of energy Regulation. Joskow and Jean Tirole's contributions were remarkable.. Joskow, Paul, and Richard Schmalensee. *Markets for Power. An Analysis of Electrical Utilities Deregulation*. Massachusetts: MIT Press, 1983.

set of rules applied to private relationships and individuals rights, which falls to the core of national system of private law in contracts and property rights. At this point EU energy law intersected with European private law in property and contracts.

The intersection of EU energy law and European private law refers to a normative system of rules that have three features: they are a set of *dynamic* rules and, because of their dynamism, the rules become *expansive* to include new subjects and, at the same time, *semantically rigid*.

EU energy/private law is *dynamic*. In two decades, the EU Regulatory Framework has been entirely re-written *three* times: from the 1<sup>st</sup> Package of 1997-1998, to the 2<sup>nd</sup> Package of 2002, to the 3<sup>rd</sup> Package of 2009-10, which is now in transition to the 4<sup>th</sup> Package, called Energy Union. On the one hand, if the EU Regulatory Framework has constantly changed throughout time, Regulatory Theories explain this dynamism as an intrinsic feature of Law in Modern Societies. If Laws are means to correct market failures, they need to be as *dynamic* as markets.<sup>51</sup> On the other hand, over two decades of Positive Market Integration, package-by-package, each package has represented an entirely new Regulatory Framework that is enacted, which then revokes an entirely old Regulatory Framework. Changes in packages are not amendments to a few provisions. They represent substantive reviews of all legal measures changing substantive obligations and Governance systems of law making and law enforcement. Legal issues raised between regulatory Packages, like the CJEU's judgments and market complaints,<sup>52</sup> are inserted into a new Package. By inserting responses to new issues, the normative system of rules tends to expand package-by-package, which refers to the second feature of European Private Law in regulated markets.

EU energy/private law is *expansive* in terms of its subjects of regulation. The easiest way to support this claim is by looking at list of EU Directives and Regulations. While the 1<sup>st</sup>

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<sup>51</sup> This dynamism of Law as means to regulate Markets has been addressed by Max Weber. In the context of Regulatory State, "New Institutional Economics" has done so.

<sup>52</sup> See C-474/08, *Commission v. Belgium*, when the Court interpreted the Article 23(2) and (5) of Directive 2003/54/EC in a way of reassuring the regulatory powers of NRAs to establish transmission and distribution tariffs. It did so though establishing that national parliaments could only approve or disapprove methods of tariff calculation, but not amended it along the legislative procedures. Following the decision of CJEU, in the subsequent electricity Directive, EU legislator clarified power-conferring rules for NRAs (Directive 2009/72/EC). The same has happened in the negotiations of the Energy Union, when the EU legislator proposed changes in the Article 3 of the electricity Directive 2009/72/EC introducing into the legislation the Court decisions in the C-265/08, *Federutility case*. The winter package proposes to review the provisions granting consumer "rights to reasonable price" and replace it with provisions speaking about "rights to competitive price".

Package had *two* Directives in 1998, EU Energy Law is now an encyclopedia with more than 30 Legislative and Implementing acts. Among provisions of these statutory acts, duty-imposing rules on property and, particularly, contracts have expanded exponentially in the subsequent Packages. There are duty-imposing rules restricting the use of property. These rules restrict *rights in rem* over ownership of transmission systems and pipelines and, by so doing, constrain the freedom of owners to use and operate its properties: known as the unbundling mechanisms. There are also duty-imposing rules on various types of market transactions – that is, on contracts. Among measures in various EU Directives and Regulations, there is a growing set of rules enshrining obligations and rights to parties involved in transmission service contracts between TSOs and undertakings – contracts originating with the unbundling mechanism. Other sets of duty-imposing rules have also targeted upstream and downstream commercial supply contracts, which could be read together with obligations applied to consumer supply contracts. Over two decades of EU energy law, supranational rules have been expanding to various types of contracts as much as sector-regulation has been advancing the regulatory framework to other subjects: storage contracts, trade intermediation contracts in wholesale markets, and several new issues will most likely be regulated in coming months with the approval of a new sector-related package (such as data management agreements and demand-response capacity delivery agreements).

Propositions about the *dynamism* or *enlargement* of the EU normative system as it intersects with EU energy law and European private law are hard to contest. They can be confirmed by simple observation. However, these propositions do not say much about how these set of rules impact on national systems of private law – neither in terms of legal interpretation nor of market behavior. Asserting that a normative system of rules has enlarged subjects of regulation to new types of contracts does not explain the phenomenon of “intrusion and substitution”. This is why this thesis made a choice of explaining plural legal systems from the *Internal Point of View*.

EU energy/private law corresponds to a normative system in which some set of rules are particularly *semantically rigid*. Among its provisions, there are sets of rules governing individuals’ behavior while making transactions through rigid and precise commands. Semantic rigidity explains why the intrusion of European private law in regulated markets is characterized by with little “divergence” within and among legal systems. This introduction has already addressed and explained the linguistic framework above. Repeating would be

unnecessarily redundant. Yet there is still a need to explain the methodology adopted in this research.

### **3. Why Contracts? Explaining Socio-legal Methods in a Hybrid and Plural Normative System**

This thesis began with the ambition of answering one single question: why has European private law in regulated markets unleashed the phenomenon of “intrusion and substitutions”? The first challenge of answering this question relies on the hybridity of EU law. EU law is a hybrid, non-systematic, and unsystematic normative system.<sup>53</sup> Within a single legislative act, there are power-conferring rules and duty-imposing rules. Within EU substantive law, there are reasons for action generally addressed to States, to national or EU administrative bodies, to national or EU legal officials, to individuals, and to varieties of private relationships. European private law is no longer a civil code divided into Books of Obligation, Property, Family, or Succession. Neither is it systematized according to addressee of rights such as Consumer Laws or Labor Laws. The EU, like all Regulatory States, while regulating markets, creates rules for the market and for a collectivity of individuals involved in markets: regulators, undertakings, consumers, and adjudicating authorities.

In EU constitutional pluralism, where non-systemic rules impact various and diverse legal systems, propositions about European private law have long relied on comparative studies based on the decisions of courts. The CJEU and the speech acts of national courts have been subject to massive and persuasive investigations that have looked at how judges interpret legal norms in different national legal systems. To manage comparative studies, variables have been carefully weighed to understand how diversity affects legal interpretation: multiple legal cultures,<sup>54</sup> translations of propositions in various languages,<sup>55</sup> methods of

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<sup>53</sup> Hans-W Micklitz argues EU is a “non-systematic” normative system and goes further with the proposition that it is also an unsystematic system of rules. For him, any attempt at systematization would harm the multi-legal cultural existing in Europe. See Micklitz, Hans-W. “The (Un)-Systematics of (Private) Law as an Element of European Culture.” In *Towards a European Legal Culture*, edited by Geneviève Helleringer and Kai Purnhagen. Germany: Nomos Verlagsgesellschaft, Verlag C.H. Beck and Hart Publishing, 2014.

<sup>54</sup> See the contributions in the edited book by Thomas Wilhelmsson, Elina paupino, and Annika Pohjolainen on “Private Law and the Many Cultures of Europe”. Wilhelmsson, Thomas. “Introduction: Harmonization and National Cultures.” In *Private Law and the Many Cultures of Europe*, edited by Thomas Wilhelmsson, Elina

interpretation,<sup>56</sup> socio-economic conditions,<sup>57</sup> and others. This thesis claims that comparative studies have contributed significantly to understanding the impact of one transnational law on multiple legal systems, but studies based solely on court decisions *could* have a myopic attitude towards European private law. These studies tend to see a vague and ambiguous European private law, leading legal systems to “divergence”, because private disputes tend to reach courts when mandatory rules applied to private relationships are vague, ambiguous, or contradictory.<sup>58</sup> Therefore, courts-centered investigations might have a *sample* bias, particularly when the object of research is European private law applied to private transactions. This focus might not capture provisions of European private law that are not vague, not ambiguous, and that have a low chance of conflicting with national legal systems. It also might not capture business-to-business disputes, which are solved outside courtrooms through negotiation, mediation or arbitration. Further, it might also be blind to small claims disputes in business-to-consumer relationships, which have been allocated to ADRs. In hybrid environments, this thesis proposes to investigate beyond courts and from the *Internal Point of View*.

The starting point of this thesis was defining the methodology. The choice was to investigate the private law dimension of EU Energy Law by tracing the impact of EU Law on *key* private transactions over three decades of Positive Integration. This thesis first identified two key transactions in energy: Supply Contracts and Transmission Service. The first type of transaction refers to a type of bilateral sales contract, in which goods (and services) are

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Paunio, and Annika Pohjolainen. Kluwer Law International, 2007. Tuori, Kaarlo. “Legal Culture and General Social Culture.” In *Private Law and the Many Cultures of Europe*, edited by Thomas Wilhelmsson, Elina Paunio, and Annika Pohjolainen. Kluwer Law International, 2007. See also Thomas Roher, Cotterrell. “Comparative Law and Legal Culture.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 1st ed. Oxford University Press, 2006.

<sup>55</sup> Curran, Vivian Grosswald. “Comparative Law and Language.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 1st ed. Oxford University Press, 2006. Nobles, Richard, and David Schiff, op. cit., 2013.

<sup>56</sup> Micklitz, Hans-W. “On the Intellectual History of Freedom of Contracts and Regulation.” *Penn State Journal of Law & International Affairs* 4, no. 1 (December 2015).

<sup>57</sup> Mattei, Ugo. “Comparative Law and Critical Legal Studies.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 1st ed. Oxford University Press, 2006. Riles, Annelise. “Comparative Law and Socio-Legal Studies.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 1st ed. Oxford University Press, 2006.

<sup>58</sup> Thinking from this perspective, Hans Lindahl’s assertion about Pluralism is plausible. Hans Lindahl argues the constitutive element of Pluralism is not the simple empirical claim about overlapping legal systems, but that Pluralism exists if, and only if, these overlapping legal systems conflict and resist. Hans Lindahl. “Legal Authority and the Globalisation of Inclusion and Exclusion” (Forthcoming in Cambridge University Press, 2017).

electricity or natural gas and parties sell and purchase it for spot, short, or long-term.<sup>59</sup> They could be commercial business-to-business relationships, where buyers either produce or resell energy, or business-to-consumer relationships. The second type of transaction refers to transmission services where the object of the contract is the right to *capacity* in transmission systems and pipelines. Transmission services are like “transportation” agreements in commercial sales of good. It assures the transportation of electricity and natural gas from producers to buyers, being then the means in which supply contracts are performed. These are two key private transactions that exist in every energy market worldwide. Following the identification of key transactions, this thesis analysed transactions *before and after* the European Integration Project, advancing an account of three decades of European Integration and how it impacted those two key transactions. While EU energy lawyers explain the impact of EU on the energy market in general, this thesis proposes taking a closer look at contracts to explain the impact of EU law on the private law dimension of private actors in energy markets. This was the point where this thesis implemented – (un) consciously – an investigation *from* the Internal Point of View.

Thinking about EU energy law from the perspective of a promisors or promisee was they key element that brought this thesis and this author to understand law from the Internal Point of View. Through literally *learning by doing*, the choice of understanding EU law through isolating types of contracts and identifying provisions of Law, CJEU decisions, and other sources of law providing “special reasons for actions” to promisors and promisees, this thesis implemented – (un) consciously – sociological contextualist methods to understand European private law.

Between the two *key* transactions in the energy market, Supply Contracts and Transmission Services, this thesis selected two Long-Term Contracts in business-to-business relationships: Long-term Reservation Capacity and Long-Term Supply Contracts. There are *three* reasons that justify the methodological choice of looking at these two types of transactions: they are both are *Long-term* agreements; they are both are *business-to-business* relationships; and they are different as one take place in a natural non-competitive market, while the other has natural restrictions on competition.

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<sup>59</sup> Even though the Supply of Gas and Electricity for final customers is distinguished as “Services of General Economic Interest”, Energy has been perceived either as a Good or Service depending on the legal framework.

Long-Term Contracts are interesting because their long-term *duration* tends to be longer than the changes in the EU Regulatory framework. Moreover, they are transactions in which contractual parties, in the case of business-to-business relationships, tend to react when the EU Regulatory Framework impacts on their pre-existing private order. Therefore, tensions between national systems of private law, protecting freedom of contract and *pacta sunt servanda*, tend to come up. Either EU Lawmakers create dimensions of EU Energy Law, or disputes tend to come up and reach Courts. How EU Energy Law impacts on the private dimension of those contracts will be the object of research in *Case I* on Long-term Reservation Capacity, and *Case II* on Long-Term Supply Contracts.

The following propositions guide the investigation in the field through the development of *Case I and Case II*. How has EU energy law intersected subjects of EU private law by ruling market transactions since the EU pursued the creation of the Internal Energy market for electricity and natural gas? In other words, how are these rules recognized (criteria of validity), how do they govern market transactions (normativity of law), and how do they interact with overlapping the national private law systems of Member States (interaction of plural legal systems)?

In Case I, this thesis develops the investigation into how primary rules of EU private law have directly and indirectly imposed duties and obligations on individuals involved in *Long-Term Capacity Reservation Contracts (LCRs)*: business-to-business contracts between electricity undertaking and TSOs operating transmission in electricity markets. In the context of network industries, the opening of the market for competition depends on creating rights to access networks as long as they are *natural monopolies*. Since the 1<sup>st</sup> Package, EU energy law implemented two strategies. It opted for unbundling TSOs when the property of transmission systems is held by electricity undertakings involved in supply operations. Thereon, the whole capacity of transmission systems became the object of contracts. Secondly, to ensure access to networks, EU private law has ruled contracts between TSOs and electricity undertakings over two decades of Positive Integration. This thesis shed light on how EU energy law started by creating rules with vague obligations of non-discrimination in the 1<sup>st</sup> Electricity Directive and later advanced to a mass production of semantically rigid rules through Network codes with general application.

In Case II, this thesis shifts the investigation from transactions in natural monopolies, and non-competitive markets, to competitive markets. While one could expect regulation in

transmission contracts, it is perhaps surprising that EU energy law also advances rules towards Upstream and Downstream Long-Term Supply Contracts. It has done so through both Sector-Regulation and Competition. By looking closely at Sector-Regulation, this thesis shows how EU lawmakers advanced few sets of rules that, though not as expansive as in transmission contracts, impact on private relationships with semantically rigid terms. With regard to Competition, this thesis identifies how the Commission used its adjudicating authority to supplement the primary and vague rules of the Treaty and, therefore, set out a “black list” of prohibited clauses through Commitment-decisions. Commitment-decisions are enforcement mechanisms that are neither a commitment nor a decision and, yet, are not judicially reviewed. Despite the large endorsement of commitment-decisions as a source of EU law by EU energy lawyers, research on European private law based on court decisions does not take them into account.

Both *Case I* and *Case II* support the claim in this thesis about the self-standing European private law. They both prove how European Private law in energy markets has advanced a normative system of rules with semantically rigid content. To grasp it, one needs to understand the normative system from the *Internal Point of View* and using the conceptual frameworks of secondary and primary rules is a powerful way to do so.

This thesis is divided into three Parts.

In the First Part (chapter 2), this thesis lays out the first layers of arguments. To identify rules governing private matters in the EU legal system, it maps the theoretical debate on conceptual disagreements regarding classic and modern concepts of private law. This reconciles two fields of legal scholarship that rarely meet – EU private law and EU energy law – and illuminates the commonly disregarded private law dimension of EU energy law.

In the Second Part (chapter 3), this thesis advances the conceptual framework that allows for the combination of concepts of primary and secondary rules and inputs of the postmodern philosophy of law to reveal the intertwined aspect of law and language in different approaches to Harmonization.

In the Third Part (*Case I* in chapter 4; and *Case II* in chapters 6 and 7), this thesis tests the prior developed analytical tools by tracing distinct types of rules in intersecting subjects of

EU Energy Law and EU Private law. It identifies a distinct set of EU rules governing individuals' behaviors in certain types of transactions with the goal of building the Internal Energy Market since the 1990s. The aim is to build an analysis in terms of how the semantic rigidity of language was created and how it changed over time.



– CHAPTER 2 –

**The Rise and Fall of the Classic Concept of Private Law:**

**Enhancing Legal Consciousness of European Private Law**

**1. Breaking my own paradigms: the DCFR and the Various Concepts of Private Law**

**2. Deconstructing the Classic Concept within and beyond States: Two Intellectual Developments, One Conclusion**

2.1 Adjusting Theory to Realism

2.2. Adjusting Theory to the Transformation of the State

2.2.1. The inner face of States: Towards Welfare and Regulatory States

2.2.2. The outer face of States: Globalization and the Privatization of Private Law

**3. Constructing the Modern Concept: The Legal Consciousness of European Private Law**

3.1. Negative Integration through Law and without Private Law

3.2. Negative Integration through Private Law: First Signs of European Private Meta-law

3.3. Positive Integration through Private Law: From European Private Law towards a Self-standing European Private Law

**4. Are we all pluralists? Legal Consciousness, Private Enforcement, and Effectiveness**



– CHAPTER 2 –

**The Rise and Fall of the Classic Concept of Private Law:  
Enhancing Legal Consciousness of European Private Law**

“Most questions and propositions of the philosopher result from the fact that we do not understand the logic of our language. They are of the same kind as the question whether the Good is more or less identical than the Beautiful”

Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*

This thesis started with the aim of answering one proposition: How has *EU Energy Law* interacted with *EU Private Law* governing contracts in the electricity and gas sectors since the EU has pursued the construction of a single internal Energy market? Over the years of research in the field, this author has witnessed two opposite reactions to this question: on one side are those who think this is a *meaningful question* and on the other are those who *dismiss it*. The reason for the opposite reactions lies in the logic of our language: the different and sometimes divergent *concepts of Private Law*. For those who understand the term Private Law through a classic conceptual lens, the term *European Private Law* is senseless. If the classic concept defines Private Law either as a *coherent* body of rules grounded in *autonomy-based value*, or as a *monist* and *codified* collection of rules of civil law made by States, the word *European Private Law* is senseless as long as it refers to a body of rules that is *functional, plural*, and made by *a particular multi-level governance of national and supranational governmental bodies*.

Taking a leaf out of the Wittgenstein's book on the logic of our language, the meaning of a sentence is determined as soon as the meaning of the components of the words is known.

<sup>1</sup> This chapter is written with the objective of giving meaning to the two key legal concepts of this thesis: *Private Law*, and thus also, *European Private Law*.

This chapter argues that debates over the private law dimension of the European Integration Project, as well as its interaction with national legal systems of private law, are hampered by the persistence of the classic concept of Private Law.<sup>2</sup> Classic Legal thought, which defines private law as a *coherent, systematic, and monistic* set of rules based on either *value-neutral* or *deontological autonomy values*,<sup>3</sup> has long been contested by two intellectual developments: one committed to challenging Formalism, the other bringing a perspective from the Sociology of Law. Though underpinned by different arguments of causality, for either metaphysical or epistemological reasons, both intellectual developments converge into one normative conclusion: the rise and fall of the classic concept of private law.<sup>4</sup>

Given that classic thought about private law doesn't work, I take it for granted that European private law is best understood through the lens of the modern concept of private law. The modern concept of Private Law begins from the recognition of rules related to contractual relationships, liability, and property rights. By doing so, it depicts Private Law not only as power-conferring rules allowing individuals to set binding obligations one to another,

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<sup>1</sup> Wittgenstein, Ludwig, David Pears, and Brian McGuinness. *Tractatus Logico-Philosophicus*. Routledge, 1975.

<sup>2</sup> This thesis is not the first piece of academic work blaming the persistence of Classic Legal Thinking (or Formalism) in Europe as a reason to reject the private dimension of EU Law. See Caruso, 1997, 2013; Kennedy, 1997, 2000. Caruso, Daniela. "The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration." *European Law Journal* 3, no. 1 (1997); Caruso, Daniela. "The Baby and the Bath Water: The American Critique of European Contract Law." *American Journal of Comparative Law* 61 (2013): 479–506. See also Kennedy, Duncan. "The Paradox of American Critical Legalism." *European Law Journal* 3, no. 4 (1997): 359–77. See also the historical approach by Letto-Vanamo, Pia. "Fragmentation and Coherence of Law - a Historical Approach." In *Coherence and Fragmentation in European Private Law*, edited by Pia Letto-Vanamo and Jan M. Smits. Sellier European Law Publishers, 2012.

<sup>3</sup> There are two formalistic approaches to private law. One claims private law is a system of rules with neutral-values. These arguments are commonly associated with Will Theorists of 19<sup>th</sup> century. The other advances a more sophisticated argument. It does not deny the moral ethics of private law, but grounds the moral ethics in deontological autonomy values. Ernest Weinrib develops this argument best. The classic Concept of Private Law as mentioned in this chapter refers to these two formalistic approaches to private law. See Weinrib, Ernest J. *The Idea of Private Law*. Revised edition. Oxford, United Kingdom: Oxford University Press, 2012.

<sup>4</sup> The title of this chapter borrows the dichotomy – "Rise and Fall" – as a reference to the remarkable works of private legal scholars who employed the expression to discuss the transformation of Private Law thinking focusing on British and American legal systems. Atiyah in "The Rise and Fall of Freedom of Contract" and Duncan Kennedy in "Rise and Fall of Classic Legal Thought" adopt genealogy to deconstruct the classic theory of private law as the result of the mainstream ideology of the 19<sup>th</sup> century. Kennedy, Duncan. *Rise and Fall of Classical Legal Thought*. Washington, DC: BeardBooks, 2006. Atiyah, P. S. *The Rise and Fall of Freedom of Contract*. Clarendon Press; Oxford University Press, 2017.

but it also reveals private law as a set of duty-imposing rules.<sup>5</sup> At the same time, private law embraces power-conferring rules as means to enforce the individuals' will, and there have always been duty-imposing rules obligating individuals to act in *good faith* and *fair competition*, or the rights to protect weaker parties or new market entrants. Therefore, if one agrees that duty-imposing rules of *good faith* are rules of private law, but at the same time describes private law either as system of rules with *value-neutral* or autonomy-based value, this factual claim is sufficient to grasp contradictions between the belief of what private law is and what private law is in action.

The modern concept of private law better explains private law *within, between, and beyond* States. Private law is a *dynamic* set of rules in a *national or supranational* legal system which are *means* to accomplish values, whether they are (moral) autonomy values or other utilitarian or social values.<sup>6</sup> While national private law refers to a combination of power-conferring rules and duty-imposing rules, a supranational system of private law only has duty-imposing rules. The classic concept is blind to picture it. It cannot identify how supranational private law interacts with national private Law, neither can it identify the effectiveness carried out by private enforcement. Furthermore, it cannot perceive the essential *functionalism* of private law as a means to accomplish one or a plurality of the Moral Ethical.<sup>7</sup> Whether there is a dichotomy in the values of private law *within* and/or *between* legal systems, the proposition is food for thought to legal scholarship investigating the private law dimension of European Private Law: individualism and altruism;<sup>8</sup> freedom-of-contract and freedom-to-contract,<sup>9</sup> and freedom of contract and regulated freedom.<sup>10</sup>

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<sup>5</sup> Klass, Gregory. "Three Pictures of Contract: Duty, Power, and Compound Rule." *New York University Law Review*, 2008, 1726–83; Hart, H. L. A. (Herbert Lionel Adolphus). *The Concept of Law*. Clarendon Press, 1961.

<sup>6</sup> Gordley, James. *The Philosophical Origins of Modern Contract Doctrine*. Clarendon Law Series. New York: Oxford University Press, 1991.

<sup>7</sup> The three moral ethics approaches to consent in private law –led-rights, led-utilitarianism, led-duty – refer to moral autonomy, utilitarian, an social value respectively. Beyleveld, Deryck, and Roger Brownsword. *Consent in the Law*. Hart, 2007.

<sup>8</sup> Kennedy Kennedy, Duncan. "Form and Substance in Private Law Adjudication." *Harvard Law Review* 89, no. 8 (1976): 1685–1778.

<sup>9</sup> Dagan, Hanoch, and Michael Heller. *The Choice Theory of Contract*. Cambridge: Cambridge University Press, forthcoming. See also Dagan, Hanoch. "Between Regulatory and Autonomy-Based Private Law." *European Law Journal* 22, no. 5 (September 2016): 644–58. doi:10.1111/eulj.12193.

<sup>10</sup> Micklitz, Hans-W. "On the Intellectual History of Freedom of Contracts and Regulation." *Penn State Journal of Law & International Affairs* 4, no. 1 (December 2015). Micklitz, Hans-W., and Guido Comparato. "Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU." In *General Principles of EU Law and European Private Law*, edited by Ulf Bernitz, Xavier Groussot, and Felix Schulyok. Netherlands: Kluwer Law International, 2013.

The EU legal system is the epitome of a transnational legal system grounded in a policy-oriented mandate. To pursue its mandate, the EU has advanced a set of rules regarding product liability, rights to withdraw, information duties, and others duties and rights governing contracts, property, and liability. These rules make the private law dimension of EU Law uncontestable. However, if one looks at the substantive law of EU Legal Systems having the classic concept of private law in mind, private law as conferring-power rules in *monist, coherent, and autonomy-based value* system, they would be inclined to dismiss any assertion about European Private Law. Therefore, most of the debate about whether or not EU Law has a private law dimension is often blurred by epistemological disagreements over the concept of private law, rather than empirical disagreements about the existence or non-existence of rules regulating transactions or use of property. The consequence is an underdeveloped *Legal Consciousness* regarding the private rights of EU Law when applied to private relationships and, therefore, a missed opportunity to improve the *effectiveness* of the EU Legal System through private enforcement and private remedies.<sup>11</sup> This is the reason for beginning this chapter by quoting Wittgenstein's book *Tractatus Logico-Philosophicus*: "most questions and propositions of the philosopher result from the fact that we do not understand the logic of our language".

This thesis aims to understand the impact of the European Integration Project on the private law dimension of energy Markets - EU Energy Law – with a close look at contractual relationships. But before starting, the deconstruction of the classic concept of private law is a *sine qua non* of developing firm common grounds - field and subject – to engage with this research. This is the aim of the chapter 2, which is divided into four sections.

The first section (1) introduces the problematic of how different concepts of private law have hampered genuine discussions on European Private Law in the context of the Draft Common Frame of Reference (hereinafter DCFR). It also introduces the first hints of claims developed in the next two subsections on why the classic concept of private law needs to be reviewed. The second section (2) of this chapter borrows a genealogical account from legal historians to separate the classic concept of private law from its origins. This sets the groundwork for the subsequent map of arguments raised by two different intellectual projects

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<sup>11</sup> Denis Galligan identified "the Contours of Compliance" as the main conditions to promote social "changes through Law" in modern Societies. Between them, he listed Legal Consciousness, a Settle Disposition to Comply with Law, and Legal Architecture that allows the dynamic change of the law. Denis, ed. *Law in Modern Society*. Oxford: Oxford University Press, 2016, pp. 332-341.

that both end by deconstructing this classic way of thinking: one based on the philosophy of law (2.1), and the other on the sociology of law (2.2). The latter intellectual development is then subdivided in two more subsections to observe the phenomenon of the transformation of private law: one that explains the transformation of private law within and by States (2.2.1), the other that observes the transformation of private law beyond States (2.2.2). The third section (3) then shifts the debate from the deconstruction of the classic concept to the construction of the modern concept in the context of the European Integration Project. It starts by explaining how European Private Law emerged and evolved along the three stages of the European Integration Project: negative integration through law without a private law dimension (3.1); negative integration through law and the first hints of European Private Meta-law (3.2), and positive integration through the expansion of European Private Law towards a self-standing European Private Law (3.3). The fourth section will then raise a question about the extent to which the persistence of the classic concept of private law among legal scholarship is still an obstacle to the effectiveness of EU integration through the combination of public and private enforcement.

## **1. Breaking my own paradigms: the DCFR and the Various Concepts of Private Law**

The beginning of the 21<sup>st</sup> century was also the beginning of a new round of debates among private lawyers in Europe motivated by the Commission's audacious plan to draft the European Civil Code. Before it, the last two decades of the 20<sup>th</sup> century were marked by the academic debate about the EU's bold move from *solely negative integration* towards the political process of *positive integration*.<sup>12</sup> Rules on consumer and company law were seen as

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<sup>12</sup> The distinction of *negative integration* and *positive integration* employed along this chapter follows the definition created by Fritz Scharpf in 1999, in which the former refers to the community integration mostly based on the enforcement of rights in the Treaties, and the later refers to the positive integration through the approval of Secondary Law. Later, Hugh Collins used the same distinction to explain the process of Europeanization of private law. See chapter 2 "Negative and Positive Integration" in Scharpf, Fritz. *Governing in Europe: Effective and Democratic?* Oxford University Press, 1999. Collins employs the same term to discuss European Private Law. See Collins, Hugh. *The European Civil Code : The Way Forward*. Cambridge University Press, 2008.

the most advanced intervention of EU Law into private law.<sup>13</sup> The European codification project in the early 21<sup>st</sup> century set new ground for the debate on European Private Law. The 2001 Communication of the European Commission launched the first initiatives of what was “the action plan on a more coherent European Contract Law”,<sup>14</sup> which motivated a large academic debate across Europe on the legitimacy of the European Code of Contract. The project, which started with the establishment of a working group, a so-called network of excellence, reached its highest point in 2008 with the release of the first edition of the DCFR, which was reedited and released in its full in 2009.<sup>15</sup> Ten comprehensive books together with “the Fundamental Principles of European Contract Law” would have formed, as the authors said, a “coherent body of European Contract Law”. Resembling the codification of private law in civil law systems, the DCFR addressed book-by-book, chapter-by-chapter, the core concepts of private law common to all legal systems – such as obligation, contractual liability, and unjust enrichment – which would have normative standards of conduct applicable to any individuals engaged in transactions within the EU’s jurisdiction. Moreover, besides the duties and obligation, the DCFR determined four principles as fundamental *values*: freedom, security, justice, and efficiency.<sup>16</sup>

Despite the fact that approximately 200 academics were behind the draft of the DCFR, the European codification project triggered different reaction among legal scholars in Europe, which instigated the vivid academic debate *pro and contra* the DCFR. By observing the arguments from both sides, one could map the debate in claims and arguments that circle

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<sup>13</sup> The consumer legal measures at EU level started with the Directive 85/374/EEC on product liability and later moved towards the Directive 93/13/ECC on unfair terms in consumer and Directive 1999/44/EC on consumer sales.

<sup>14</sup> European Commission Communication, “A more Coherent European Contract Law – An Action Plan”, COM (2003) 68 final, 2003.

<sup>15</sup> The Study Group on a European Civil Code and Research Group on the EC Private Law, “Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference”, the Study Group on a European Civil Code and Research Group on the EC Private Law. Acquis group’ in Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds) (2009).

<sup>16</sup> The first version of the DCFR was released in the 2008 edition, in which it enumerated a broad list of principles as principles of Contract law. In the 2009 full edition of the DCFR entitled “Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference”, the Study Group on a European Civil Code and Research Group reduced the long list of principles to “four fundamental principles”: freedom, security, justice and efficiency.

around key questions about what private law is – the concept of private law – and what private law should be.<sup>17</sup>

The first layer of argument *contra* the DCFR circled around the metaphysical concept of what private law is: whether or not it is an autonomous or functionalist system of rules. Some legal scholars asserted that the EU wouldn't have had the authority to enact a European Civil Code or even regulate private law as long as the conferred powers of the Treaty were restricted to improving the conditions of the *functioning* of the international market. Other *pro* DCFR legal scholars countered this point by holding that the EU's conferred powers are not organized in line with the *concepts* of public and private law, but this wouldn't have meant that the EU lacked the authority to enact rules of private law.<sup>18</sup> They dismissed the lack of authority claim using existing EU legislation governing contracts (e.g. unfair contract terms), property rights (e.g. intellectual property), and tort law (e.g. product liability) as counter-evidence. Yet the rejoinder of a third group of legal scholars counter-argued that the lack of authority claim was not grounded in the classic division of public and private law concepts, but rather in the question of whether a European Code would have genuinely been a means to improve the functionality of the internal market.<sup>19</sup> Hence, the first layer of the academic

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<sup>17</sup> For detailed discussions of competences with respect to private law: Micklitz, Hans W. "Review of Academic Approaches on the European Contract Law Codification Project." In *Liber Amicorum Guido Alpa: Private Law Beyond the National Systems*, edited by Mads Tønnesson Andenaes, Silvia Diaz Alabart, Sir Basil Markesinis, Hans-Wolfgang Micklitz, and Nello Pasquino. British Institute of International and Comparative Law, 2007. Weatherill, Stephen. "The European Commission's Green Paper on European Contract Law." *Journal of Consumer Policy* 24, no. 3–4 (December 1, 2001). Weatherill, Stephen. "Why Object to the Harmonization of Private Law by the EC?" *European Review of Private Law* 12, no. 5 (January 1, 2004): 633–60. Weatherill, Stephen. "Reflections on the EC's Competence to Develop a European Contract Law." *European Review of Private Law* 13, no. 3 (January 1, 2005): 405–18. Kenny, M. "The 2003 Action Plan on European Contract Law: Is the Commission Running Wild?" *European Law Review*. 28, no. 4 (March 22, 2007): 538–50; Ziller, Jacques. "The Legitimacy of the Codification of Contract Law in View of the Allocation of Competences between the European Union and Its Member States." In *The Politics of a European Civil Code*, edited by Martijn Willem Hesselink. Kluwer Law International, 2006. Hesselink, Martijn W. "The Politics of a European Civil Code." *European Law Journal* 10, no. 6 (November 1, 2004): 675–97. Van Gerven, Walter. "Codifying European Private Law: Top Down and Bottom Up." In *An Academic Green Paper on European Contract Law*, edited by Stefan Grundmann and Jules Stuyck. London: Kluwer Law International, 2002.

<sup>18</sup> Manko, Rafal. "EU Competence in Private Law: The Treaty Framework for a European Private Law and Challenges for Coherence." European Parliamentary Research Service, January 2015.

<sup>19</sup> For W. Van Gerven, the lack of authority of EU to enact a European Civil code could be grounded in the *British American Tobacco* case and *German v. Parliament and Council* case: "the Court held that a mere finding of disparity between national rules and the abstract risk of obstacles to the exercise of fundamental [economic] freedoms or of distortion of liable to result there from, [is not] sufficient to justify the choice of art. [95] as a legal basis. See Van Gerven, Walter. "The ECJ Case-Law as Means of Unification of Private Law?" In *Towards a European Civil Code*, edited by A. S. Hartkamp and Christian von Bar, 2004.

debate circled around the question of whether or not private law could be perceived solely in terms of functional rules.<sup>20</sup>

The second layer of argument *contra* the DCFR challenged the concept of private law as a hierarchical and coherent (or uniform) system of norms and principles. As the title of the Commission's action anticipated, the end of the European Codification project was to create "a more coherent European Contract Law". The claims *contra* the DCFR were then based on answering the following question: Would a European Civil Code have indeed created a more coherent Private Law in Europe? Several legal scholars categorically answered this question *negatively* by arguing that the DCFR misrepresented how private law functions in times of pluralism. Thomas Wilhelmsson<sup>21</sup> stressed the point that multiculturalism in Europe hampered the development of a coherent European Contract Law. Leone Niglia argued that, though the DCFR embraced pluralistic vocabulary, it perpetuated the hierarchical thinking of universal principles (universalism in pluralistic thinking).<sup>22</sup> Besides the prescriptive analyses, legal scholars built a normative argument against the DCFR. Grundmann objected to projects of full harmonization by underlining the economic advantages of having competition between private laws in different systems.<sup>23</sup> Despite different lines of argumentation, the second layer of criticism of the DCFR introduced a question about the legal formalism embedded in some private law thinking. It raised doubts about whether private law *is or could be* a coherent and hierarchical legal system of principles and norms.

The third and last layer of arguments *contra* the DCFR challenged the normative approach to private law as a coherent system of norms based on deontological-autonomous virtuous. The DCFR established four principles as fundamental principles of European

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<sup>20</sup> Comparato, Guido. *Nationalism and Private Law in Europe*. Hart Publishing, 2014.

<sup>21</sup> Thomas Wilhelmsson, "Varieties of Welfarism in European Contract Law." *European Law Journal* 10, no. 6 (November 2004): 712–33. Wilhelmsson, Thomas. "Introduction: Harmonization and National Cultures." In *Private Law and the Many Cultures of Europe*, edited by Thomas Wilhelmsson, Elina Paunio, and Annika Pohjolainen. Kluwer Law International, 2007.

<sup>22</sup> Leone Niglia argues that the DCFR does not reproduce the hierarchical and formalistic thought of 19<sup>th</sup> century, which eliminates from the legal frame anything that is plural. For Niglia, it is a new way in which "formalism has been rearranged to meet the contingent policy demands coming from the European Commission. What matters in this perspective is the morality of the universal values that is presumed to be the best for ruling the plurality of legal orders". Niglia, Leone. "Pluralism in a New Key: Between Plurality and Normativity." In *Pluralism and European Private Law*, edited by Leone Niglia. Oxford: Hart, 2013, p. 250-251. See also Niglia, Leone. "The Question Concerning the Common Frame of Reference." *European Law Journal* 18, no. 6 (2012).

<sup>23</sup> Grundmann, Stefan. "The Role of Competition in the European Codification Process." In *European Private Law after the Common Frame of Reference*, edited by Hans W. Micklitz and Fabrizio Cafaggi. Cheltenham: Edward Elgar Publishing Ltd, 2010.

Contract Law: contractual freedom, security, justice, and efficiency. One could claim that the four fundamental principles are conflictual by themselves. By stressing the horizontal dimension of pluralism in European private Law, Norbert Reich and Hans Micklitz questioned the “four main European Contract law principles” of the DCFR by shedding light on the already existing “pluralism of – possible conflicting – principles in private law and the EU on which the DCFR is based”.<sup>24</sup> In parallel, the Study Group of private legal scholars published a paper entitled “Social Justice and European Contract Law: the Manifesto”.<sup>25</sup> By departing from the assumption that private law has long been instrumentalised by States to accomplish social justice, the article served as a manifesto to reassure the continuity of the social values of private law. By doing this, it questioned whether Private Law is a coherent system of norms grounded in autonomy value-based.

Fifteen years have already passed since the first European Commission’s initiative towards the creation of a *grand* codification at the Union level. The cool down of both political and academic debates on the European Civil Code confirmed the predicted political unfeasibility of the Commission’s plan. Moreover, the later withdrawal of the draft proposal on a Common European Sales Law by the Commission<sup>26</sup> reinforced the unpalatable taste of the Commission’s plan in harmonizing rules of Private Law through broad packages, which would have invalidated large parts of civil codes. Furthermore, over the years the opinion of private legal scholars has converged regarding the assertion that the DCFR would have failed in its end: “plan a more coherent European Contract Law”.

If, on the one hand, the DCFR failed in being enacted as the first supranational Civil Code, on the other hand it was very successful in gathering private legal scholars from all over Europe to discuss what *private law is* and what *private should be* at the conceptual level. By describing *bits* of the complex academic debate oscillating between *pro and contra* the DCFR Project, one could conclude that private law is indeed fragmented in the plural legal system. The concept of Private Law is so fragmented and in fact, the degree of its fragmentation justifies this chapter. If this thesis is committed to answering the question of

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<sup>24</sup> Norbert, Reich. “Monistic Ideology versus Pluralistic Reality: Towards a Normative Design for European Private Law.” In *Pluralism and European Private Law*, edited by Leone Niglia. Oxford: Hart, 2013. pp. 78-79

<sup>25</sup> “Social Justice in European Contract Law: A Manifesto.” *European Law Journal* 10, no. 6 (2004); Hesselink, Martijn Willem. *CFR & Social Justice : A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law : What Roles for Fairness and Social Justice?* Sellier, 2008.

<sup>26</sup> COM(2011) 635 final.

how European Private Law has governed contract, it has to deal primarily with the question: What theory of Private Law grounds the assertions in this thesis regarding what private law is, and thus, more importantly, what European Private Law is?

Some of the arguments for and against the DCFR project revealed that lawyers do not agree on the concept of private law in Europe or worldwide. One of the reasons is the persistence of the use of classic private law among lawyers, particularly in civil law traditions. Within the traditional frame, the concept of private law has defined itself as a *coherent* (or *uniform*), and hierarchical (*monistic*) system of law based on the virtue of *autonomy* (or individuals' will).<sup>27</sup> If one applies this concept of private law to understand how law has governed transactions, they would find evidence for and against to maintain their perception. The traditional definition of private law would depict power-conferring rules which allow individuals to establish obligations between each other: the law created by private parties and enforced between these private parties while doing transactions or joint ventures. Both civil and common law systems embraces principles of *pacta sunt servanda* whereby *consent* is the foundations of validity: the individuals' will must be observed as the law between parties. However, this concept of private law does not capture the principles and rules that conflict with autonomy-based value. It struggles to explain principles rooted in private law that have existed since Roman Law such as *culpa in contrahendo*, which is found today in both the civil and common law systems; the private law within States.<sup>28</sup> Even those who consider *culpa in contrahendo* as positive duties of information aligned rather than conflicting an autonomy-based theory of private law,<sup>29</sup> get into trouble when explaining why notions of good faith and fair dealing, misrepresentation, and unjust enrichment are chapters of textbooks on Contract

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<sup>27</sup> The assertion that the classic concept of private law tends to be endorsed by private lawyers in Civil Law system, where Private Law is systematized in Civil Codes, it does not mean there is no legal scholars in common law system advocating for the traditional concept of private law. In fact, Professor Ernest Weinrib, who is the most preeminent *defender* of Formalism in Private Law nowadays, has common law as reference to defend his idea of an "Immanent Rationality of Law". Weinrib, Ernest J. "Legal Formalism: On the Immanent Rationality of Law." *Yale Law Journal* 97, no. 6 (1988).

<sup>28</sup> The concept of *culpa in contrahendo* could go back in time to the seminal article written by Rudolf von Jhering in 1861, entitled "Culpa in contrahendo, oder Schadensersatz bei nichigen oder nicht zur Perfektion gelangten Verträgen". Rudolf von Jhering advanced the thesis that private parties in private relationships have the duty of acting in good faith and, if so, sellers have the obligation to inform (information duty) certain conditions features of good or service to buyers during negotiations, which has long been recognized as principles of Private Law in German Private Law and beyond. Frederich Kessler and Edith Fine published in 1964 the comparative studies on how the notion of good faith and fair dealing in the American legal system have served many of the doctrinal functions of *culpa in contrahendo*. Kessler, Friedrich, and Edith Fine. "Culpa in Contraendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study." *Harvard Law Review* 77, no. 3 (1964): 401–49.

<sup>29</sup> Dagan (2005).

Law. Besides all the inconsistencies between the classic theory of private law and private law within States, it gets even worse when rules dealing with preliminary negotiation, default, and information duties are enacted by supranational bodies, which overlap with national systems of private law and sometimes have conflicting values.

Considering the EU Legal System is *per se plural* and *functional*, those who read this thesis through the classic concept of private law tend to deny the existence of European Private Law. However, if interlocutors who reject European Private Law are the same people who agree with the proposition that *culpa in contrahendo* is a private law doctrine, what could be their answer when the Product Liability Unfair Term Directives is under scrutiny? Though EU Law, both have rules imposing information duties and withdrawal rights. If the classic concept of private law solely captures one part of a whole body of rules commonly described as private law, why are lawyers and (some) legal scholars still replicating and reproducing a Theory of Private Law is a coherent system of rules based on autonomy-based value or neutrality?<sup>30</sup>

There are two reasons for the *path dependence* on the classic theory of private law, particularly in civil law systems, and it starts with the way in which legal education programs have been systematized. To accommodate the debate on the public and private law divide raised by Welfare States,<sup>31</sup> legal subjects were allocated in rigid boxes: one for national public law, another for national private law; one for international public law, another for international private law. Moreover, program content of national private law was and is still divided according to Civil Codes: civil, obligations, property rights, tort, family, or succession. Within this frame, disciplines of labor law, consumer law, and competition law are treated either as public law or disciplines in the peripheries of private law.<sup>32</sup> Yet the

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<sup>30</sup> Hans-W. Micklitz described his own experience as private lawyer engaged in conversations and academic debates about “Autonomy”, where people use the same term but have different concept in their minds. He does call it (un) consciousness lost in translation. Micklitz, Hans-Wolfgang. “On the Intellectual History of Freedom of Contracts and Regulation.” *Penn State Journal of Law & International Affairs* 4, no. 1 (December 2015).

<sup>31</sup> Micklitz, Hans-W. “Rethinking the Public/Private Divide.” In *Transnational Law: Rethinking European Law and Legal Thinking*, edited by Miguel Maduro, Kaarlo Tuori, and Suvi Sankari. Cambridge: Cambridge University Press, 2014. Reich, Norbert. “The Public/Private Divide in European Law.” In *European Private Law after the Common Frame of Reference*, edited by Hans W. Micklitz and Fabrizio Cafaggi. Cheltenham: Edward Elgar Publishing Ltd, 2010.

<sup>32</sup> Kaarlo Tuori’s contribution to the 1<sup>st</sup> Annual ERPL Conference describes the public and private law division as a systematization that no longer represents Law in modern societies. Yet Tuori continues arguing that terms like hybridity, commonly associated to transitional legal systems, is sometimes used to cover “conceptual confusions” about what law is and what is not law. See Tuori, Kaarlo. “On Legal Hybrids.” In *A Self-Sufficient European Private Law: A Viable Concept?*, edited by Hans W. Micklitz and Yane Svetiev. EUI Working Paper 2012/31, ERC-ERPL 01/2012. Florence: European University Institute, 2012.

public and private law divide of legal education is not the cause for *path-dependence* on the classic theory of private law, but merely facilitator. The nexus of causality lies in the persistence of the classic concept of private law in legal scholarship, which spills over into legal practice. Teaching private law categorically as means to autonomy-based value or neutrality inhibits lawyers from thinking about private law through a broader lens. It presents private law as an apolitical or neutral body of law when in fact the whole substance of private law reflects political choices and moral values. This is the truth that explains rules protecting individuals' will written in testaments, rules determining contractual capacity above or below a certain age, which were not conferred to women just a few decades ago,<sup>33</sup> and rules avoiding slayers to profit from wrongdoing.<sup>34</sup>

In opposition to the classic concept of private law, an acute awareness of the incompatibility between private law in books and private law in practice has pushed the agenda on the modernization (or transformation) of Private Law Thinking. Scholars claim there is a need to reconnect the theory of private law with what private law is within and beyond States. Rather than having a concept of private law define the *feature of its rules* (systematic and coherent) or restrain its ends to one value or no-value the modern concept of private law has two dimensions. It embraces the concept that first identifies the *subject* of private law, and further provides conceptual tools to *validate* the law regulating the subject, rules and values. Andrew Burrows provides us with a very precise and succinct account of the subject of Private Law.<sup>35</sup>

“The law of Property defines the boundaries of our rightful possessions, while the law of torts seeks to make us whole against violations of those boundaries, as well as against violations of the natural boundaries of our physical person. Contract law ratifies and enforces our joint ventures beyond these boundaries”

If private law is dynamic, the concept of private law firstly refers to its subject (i.e. contract, property, tort), rather than the feature of its rules. Secondly, private law, as any other law, has to pass through a validity test based on social rules of recognition. Gregory Klass

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<sup>33</sup> See Currie, Brained. “Women’s Contracts: A Case Study in Conflict of Law Method.” *The University of Chicago Law Review* 25, no. 2 (Winter 1958).

<sup>34</sup> See *Mutual Life Insurance v. Armstrong*, the landmark case establishing the Slavery Doctrine in the American legal system.

<sup>35</sup> Burrows, Andrews. “Contract, Tort and Restitutions. A Satisfactory Division or Not?” *LQR* 99 (1983). also Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 1996.

define rules of contract law as the combination of two pictures.<sup>36</sup> He refers to private law as a combination of power-conferring rules and duty-imposing rules, which is aligned with the choice to use Hart's concept of secondary and primary rules as the basis for the criteria of validity in this thesis. Nevertheless, a similar approach to private law can be found in Deryck Beyleveld and Roger Brownsword in the ethics of consent.<sup>37</sup> While power-conferring rules provide individuals with the power to establish law between parties through the manifestation of *Consent*, duty-imposing rules limit individuals' autonomy in light of moral and social values. The same rule of recognition that validates legal norms enshrining rights and duties and govern behavior, also validates a plurality of ethical perspectives. If so, the rule of recognition that validated rules restraining the contractual capacity of women in the 1950s is the same rule of recognition that validates equal rights for women in 21<sup>st</sup> century. The rule of recognition did not change in half a century. What did change were the duty-imposing rules and values in legal systems.

Private law is composed of *dynamic* rules that reflect the *values* of a legal system, whereby rules are more dynamic than *values* over time. Therefore, the Theory of Private Law that conjures a classic sense is misleading because it, at best, refers to a theory of private law in conformity with Liberal States in the 19<sup>th</sup> century or, *at worst*, refers to a normative theory of private law developed with descriptive term with the aim of avoiding distribution of wealth within society. At best or at worst, the classic concept of private law became obsolete throughout the time. In contrast, if the concept of private law refers to its subject, it allows an observer to see the *dynamic* of how law governs private relationships regardless the values of the society at certain moment in time. One will see that private law was and is still *functional* and *dynamic*. (Private) Law is means to ends and, along the history, these ends have oscillated between values: autonomy (moral) values, social values, and utilitarianism values.<sup>38</sup> Others will conclude that private law is now, more than ever, *plural* beyond States and by non-State entities.

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<sup>36</sup> Gregory Klass (2008).

<sup>37</sup> Deryck Beyleveld and Roger Brownsword map the Ethics of Consent though identifying three approaches to consent: a Utilitarian approach, a Right-led Approach, and a Duty-led Approach. Instead of describing private law from one of the ethics of consent, they rely on the moral theory of Alan Gewirth to explain how private law deals with the plurality of ethical perspectives. Deryck Beyleveld and Roger Brownsword op. cit., pp. 32-38.

<sup>38</sup> Patterson, Dennis M. "Reviewed Work: The Idea of Private Law by Ernest J. Weinrib." *Modern Law Review* 58, no. 6 (1995): 916-17.

Since the early 1990s, legal scholars on both sides of the Atlantic have advocated for the deconstruction of classic private law thinking. Legal scholars in both the US and Europe, through disagreements about the causes that justify the detachment of laws in book and law in action (the two intellectual developments), favored private law reexamination (one conclusion). They both deconstruct the deontological basis for private law as a normative system autonomy-based value or the rhetoric discourses about neutrality of private law.

In the 1980s the same discussion went beyond State borders and reached transnational legal systems. Different from prior studies, which assessed private law within States, European and International Lawyers started to observe the emergence of private law beyond States. Being the most advanced transitional body of law with a policy mandate of having integrated markets, the Integration Project spilled over into private law.

European Private Lawyers have long observed the expansion of the European Integration project upon private since late 1970s.<sup>39</sup> European Private Law thus means the gradual enactment of imposing-duties rules governing contract, tort, and property, and joint venture, which then overlap with national private law in contract law, tort law, property law, and company law. When the EU legal system steps into private law, legal scholars have described the intersection with national legal system as not a single path. European Private Law could provoke different reactions in national legal systems: *divergence* or *convergence*, *resistance*, or intrusion.<sup>40</sup> However, to engage with European Private Law, the deconstruction of the classic Theory of Private Law is indispensable. Given the deconstruction of classic concept(s), the modern concept of private law is then the normative approach endorsed by this

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<sup>39</sup> Among several private law scholars that dedicated their work to understand the process of Europeanization of Private Law, special attention must be given to the *Acquis Group*, which was established to analyze the existing *acquis communautaire*. They were those who raised their voices to argue that EU legal order had interfered in contract law through the body of rules in EU primary and secondary law and Court decision. This thesis has benefited immensely from the proposition on the substantive and institutional aspects of European Private Law that were formulated for their member. See Gerhard Dannemann, *Consolidating EC Contract Law: An Introduction to the Work of the Acquis Group*, in Acquis Group, *Contract I: Pre-contractual Obligations, Conclusions of Contracts, Unfair Terms*. See also Christian Twigg-Flesner, *The Europeanization of Contract Law*, 2008. Twigg-Flesner, Christian. *The Europeanisation of Contract Law: Current Controversies in Law*. Routledge-Cavendish, 2007.

<sup>40</sup> The categories of *conflicting and resistance*, *convergence*, *intrusion and substitution*, are categories developed by Hans W-Micklitz within the framework of the ERPL Project. See Micklitz, Hans-W. "The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation." *Yearbook of European Law* 28, no. 1 (2009): 3–59,. See also Micklitz, Hans-W. editor, Yane Svetiev, and Guido Comparato. *European Regulatory Private Law: The Paradigms Tested*. European University Institute, 2012.

thesis. The objective of this chapter is then to set out common ground for the coming chapter on European Private Law.

As has been said, theoretical propositions about the transformation of private law thinking are not exclusive to European legal scholarship. European Private Law is indeed one subject that composes the broader camp of transformation of private law. Yet the EU legal system represents the epitome of transnational law, and, therefore, the foundations of European Private Law and its interaction with national private law in Member States is more complex than any other private law beyond State. These are the reasons why the next two subsections are divided into two parts. The first part maps the arguments that deconstruct classic private law thinking within and beyond States in general, reinforcing the modern concept of private law (2). The second part takes a closer look at how the deconstruction of the classic concept of private law helps us understand the phenomenon of European Private Law over time (3).

## **2. Deconstructing the Classic Concept within and beyond States: Two Intellectual Developments, One Conclusion**

Private legal scholars have long upheld that there is a need for the fall of the classic concept of Private Law. The Classic Theory of private Law was brought about with a 19<sup>th</sup> century codification project and has persisted as the mainstream way of thinking about private law within national legal systems.<sup>41</sup> Yet legal scholars have criticized the metaphysical and epistemological foundations of classic private law worldwide. Neither Formalistic nor Universalistic are treated as uncontestable theories of private law. The concept of private law based on the virtuous of autonomy (or the will theory) as the normative framework of a coherent, hierarchical and *monistic* system is and must be challenged in legal scholarship and legal practice.

First the foundations of classic private law need to be defined in order to understand the critical thinking of those who argue in favor of the modernization of classic private law.

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<sup>41</sup> Kennedy, Duncan. "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form.'" *Columbia Law Review* 100, no. 94 (2000): 94–175.

James Gordy's work is notable because he traces the origins of the legal doctrine of private law, which he later uses to underpin metaphysical and normative reasons as to why there is a need for the modernization of private law thinking. Before the establishment of classic private law thinking in the 19<sup>th</sup> century, Scholastics, a member of the medieval philosophical school of scholasticism in the 16<sup>th</sup> and 17<sup>th</sup> centuries, were recognized for their efforts in building a coherent system of doctrines and principles of Roman law. As James Gordy stresses, Scholastics preserved key inherent concepts from Aristotle's theory of ethics such as *just price* and *equitable contract terms* in the system they built.<sup>42</sup>

In contrast to Scholastics, jurists in 19<sup>th</sup> century started to construct a legal discourse criticizing the existence of a normative system where rules and principles could conflict. Back then, the legal discourse begun to converge to the idea that conflicting principles and rules would cause legal uncertainty. The solution was then to develop a theory of private law in which the concept of will – as the expression of individual's autonomy – was the cornerstone of a coherent, hierarchical and *monistic* private law system.<sup>43</sup> The consequence was the binary division between private and public law as two separate coherent systems: Private Law would be based on autonomy and corrective justice, while public law would be based on the moral and social values of distributive justice. The systematization of national private law in codes was referred to as the concrete manifestation of this paradigm, which was reinforced by the movement of National Constitutions.<sup>44</sup> Norms of Private Law rooted in the Aristotelian tradition of commutative justice – such as *just price* and *equitable contract terms* – were no longer explained by the Theory of Private Law of the 19<sup>th</sup> century, despite being concepts with meaning in the philosophical synthesis of late scholastics.<sup>45</sup>

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<sup>42</sup> Here we are talking about the late scholastic or Spanish natural law school were the first to give Roman Law a theory and systematic doctrinal structure. Their leaders were Domingo Soto (1494-1560), Luis de Molina (1535-1600) and Leonard Lessius (1554-1623). Their work deeply influenced the 17<sup>th</sup> century founders of the northern natural law school Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694). see James Gordley, op. cit., 1991.

<sup>43</sup> About the break that emerged in the 19<sup>th</sup> century by the will theorists, see James Gordley (1991); Kennedy (2006). See also the historical account of David Ibbetson, where he writes about the Modern Theory of Contracts, the rise of the Will Theory and its declined with the implementations of Legal Regulations and Contractual Fairness. Ibbetson, David. *A Historical Introduction to the Law of Obligations*. Oxford University Press, 2001.

<sup>44</sup> See Micklitz (2014); Reich (2010).

<sup>45</sup> James Gordley distinguished the jurists — Will Theorists – from philosophers who were utilitarian like Benthan or rights based as Kant and Hegel. While the former had a philosophical meaning of will, the jurists adopted the simplistic idea of what will means and impressed it into service. Gordley, James. *Foundations of Private Law : Property, Tort, Contract, Unjust Enrichment*. Oxford, New York: Oxford University Press, 2006.

To understand how classic private law thinking was received in the 19<sup>th</sup> century, James Gordley builds an analogy between the proposition of the Will Theory and how the theoretical construction was attractive to both prominent philosophies present in 19<sup>th</sup> century: utilitarianism and rights based theories.<sup>46</sup> In Utilitarianism, if the task of law is to ensure that people's preferences are satisfied to the greatest extent possible, the Will Theory is attractive for protecting and enforcing parties' preferences; individuals' choices. For rights based philosophers, if law is obligatory because it is rooted in human freedom and autonomy, the will theory in private law provides the status of a right to individuals' expression of freedom. Classic private law thought flourished in legal discourse with this philosophical meaning of will. The Will Theory separated law into two different boxes: private v. public law, corrective v. distributive justice, apolitical v. political, neutral v. values. The supremacy of the will of the parties – captured by the expressions autonomy-based value and freedom of contract – serves as justification for private law thought rooted in an individualistic and philosophical conception of autonomy.

Although classic private law theory dates back to the early 19<sup>th</sup> century, its propositions of private law survived to modern times and they have still persisted in postmodern societies. To explain the difference between scholars who still uphold the classic private law thinking in the 21<sup>st</sup> century and those who argue in favor the modernization of private law, this thesis borrows a metaphor used by Hugh Collins, who illustrates the separation of the public and private systems of law as semi-detached houses: one representing private law, the other public law. For classic private law thinking, the structural relation between private and public law systems resembles semi-detached houses that are inhabited entirely separately. One would be composed by power-conferring rules giving individuals the freedom to enforce their will among themselves, while the other would be composed of duty-imposing rules giving the State the power to impose its will. Each legal system develops its own autonomous integrity and coherence and there is no interconnection.<sup>47</sup> For modern private lawyers, the structure of the semi-detached houses needs to be portrayed differently, but how it is portrayed changes from one lawyer to the next. For this thesis, the house of private law is inhabited both by conferring-power rules and imposing-duties rules addressed to subjects of human

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<sup>46</sup> James Gordley (2006).

<sup>47</sup> The two characterizations of the two intellectual developments were borrowed by Hugo Collins. Collins, Hugh. "The Impact of Human Rights Law on Contract Law in Europe." *European Business Law Review* 22, no. 4 (2011): 425–35.

relationships. Private law is then the result of a dynamic interaction between pluralities of ethics that inhabit the same house.

For Collins, one among many private legal scholars who criticizes classic private law thinking, there are *two* intellectual developments. Despite theoretical disagreements over the arguments about why classic private law theory needs to be dropped, both intellectual developments converge on the claim that private law thinking needs to be modernized.<sup>48</sup> While one intellectual development dismisses the doctrinal and legal theoretical foundation of classic private law by revealing its unrealistic grounds and social construction project, the other perceives classic private law as a theory suitable for the Liberal State, yet that it needs to be adapted to the continuous transformations of the State in modern and postmodern societies.

### *2.1 Adjusting Theory to Realism*

The first intellectual development arguing for the modernization of private law *thinking* arose among legal philosophers who refused both the epistemological and the metaphysical foundations of classic, 19<sup>th</sup> century private law theory. For them, classic private law thinking – intentionally or non-intentionally – distorts reality because it bases its metaphysical proposition of private law on arguments that goes far from features of what private law is in practice. Put simply, the first intellectual development sees classic private legal thinking as a patient that has become ill with a condition of cognitive distortions. This is the reason why they do not claim to be in favor of the *transformation of private law*, but rather they favor the *transformation of classic private law thought*.

There are three schools of legal thought that undermine the foundation of the classic theory of Private Law: Legal Realism, and Critical Legal Studies. For legal realists, describing private law as an autonomous system based on the supremacy of the will of the parties is founded on an erroneous formalistic approach to law. If legal theories must represent the metaphysical views of the world, an empiricist proves that there have always been propositions of law solving substantive legal issues that are based on opposite rhetorical

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<sup>48</sup> Hugo Collins uses the analogy of the two semi-detached houses to draw the distinction between two theories of private law. Collins, Hugh. “On the (In)compatibility of Human Rights Discourse and Private Law.” In *Constitutionalization of European Private Law*, edited by Hans-W. Micklitz, First edition. The Collected Courses of the Academy of European Law, volume XXII/2. Oxford, United Kingdom: Oxford University Press, 2014.

modes: individualism and altruism.<sup>49</sup> As it stands, the claim that private law is not in the service of any external moral obligation is metaphysically and epistemologically debatable. This is the core point of departure for those who claim there is a disconnect between the *law in books with law in action*.<sup>50</sup> Critical Legal Scholars, who moved beyond the realists by applying genealogical methods to the study of classic private law theory, argue that the legal doctrine of an autonomous private law system was a normative theory of private law built to support the contingent distribution of wealth in the 19<sup>th</sup> century.<sup>51</sup> What was a normative will theory, which might have been well suited to the political conjuncture of the 19<sup>th</sup> century, has been twisted into descriptive rhetoric about the foundation of private law perpetuating the contingent distribution of wealth of the 19<sup>th</sup> century over subsequent years.<sup>52</sup>

## 2.2. *Adjusting Theory to the Transformation of the State*

Rather than rejecting the foundations of classic private law thinking as a theoretical construction, the second intellectual development perceived it as a legal doctrine conforming the purposes of Liberal States in the 19<sup>th</sup> century and the codification movement in Continental Europe.<sup>53</sup> However, it became obsolete over time with the transformation of States. The challenge of those who argue in favor of the modernization of private law is to reconcile private law thinking with modern and postmodern societies.<sup>54</sup> To do so, the modernization of private law could be described from the observation of the transformation of the State from two dimensions, which is expressed in the metaphor of the *inner* and the *outer*

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<sup>49</sup> Kennedy, Duncan. "Form and Substance in Private Law Adjudication." *Harvard Law Review* 89, no. 8 (June 1976): 1685–1778.

<sup>50</sup> The distinction between "Law in book and Law in practice" is commonly associated with Oliver Wendell Holmes' Legal Empiricism. About the influence of Holmes in the Realism movement see Twining, William. *Karl Llewellyn and the Realist Movement*. Second edition. Cambridge University Press, 2014. Holmes, Oliver Wendell. "The Path of Law." *Harvard Law Review* 10 (1897): 457.

<sup>51</sup> Kennedy, Duncan. "Toward and Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940." *Research in Law and Sociology* 3 (1980): 3–24.

<sup>52</sup> Kennedy, Duncan. "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form.'" *Columbia Law Review* 100, no. 94 (2000): 94–175. Kennedy, Duncan. "Formalism." In *International Encyclopedia of the Social Behaviour Science*, Vol. 13. Amsterdam: Elsevier, 2001.

<sup>53</sup> Wieacker, Franz. *A History of Private Law in Europe with Particular Reference to Germany*. Oxford : New York: Clarendon Press; Oxford University Press, 1995.

<sup>54</sup> Franz Wieacker (1995).

*face* of the State firstly coined by Phillip Bobbitt.<sup>55</sup> By observing the transformation of States from its *inner face*, this thesis undermines the metaphysical character of classic private law. By observing it from its *outer face*, it reveals the emergence of a modern concept.

### 2.2.1. *The inner face of States: Towards Welfare and Regulatory States*

If the classic theory of private law represented a metaphysical account of law in Liberal States, it could no longer represent private law in Welfare States in the early 20<sup>th</sup> century,<sup>56</sup> nor could it represent private law in Regulatory<sup>57</sup> or Market States.<sup>58</sup> Whereas Will Theorists have persisted in articulating private law as a *coherent, monistic* system grounded in autonomy (in its individualistic and philosophical conception), private law has changed through legislation and adjudication to accommodate the values of modern and postmodern societies. Private law became, henceforth, the means to accomplish the ends pursued by different types of societies such as Welfare States in the 20<sup>th</sup> century and Regulatory States in 21<sup>st</sup> century.<sup>59</sup>

The classic thinking started to be undermined with the emergence of the Welfare State in the early 20<sup>th</sup> century. In Europe, the pressure of social movements over States led to legislative reforms to protect weaker parties exposed to contractual relationships with an imbalance of bargaining power. Back then; Franz Wierweck classified these new rules

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<sup>55</sup> This thesis borrows from Phillip Bobbitt the terms “*Inner and Outer face of States*”. Nevertheless it does so with a slight difference in meaning, in particular when it concerns the outer face of States. In relation to the inner face of States, Bobbitt uses the term to depict the way in which States regulate their own nation through State laws. To what concerns the outer face, Bobbitt describes how States have a strategic relationship with other States. In this thesis, the outer face of States represents the relationship that States pursue with other States and also private and public organizations that does not fall into the institutional category of Sovereign State. As it stands, the definition of the Outer and Inner faces of States applied in this thesis is more aligned with the description employed by Dennis Patterson and Ari Afilalo. See Bobbitt, Philip. *The Shield of Achilles : War, Peace and the Course of History*. First edition. Knopf, 2002. Patterson, Dennis M. (Dennis Michael), and Ari Afilalo. *The New Global Trading Order : The Evolving State and the Future of Trade*. Cambridge University Press, 2008.

<sup>56</sup> Franz. Wieacker (1995).

<sup>57</sup> Majone, Giandomenico. “The Rise of the Regulatory State in Europe.” *West European Politics* 17, no. 3 (July 1, 1994): 77–101.

<sup>58</sup> For Hans Micklitz, Market State is “With a view of regulatory integration, the main features of the EU Market State are the following: the shift from private into public - the State outsources its regulatory functions; the shift from law and regulation to regulation and outsourcing privatization, such as may be observed in the areas of utilities, transportation and healthcare. The bottom line: sovereignty loses its Nation State force and preserving market conditions for the maximization of economic opportunity”. Footnote 21, Micklitz in Lioni 2013.

<sup>59</sup> Caruso, Daniela. “Contract Law and Distribution in the Age of Welfare Reform Symposium: AALS Section on Contracts: New Frontiers in Private Ordering.” *Arizona Law Review* 49 (2007): 665–94.

restricting freedom as implications of social solidarity.<sup>60</sup> Labor and Consumer law created rules of contract, property, and tort. If one takes the transformation of States *hand-in-hand* with the *dynamic* change of law, private Law presented itself as a dynamic instrument.<sup>61</sup> In 1936, the French government approved the *Accords of Matignon* after the May-June general strike. It restrained the prior autonomy of employees and employers to freely negotiate weekly working hours and wages. By the time the German government had already passed a Cartel Ordinance, during the inflation crisis of 1923. This act reinforced State authority to restrict the autonomy of parties when the terms and conditions of contracts resulted in inflating surplus revenue to the detriment of consumers.<sup>62</sup> Decades later, the House of Lords confirmed the punitive damages awarded by the jury in the famous 1964 case *Rookes v Bernardes*, and tort law became a regulatory instrument to dissuade outrageous behavior, which is far from its corrective justice purposes in classical private law terms.<sup>63</sup>

With the decline of Welfare States and the emergence of Regulatory States, the system of private law took another turn in the late 20<sup>th</sup> Century. At this time, trust in market mechanisms pushed wide reform to open markets for competition. Public operations in heavy industries and public utilities were privatized and exposed to hybrid rules in Regulation and Competition. Both Regulation and Competition impact private law creating duty-imposing rules to govern human behavior and, at the best, to pursue utilitarian values. In Electricity markets, States have conferred rights for competitors to access transmission and distribution systems as means to increase competition and reduce marginal costs. There are cases in which

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<sup>60</sup> The claim of private legal scholars in middle 20<sup>th</sup> century for the modernization of private law thinking could not be better represented than the words written by Franz Wieacker in 1952. “When the exercise of its classical institutions does involve the use of economic or social power, the question of the role and the status of private law in the social state under the role of law arise starkly. Here too the Basic Law in Western Germany irrefragably guarantees rights of ownership and inheritance, and also, according to the prevalent and correct interpretation of its second and tenth article, freedom of contract: consistently with traditional individual rights, these are the freedom of individual choices. At the same time the social function of contract, economic rights, land ownership, capital the means of production, and economic association in our present system is undeniable: unlike the entrepreneurial economy the social economy sees them as a means of ensuring the distribution of sources, the creation of assets, and the maintenance of the necessities of life are affected in a just manner. When social considerations of this order are taken into account in way the law is applied, private rights arising from contracts (exchange, use, employment, and insurance), tort or liability insurance appear in a new light. They may still represents areas of freedom (notably guaranteed by the fundamental rights) but such freedom is now limited not only by the freedom of other individuals but also by the implications of social solidarity for the relationship between individuals”. Franz. Wieacker (1995), p. 486.

<sup>61</sup> Micklitz, Hans-W. “Social Justice and Access Justice in Private Law.” *EUI Working Paper LAW 2011/02* (2011).

<sup>62</sup> Example cited by Wieacker when arguing about the “disintegration of private law” and social law. Franz Wieacker (1995), p. 433.

<sup>63</sup> Weir, Tony. *An Introduction to Tort Law*. Second Edition. Clarendon Law Series. Oxford, New York: Oxford University Press, 2006, p. 219-220.

States regulated price caps in wholesale Markets (or Ramsey Pricing).<sup>64</sup> Rights to access networks and obligations to respect price caps could be *mandatory rules* applied to transmission/distribution service contracts and supply agreements respectively. Both regulations are also justified through Utilitarian values.

Despite undeniable *changes of law* and *social changes through law* in the last century, the classic concept of private law persists. This is thanks to the rhetorical discourse of Will Theorist in the 20<sup>th</sup> century. To defend the “Purity” of Private Law, Will Theorists argued that Labor law and Consumer Law rules were not private law, but rather rules marginalized as *hybrid law*. The same argument was extended to justify the exclusion of market regulation rules as a branch of private law. This represented the rupture between theory and practice.

When the Will Theorist marginalized this set of rules based on social values from “Pure Private Law”, it provoked not only the rupture between “Private Law in books and Law in practice”, but it also provoked a negative impact upon “Law in practice”. The impact upon “Law in Practice” happens where there is a lack of Legal Consciousness among individuals about their rights and duties and how to enforce them. If duty-imposing rules are *mandatory rules* of contracts applied to two persons making transactions, the non-compliance with duty-imposing rules could hold complaints based on private remedies (e.g. breach of contract). The lack of Legal Consciousness about private and duties applied to private relationships diminishes the effectiveness of the legal systems. It concentrates and overweight public enforcement carried by State. While in the 20<sup>th</sup> century Unions were trusted to enhance legal consciousness, there are no organizations in 21<sup>st</sup> century with analogous power. In Modern Society, effectiveness depends more on private enforcement, which depends more on individual awareness, willingness and accessibility to justice.<sup>65</sup>

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<sup>64</sup> Ramsey Pricing are temporary mandatory rules imposed to every transaction of electricity wholesale throughout a certain period of time, when high demand picks increases excessively revenues of producers for natural accidents or some sort of market failure. Cap prices are regulatory mechanism imposed by States on market actors. Differently from traditional protective measures of consumer law, these rules aim is to protect demand-side.

<sup>65</sup> Galligan, Denis, ed. *Law in Modern Society*. Oxford: Oxford University Press, 2016.

### 2.2.2. *The outer face of States: Globalization and the Privatization of Private Law*

If explaining the transformation of States together with the transformation of private law is a way to deconstruct the classic concept within States, this exercise is harder when the objective is deconstructing the classic thought of law beyond States. There is one reason why international lawyers are even more resistant to the modern theories of private law. While the classic concept within States restrains private law thinking to conferring-power rules, there are no conferring-power rules beyond national legal systems ensuring the enforcement of individuals' will. There are agreements between States committed to the mutual recognition of conferring-power rules given by States to individuals. These are the grounds of International Private Law. If so, international public lawyers are inclined to deny that supranational imposing-duties rules governing transactions, property or torts are hybrid rules with characteristics of public and private law at the transnational level.

International Private Law corresponds to a set of rules determining the applicable law and competent jurisdiction to solve conflicts in cross-border transactions. Therefore, as Horatia Murr-Watt asserts,<sup>66</sup> international private law has little to say about the reconfiguration of sovereign authority<sup>67</sup> and the rise of transnational functional regimes. By functional regimes, Horatia Murr-Watt means the growth of duty-imposing rules at transitional level governing commercial contracts, (intellectual) property rights, and the liability of multinational corporations which is neither captured in the classic concept of Private law, nor is it captured in International Private Law. Therefore, there is a tendency of public International Lawyers to combine duty-imposing rules applied to States to remove tariffs for trade together with imposing-duties rules prohibiting individuals from using seeds with patents in foreign jurisdictions. The issue here is that International Public Law can explain the public enforcement of WTO rules obliging States to remove tariffs for trade, but it cannot explain the second phenomenon properly. It lacks tools to explain the impact of TRIPs

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<sup>66</sup> Muir-Watt, Horatia. "Private International Law beyond the Schism." *Transnational Legal Theory* 2 (2011).

<sup>67</sup> Hand Lindhal starts his new book on "Legal Authority and Globalization of Inclusion and Exclusion" by contextualizing the conflict between Monsanto and Indian farmers regarding the enforcement of patent rights against Indian farmers. However, the understanding of the phenomenon from the Private Law perspective is not his focus. Private Law plays an important role to explain the reaction of Indian farmers against the charge of royalties. Hand Lindhal, "Legal Authority and Globalization of Inclusion and Exclusion", forthcoming in Cambridge University Press, 2017.

upon private law, as well as how Monsanto conducted the private enforcement of patent rights against farmers in Indian National Courts before recognition of the patent by India.<sup>68</sup>

The classic concept of private law, the theoretical construction of which was to create a pure private law within States in the 19<sup>th</sup> century, is replicated beyond States. The theory of private law as a *coherent, hierarchical, monistic* system of law based on autonomy based-values is the product of the vertical modulation of law into a black-box model.<sup>69</sup> The black-box model is the metaphor first used by William Twining to represent the misrepresentation of the phenomenon of law in general and, most importantly, to represent transnational law. Law is still taught through the binary of national and international private law, and public and private law. Therefore, if national lawyers are still narrowing down private law as conferring-power rules at the national level because of the classic concept of private law, imposing-duties rules of private law beyond States are left drifting along lifeless. Neither International Private Law, nor the classic concept of private law is useful to explain Globalization.

Globalization refers to the increasing cross-border movement of good, services, capital, and citizens which affect both traditional fields of international law. For International Public Law, States are still holding *authority* to either rule their nations or delegate that authority to supranational bodies, on the other hand States no longer have the *full capacity* to regulate actions and events that transcend territorial jurisdictions of sovereign States<sup>70</sup> International law represented by the black-box model is bound to fail in postmodern society, where law needs to be *dynamic* as much as technology changes. Being Law a social phenomenon, and *transnational law*,<sup>71</sup> which regulates actions and events, emerged and have become a field of

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<sup>68</sup> Bobbitt named as Opaque Sovereignty. See Bobbitt, Philip. *Terror and Consent: The Wars for the Twenty-First Century*. First American edition. A.A. Knopf, 2008. See also MacCormick, Neil. *Questioning Sovereignty*. Oxford: Oxford University Press, 1999.

<sup>69</sup> The metaphor of the black-box model was firstly coined by William Twining and later used by Tuori. Twining, William. *General Jurisprudence: Understanding Law from a Global Perspective*. Cambridge: Cambridge University Press, 2009.

<sup>70</sup> The increase of global trade has concomitantly reduced the *regulatory capacity* of the Sovereign States in the production of the transnational normativity. On the one hand, some scholars refer to this phenomenon as the vanishing of the Sovereign State. On the other hand, others hold the idea that the State is crossing a transformation process, instead of disappearing. To mention some of the latter, Dennis Patterson and Ari Afilalo (2008), Philip Bobbitt (2002). Sassen, Saskia. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton University Press, 2008. Stven Steimo, *The Evolution of Modern States: Sweden, Japan, and United States*. New York: Cambridge University Press (2010). Also J Sgard, E Brousseau and Y Schemeil, 'Sovereignty without Borders: On Individual Rights, the Delegation to Rule and Globalization' Working Paper, Sciences-po, CERI, 2010.

<sup>71</sup> Phillip Jessup coined the term transnational law in 1956. "The problems to be examined are in large part those which are usually called international, and to be examined consists of the rule applicable to be to these problems. But the term "international" is misleading since it suggests that one is concerned only with the relations of one

research that has attracted massive attention from scholars. Scholars who were rooted in the traditional fields of law – constitutional law, administrative law, private law – have made efforts to understand the phenomenon of transnational law sometimes transposing key concepts of their disciplines to the transnational level.<sup>72</sup> Globalization has complicated the classic concept of private law. Globalization has led to a *disorder of orders*<sup>73</sup> and somebody inside the *black-box* cannot discern the lack of conformity between theories of law and law in action in this global era.

In an effort to systematize private legal scholarship that challenged classic private law by looking at the various manifestations of private law beyond the state, Ralph Michaels and Nils Jansen,<sup>74</sup> grouped private law under *three* headings according to the subject of their research: Europeanization of private law, Globalization of private law, and Privatization of private law.<sup>75</sup> The Europeanization of private law, which is the theoretical framework of this thesis, will be discussed in-depth in the coming sections. At the moment, let this manuscript briefly focus on the phenomenon of Globalization and Privatization as described by Ralph Michaels and Nils Jansen. Although the purpose of this section is *not* to build an exhaustive list of transnational law regimes, but rather helpful to contextualize the modern concept of private law beyond States. While Globalization considers the reconfiguration of Sovereignty

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nation (or state) to the other nation (state). (...) I shall use, instead of using the term ‘international law’, the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are others rules which do not wholly fit into such standard category”. Jessup, Phillip. *Transnational Law*. New Haven: Yale University Press, 1956.

<sup>72</sup> Legal scholars have intensively engaged in researchers whose subjects are new modes of law making, judicial and non-judicial adjudication emerging at the global level by asking how those novel could affect the traditional concept of law in itself. Among those scholars, four trends of research can be roughly identified by the similarities of their analytical arguments. Constitutionalism as Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford Constitutional Theory. Oxford, New York: Oxford University Press, 2010. Fragmentation of law as Koskenniemi, Martti. “Constitutionalism, Managerialism and the Ethos of Legal Education.” *European Jo*, 2007. Global administrative law as Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart. “The Emergence of Global Administrative Law.” *Law and Contemporary Problems* 68, no. 3 (2005): 15–62. Legal pluralism as Teubner, Gunther. “Global Bukowina: Legal Pluralism in the World Society.” In *Global Law without a State*, edited by Gunther Teubner. Studies in Modern Law and Policy. Aldershot; Brookfield, USA: Dartmouth, 1997. Benda-Beckmann, Franz von. “Who’s Afraid of Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law*, December 2, 2013. Berman, Paul Schiff. “Global Legal Pluralism.” *Southern California Review* 80 (2007): 1155. Calliess, Galf-Peter, and Peer Zumbansen. *Rough Consensus and Running Code: A Theory of Transnational Private Law*. Hart Monographs in Transnational and International Law, v. 5. Oxford: Hart, 2010.

<sup>73</sup> Neil Walker. “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders.” *International Journal of Constitutional Law* 6, no. 3–4 (July 1, 2008): 373–96.

<sup>74</sup> Michaels, Ralf. “Globalization and Law: Law Beyond the State.” In *Law and Social Theory*, edited by Reza Banakar and Max Travers, Second edition. Hart Publishing, 2013.

through hybrid regimes of International Public Law, Privatization describes the rise of transnational functional regimes.

The Globalization of Private Law imagines private law made beyond States whose validity relies on delegated powers by States to supra-governmental bodies.<sup>76</sup> It refers to imposing-duty rules governing contract law, property rights, and tort law of States made by the WTO when adjudicating trade disputes.<sup>77</sup> It also defines private law derived from Arbitral Awards as a source of *Lex Mercatoria*,<sup>78</sup> whose validity and normativity is derivative of the New York Convention.<sup>79</sup> Though not a novel phenomenon, Globalization of Private Law serves as a counter-example to the classic concept of private law as conferring-power rules made by States. Contract law doctrines based on Arbitral Awards reinforce the evidence of *Lex Mercatoria* as a set of duty-imposing rules. Moreover, it hampered the understanding of the legal phenomenon from the Internal Point of View.<sup>80</sup>

Besides International Treaties, Ralf Michaels and Nils Jansen also refer to Regulatory Networks as means of Globalization of private law. However, Regulatory Networks, defined

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<sup>75</sup> The three headings of legal scholarship studying the emergence of private law beyond the State, which are identified by Ralf Michaels and Nils Jansen, either aim to empirically prove the existence of private law beyond State or propose a theory of the about how this law affect our understanding of law. Michaels and Jansen (2013),

<sup>76</sup> Michaels and Jansen (2013), p. 864-868

<sup>77</sup> Micklitz, Hans-W. "The Internal vs. the External Dimension of European Private Law – a Conceptual Design and a Research Agenda." *EUI Working Papers LAW 2015/35* (2015).

<sup>78</sup> *Lex Mercatoria*, which is a transnational body of substantive rules created by practices of commerce and applied by International Arbitration. See Peer Zumbansen, *Lex Mercatoria*; Claire Cutler, *Private Power and Public Authority: Transnational Merchant Law*.

<sup>79</sup> The Recognition of Foreign Arbitral Awards by New York Convention confers powers to Arbitral Courts the make rules of private law by adjudicating commercial disputes. Donald B. King, *Does an Unknown Exist? Impact of Commercial and Consumer Law* (2003).

<sup>80</sup> Ralf Michaels and Nils Jansen identify International Treaties governing contract, property, and tort as evidence of the private law beyond States. Nevertheless, their approach to private law in Treaties could provoke reactions form International Public Lawyers. One could claim that private law enacted in International Treaties does not challenge the conceptual framework of International Public Law. Whereas International Treaties ruling private law serve as an irrefutable evidence of the making of private law beyond States, it is still in conformity with traditional dualistic regimes of international law. Their rules are primarily binding to States, not to individuals. Nevertheless, there are two ways for answering this criticism. Firstly, Ralf Michaels and Nils Jansen are not arguing that Globalization of Private Law challenges the discipline of International Public Law. Internal Public Law are still capable to explain the public enforcement of International Law governing for instance Intellectual property rights. Counter-measures are still an instrument to oblige States to change national private law. However, what this thesis does, and which goes beyond the analysis of the authors, is to claim that International Public Law will not capture (again) the phenomenon of private enforcement of International Treaties taking place in national courts. This was how the EU Legal System started to gain features of a *sui generis* Constitution. The landmark *Costa v. Enel* case begun from the private enforcement of private remedies between the electricity supply contract between Mr. Costa and the electricity Italian supplier Enel. While Enel sued Mr. Costa for breach of contract claiming non-payment of electricity bills, Mr. Costa defences argued non-recognition of debit if the nationalization of electricity supplier was a violation of the rules of the Treaty.

as a transnational association of national government branches (e.g. network of central banks, national competition authorities or judges), do not have conferring-powers to issue binding rules to their members. Therefore, despite the role of networks as a powerful political mechanism for the cooperation and harmonization of national private laws, this thesis does not perceive Regulatory Networks as an illustration of the Globalization of Private Law. Recommendations do not bind States to change the primary rules of national private law.

Ralf Michaels and Nils Jansen also identify another category of private law beyond States that calls classic private law into question: the phenomenon of the Privatization of Private Law. Nowadays, a large body of empirical research underpins descriptive analyses of functional regimes made and sometimes adjudicated by private bodies like NGOs, private associations, and private corporations. Different from supranational governmental organizations, the normativity of the rules of these private regimes (or systems) is not grounded in the *social contract* as means to confer power (i.e. the *social contract* confers power to States that in turn confer power to supranational governmental bodies). By contrast, the validation of these rules is grounded in consent. National and Supranational Governmental bodies have no or have a minor role in making or adjudicating the rules. When Internet users wish to register a domain name, they give their consent to be governed by the ICANN's approved terms and conditions. When a person uses a digital platform to offer or purchase goods, a click in the check box is the manifestation of consent, which makes the terms and conditions of digital platforms binding to private contractual relationships. Privatization of private law does not mean that rules don't or cannot pursue social values. This author recently received a notice about changes in standard-form contracts from Airbnb. The terms and condition were amended to include obligations of non-discrimination. Moreover, privatization of private law also does not infer the emergence of *autonomous systems* (i.e. systems independent of national and international systems of law, which is different from *autonomous value*). Anna Becker shows us how German and English Courts have turned Corporate Social Responsibility (CSR) standards into binding rules of law by recognizing their normative strength with regard to third parties.<sup>81</sup> The International Safe Harbor Privacy Principles reinforces Dennis Patterson and Ari Afilalo's proposition that functional systems are not

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<sup>81</sup> Beckers, Anna. *Enforcing Corporate Social Responsibility Codes : On Global Self-Regulation and National Private Law*. Hart Publishing, 2015.

*autonomous* systems, but rather systems that work under the *acquiescence* of sovereign States

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Like *lex digitale*<sup>83</sup> or *CSR*, there are several other functional regimes that illustrate the Privatization of private law at local, national or transnational levels. *Lex Sportiva*<sup>84</sup> is another example of a body of law at the transnational level. Intrigued by the evolving power of these functional systems, legal and political scholars have questioned to what extent someone's consent to *opt-out* or *opt-in* to these functional regimes can still be considered *voluntary consent*. They emphasized the fact that functional regimes work like gatekeepers. To access facilities and associations that are either part of our daily habits or conditional on access certain markets, *consent* is the key. Facebook's terms and conditions are not individually negotiated and users express consent only by *opting-in* or *opting-out*. Soccer teams have to consent to FIFA's terms and conditions to access UEFA Championing Leagues. The power of these functional systems justifies what Gunther Teubner called *Transnational Private Constitutional Orders* aligned with traditional legal systems: national and international legal systems.<sup>85</sup>

Globalization and the Privatization of Private Law are factual claims against the persistence of the classic concept of private law. These categories reveal the inconsistencies between the theory of will in books and law in practice. However, besides the theoretical misrepresentations, the classic concept also has a negative impact on law in practice. When scholars observe the Privatization of Private law, the private law dimension is self-evident. NGOs, standard bodies, or digital platforms are organizations whose legal constitution relies on corporate and contract law. Normative theories such as Transnational Private Constitutional Orders or Global Administrative Law attempt to construct legal discourses imposing sort of (universal) social values to those Systems of Law, which have a widely recognized private dimension. On the other hand, the Globalization of Private Law, which came into being through International Organizations, has delegation authority and a policy mandate set out by States and through States, which means that the private dimension is often

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<sup>82</sup> Patterson and Afilalo (2008).

<sup>83</sup> Dirk, Lehmkuhl. "The Resolution of Domain Names v S Trademark Conflicts: A Case Study on Regulation Beyond the Nation State and Related Problems." *Zeitschrift Für Rechtssoziologie* 23, no. 1 (2002): 61–78.

<sup>84</sup> Duval, Antoine. "Lex Sportiva: A Playground for Transnational Law." *European Law Journal* 19, no. 6 (November 1, 2013): 822–42.

<sup>85</sup> Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012.

obfuscated by the public law dimension. The reason why is (again) the misrepresentation of private law through the Will Theory. If the classic concept is put aside, the legal consciousness of the private dimension of International Treaties, either regulating intellectual property rights or Trade, will be enhanced in the legal community. The outcome would be a better understanding of how plural legal systems interact,<sup>86</sup> as well as an increase in Legal Consciousness and a more effectiveness International Legal System. Even taking into account the *genuine* normative concerns of scholars against private enforcement,<sup>87</sup> none can deny that the European Constitutionalism was the result of the infant Legal Consciousness of the private dimension of EU Law.

### **3. Constructing the Modern Concept: The Legal Consciousness of European Private Law**

Legal scholars who study the phenomenon of private law beyond the State see EU law as the epitome of transnational law.<sup>88</sup> Make no mistake, EU experience has been highly exceptional and deserves particular notice. Different from the WTO or other infant Regional Integration Projects, the EU legal System has contingent competence, a policy mandate, Executive, Legislative, and Judicial bodies, and – most importantly – a wide acceptance of primacy doctrine in legal discourse. The impact of European Integration on private law was then foreseeable over negative and positive integration. If propositions about European Private Law (or the private dimension of EU Energy Law) are still provoking negative reactions, these negative reactions could be the result of path dependence on the Classic Concept of Private Law. On the other hand, if the EU transformed into a European Economic Constitution in the early years of the integration project, it was thanks to the infant Legal Consciousness of the modern concept of private law.

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<sup>86</sup> Berman (2006), Zumbansen and Calliess (2010).

<sup>87</sup> When scholars reject the private law dimension of International Law and EU Law, but at the same endorse the proposition that they are “hybrid” legal systems, this thesis is not categorically inferring they are all deluded by the classic concept of Private Law. Some scholars have a normative claim that justifies their dismissive position towards private law. Some of them argue that the Sovereignty of States must be conserved, others for the coherence of International Law (or non-fragmentations). By increasing legal consciousness of the private law dimension of International Treaties, more individuals would feel entitled to rights created by International and Supranational authorities.

If private legal scholars have long contributed to deconstructing classic thought, obviously legal scholars in Europe were part of it. Scandinavian legal realists have long rejected formalism and have influenced the legal discourse in Nordic Countries.<sup>89</sup> Meanwhile, the sociological contextualist approach of English commercial law of contracts allowed for the Legal Consciousness of moral ethics of national private law in early 20<sup>th</sup> century.<sup>90</sup> What is more, Max Weber is considered the godfather of Sociology of Law and his historical account of the role of (private) Law as means a to industrial capitalism in Europe is the bedrock of Critical Legal Studies.<sup>91</sup>

Despite various Schools of Legal Thought and changes in isolated national Legal Systems, the concept of Private Law as a coherent, systematized body of rules with autonomy-based value persisted for over half a century of Welfarism. Yet it continues to be replicated in the age of Regulatory States. If so, there is no surprise in the assertion that the impact of European Integration upon private law suffers resistance to be noticed and discussed. Although the direct effect doctrine has opened the door for *Integration through Private Law* since the 1960s, it suffered resistance during the negative integration project, capture attention with positive integration, and received a lot of attention from legal scholars after the Commission's audacious plan to draft the European Civil Code: the DCFR.

### *3.1. Negative Integration through Law and without Private Law*

Since the first decades of integration, the EEC and its economic project of integration through law went through a different path than traditional Treaties of Public International Law. General principles of International Public Law were no longer capable of depicting the *sui*

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<sup>88</sup> Tuori (2015).

<sup>89</sup> See Malminen, Toni Petteri. "The Intellectual Origins of Legal Realism," (Doctoral Dissertation) June 10, 2016.

<sup>90</sup> European Private legal scholars from common law systems associated the deconstruction of the classic private law thinking to the sociological contextualist approach to study commercial law which was initiated by Lord Steyn, Hoffmann and Ian Macneil, See the contributions of Jay M Feinman (Introduction) and Roger Brownsword (Post-Technique: The new social contract today) in the book "Changing concepts of contracts: Essays in honour of Ian Macneil". Campbell, David, Linda Mulcahy, Sally Wheeler, and Ian R. Macneil. *Changing Concepts of Contract : Essays in Honour of Ian Macneil*. Palgrave Macmillan, 2013.

<sup>91</sup> In the 19<sup>th</sup> century, although the classic private law thinking become mainstream, thinkers as Max Weber studied the emergence of industrial society considered private law as a major factor in the process. This sociological approach, which considers private law as an instrument to accomplish economic goals, was at that time incompatible with the contemporary classic private law thinking. Trubek, David M. "Max Weber on Law and the Rise of Capitalism," Faculty Scholarship Series, 1972.

*generis* features of EU legal systems before the landmark *Van Gend & Loos* and *Costa v. Enel* cases.<sup>92</sup> This is thanks to the establishment of the principles through the speeches of the Court that turned the Treaty into a *sui generis* Constitution. Therefore, expressions like *negative integration*,<sup>93</sup> *integration through Law*, or *the Law of Integration*,<sup>94</sup> refers to the period in time in which the integration of the EU community relied exclusively on the enforcement of the Treaty, and not on secondary legislation.

In the first years of the Economic Integration project,<sup>95</sup> the EU had already emerged as a legal system based on the values of *four freedoms*, *non-discrimination*, and performance-based *competition*, which were later described by Professor Karlo Tuori as the triumph of the European Microeconomic Constitution.<sup>96</sup> European Constitutionalism has possessed two intertwined aspects since the 1960s: one formal, the other substantive. The formal aspect relates to the constitutional significations of Treaty provision, which Kaarlo Tuori calls the *four crucial features* of European Constitutionalism: direct applicability in Member States (or direct effect), supremacy, direct effect in private parties (or vertical direct effect), and the ancillary role of ECJ for judicial review.

“Four crucial features detached the relevant Treaty Provisions and doctrinal principles from international law template and conferred on them a constitutional label: firstly, direct applicability and direct effect in Member States; secondly, supremacy over conflicting national law; thirdly, creation of rights and obligations for private parties; fourthly, functioning as yardsticks by which the ECJ reviews not only secondary legislation but also - even primarily - compliance of national law with European Law, thus protecting individual economic rights against possible interference by Member States”<sup>97</sup>

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<sup>92</sup> See both landmark cases: *Van Gend & Loos*, in which the judgment of the Court refers to EU legal order as a “new legal order” with regards to the direct effect of European rights for citizens; and *Flamino Costa v Enel*, in which the Court first set the Supremacy character of EU Law. Case C-26/62, *Van Gen en Loos*, ECR [1963]; Case C-6/64, *Flamino Costa v Enel Case*, ECR [1964]. See also De Witte, Bruno. “The European Union as an International Legal Experiment.” In *The Worlds of European Constitutionalism*, edited by G. (Gráinne) De Búrca and Joseph Weiler. Cambridge University Press, 2011, pp. 19-56.

<sup>93</sup> See footnote 1.

<sup>94</sup> *The Law of Integration* refers to the remarkable book of Pierre Pescatore firstly published in French in 1972 offering an account of the experience as a distinct phenomenon of from the classical international law experience. Pescatore, Pierre. *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities*. Sijthoff, 1974.

<sup>95</sup> *European Constitutional Economic Project* or *European Economic Constitutionalization* are terms that refers to the EU legal System as plural legal order, on contrary to *monist* projects of enacting a single European Constitutional. While the former preserves the pluralism of legal systems in Europe, the later pursues the replacement of national Constitutions by one single Constitution.

<sup>96</sup> Tuori (2015), pp. 136-137.

<sup>97</sup> Tuori (2015), p. 137.

The other is the substantive aspect of EU law.<sup>98</sup> For Kaarlo Tuori, the substantive law of European Constitutionalism is the combination of valid rules recognized in the EU Legal System and the interaction between those rules and legal discourse. The recognition of valid rules is what he describes as perceptive approach to law, while the later is the discursive approach to law. This definition is accurately described precisely in the proposition “Law brought about in and through legal discourses”.<sup>99</sup> Therefore, the substantive dimension of EU Law derives from speech acts of the CJEU, EU Legislator, Legal Scholarship, and its interactions with legal discourses in national legal systems. If this chapter aims to identify the private law dimension of EU Law, the substantive aspect of EU Law is what matters most for this investigation. Awareness of rules of EU Law applied to private relationships is a precondition for identifying the impact of European Private Law and the Modern Concept of Private Law is a precondition for this.

Private law is a body of rules that governs economic transactions, business organization, rights *in rem*, compensation for wrongs and other types of private relationships. It concerns the rules of contract law, property rights, and tort law. EU competences are not organized in line with the public and private division of law, but are rather organized according to policy mandates that promote market integration. The Treaty establishes the subsidiarity principle as a reference to determine the competence of the EU, while the CJEU and National Courts complete the check-and-balance system together with EU Administrative and Legislative bodies. If EU policy mandate is defined according to the effectiveness of implementing the EU rights of four freedoms, non-discrimination, and competition rules, EU law would sooner or later spill over into the areas of major concern of private law.<sup>100</sup> Thanks to the formal aspects of European Constitutionalism, the hybrid character of EU Substantive Law has appeared through the recognition of lawmaking and law-enforcement since the early years of European Integration.

To understand how the European Integration Project could and has impacted on private Law, there is a need to *map* out the ways in which European Private Law has been created, changed, and revoked in the EU Legal System. The substantive dimension of European

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<sup>98</sup> Tuori (2015), p. 137.

<sup>99</sup> Tuori (2015), p. 112.

<sup>100</sup> See Micklitz and Weatherill, *Internal Market and Consumer Protection: EC and Civil law*, in Micklitz and Weatherill, 1997, pp. 344-345. Micklitz, Hans-W., and Stephen Weatherill. *European Economic Law*. Ashgate/Dartmouth, 1997.

Private Law has been created through both power-conferring rules for law-making and law-enforcement, where the latter relies on national and supranational adjudicating bodies. Although the making and enforcement of European Private Law will be discussed in-depth in the context of the Energy market in the coming chapter, a synthesis is necessary to clarify the coming sections in this chapter.

On the *lawmaking side*, EU Law impacts private law when the Treaty or secondary legislation (Legislative Acts, Impending and Delegated acts) enact provisions creating mandatory rules for private parties in their private relationships: contract, property, and tort. When Article 101(1) of TFEU states that “agreements which may affect trade between Member States or competition within the internal market” should be prohibited, the Treaty is governing the contractual relationships. The same can be said about secondary legislation when the Unfair Terms Directive imposes mandatory rules regarding the right to withdraw.

On the *law-enforcement side*, there are *four enforcement mechanisms* by which the Integration Project could impact on private law and the private order of individuals. Thanks to the formal aspects of the European Constitution, the enforcement of EU Law relies on both public enforcement and private enforcement. *Through public enforcement*, the first mechanism refers to the enforcement of EU Law on Member States, to change their national private laws (e.g. infringement procedure), while the second is a matter of EU authorities invalidating terms and conditions set out between private parties in their private order (e.g. public enforcement of competition law). *Through private enforcement*, there are also two enforcement mechanisms. One is a vertical direct effect of EU Law, which confers rights to individuals to enforce EU law before national courts against Member States (e.g. compensation duty against States). The other is a horizontal direct effect, which confers rights to individuals to enforce EU Law against another individuals (e.g. breach of contract).<sup>101</sup> While public enforcement depends on power-conferring rules to adjudicate, private enforcement relies on private parties being able and willing to enforce their rights.

Public and private enforcement are always to increase effectiveness of Integration project and the European Private Law. Public enforcement of European Private Law relies on Governmental bodies, which have the burden of the cost of monitoring markets and carrying

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<sup>101</sup> An early acknowledgement of the phenomenon of European Private Law can be found in Günter Beitzke’s work. In 1964, he wrote that the “problem of private law harmonization in the European Economic Community with a call for a greater awareness that the goal to be served is not an isolated legal-technical task, but rather European Law”. See the citation of Günter Beitzke in Hans W-Micklitz and Stephen Weatherill, (1997), p. 364.

out investigations. On the other hand, private enforcement depends on the awareness of individuals' rights, enforcement procedures, and the willingness to enforce their rights. Throughout the prior chapter, this thesis aimed to deconstruct the classic concept of private law. The deconstruction of classic thought is necessary to increase awareness of individuals' rights within the *conceptual confusion* of the EU Law being considered a hybrid normative system.

In 1964 Günter Beitzke had already drawn attention to the problem of awareness as one of the issues with the Harmonization of Private Law.<sup>102</sup> The lack of awareness of the private dimension of EU Law was an obstacle for the private enforcement of EU Law. If Beitzke was correct in 1964, his proposition became even more pertinent when the European Integration Project switched from a negative to a positive integration strategy. Throughout half century of market integration, the EU has advanced two major integration strategies.<sup>103</sup> From the 1960s to the 1980s, the EU pursued its integration project through a negative strategy, which consisted of boosting integration through the public and private enforcement of the Treaty against State acts and national laws. From the 1980s onward, the EU has moved towards a positive integration strategy, which has put more weight on the role of secondary legislation. EU secondary legislation is a wide set of duty-imposing rules regulating individuals and market transactions to pursue the completion of the internal and competitive market. Within this scope, public and private enforcement of EU Law against market actors has become crucial to the effectiveness of EU.

Notwithstanding the formal aspects of EU Law, the substantive dimension of European Private Law did not exist until the late 1970s. Even in the landmark *Costa v. ENEL case*,<sup>104</sup> a dispute was brought by ENEL against Mr. Costa, because of a failure to pay an electricity bill, the judgment of the Court did not address private law. From the perspective of remedy, the case was referred to the Court for the formation-based defense brought by Mr. Costa to invalidate his public electricity supply contract with ENEL. The defense argued that the nationalization of production and distribution of electricity by the Italian government in violation of the Treaty, which could have contaminated the enforceability of the debt. Despite

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<sup>102</sup> The proposition regarding the private enforcement of EU Law through horizontal direct effect is not immune to contestation when Directives are sources of EU Law. The debate will be addressed in the coming chapter.

<sup>103</sup> To see this distinction of the two broad strategies of the European Union – positive and negative integration – see Collins, Hugh. *The European Civil Code : The Way Forward*. Cambridge University Press, 2008, pp. 34-40.

<sup>104</sup> *Flamino Costa v Enel Case*, ECR [1964].

the relevance of the *Costa v. ENEL case* in terms of the direct horizontal effect doctrine, the Court dismissed the material claim. Moreover, reading the case law outside the historical context led to inaccuracies. Stepping back in time, ENEL was then perceived as an extension of the Italian government after nationalization. Besides the *Costa v. Enel case*, there were other disputes with similar contexts, but they neither invalidated national private law, nor did they create rules of European Private Law until the *Cassis de Dijon case*<sup>105</sup> challenged the inertia.

The next two subsections address how the first pieces of European Private Law emerged and how they have expanded since positive integration.

### *3.2. Negative Integration through Private Law: First Signs of European Private Meta-law*

The CJEU's judgment that represented the first step towards European private law was the *Cassis de Dijon case*.<sup>106</sup> The case concerned the German rules stipulating that all fruit liqueur sold in German territory had to contain at least 25% alcohol by volume. French fruit liqueur Cassis de Dijon contains between 16% and 19%. Since Cassis de Dijon was labeled as a fruit liqueur, German authorities decided it would mislead consumers about its composition and, for this reason, the sale of Cassis de Dijon was prohibited in Germany's territorial jurisdiction. In answering the preliminary request, the CJEU concluded the German law violated the Treaty by imposing measures that were equivalent to a quantitative restriction on imports.

The *Cassis de Dijon case* represented the first move of EU Law towards the sphere of private law, though was restricted to changing national private laws. German law regulating information duties of the fruit liqueur's suppliers are imposing-duties rules of private law, and therefore, mandatory rules for business-consumer relationships. The German Law illustrates a set of positive duties raised in middle of the 20<sup>th</sup> century to protect weaker parties from the exploitive behavior of suppliers. For scholars who endorse the view that consumer law is not

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<sup>105</sup> C-128/78, Cassis de Dijon [1979].

<sup>106</sup> C-128/78, Cassis de Dijon [1979].

private law, the decision of the German Authority can be analyzed as the application of the *culpa in contrahendo doctrine*.<sup>107</sup>

The *Cassis di Dijon case* is emblematic in understanding European Private law. It invited legal scholarship to discuss the impact of the Integration Project on national private law and open a new vein in legal discourse. Not surprisingly, more cases have reached the CJEU after national Courts requested preliminary rulings on conflicts between national private law and EU law. There were preliminary references to the national Labor laws such as in the *Viking case* on Trade Union Agreements.<sup>108</sup> For those who hold a classic concept of private law, the *Cassis di Dijon* and *Viking cases* would not represent a factual claim of European Private Law since they marginalized these set of rules from a pure private law stance. However, the Court has also been referred on cases relating to various (national) Civil Codes. Until 1993, cases like *Alsthom Atlantique v. Compagnie de construction mécanique Sulzer SA*,<sup>109</sup> *Francovich v. Italy*,<sup>110</sup> *MC Motorradcenter GmbH v. Pelin Baskiciogullari*,<sup>111</sup> and *Bernard Keck v. Daniel Mithouard*<sup>112</sup> reached the CJEU after national courts unprecedentedly made preliminary references to the conflicting rules in their respective Civil Codes and in the Treaty. In the cases above, the Court was questioned about rules on vendors' liability for defective products, and the prohibition of *resale at a loss* in the *Code Civil des Français*; State's strict liability in the *Codice Civile italiano*; and *culpa in contrahendo* in pre-contractual liability in the *Bürgerliches Gesetzbuch (BGB)*. Though some of the cases were dismissed based on the EU's lack of competence, these cases signaled the beginning of changes in legal discourse in favor of a more expansive European Private Law.

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<sup>107</sup> More than thirty years have passed since the *Cassis de Dijon's* judgement by CJEU and there are still legal scholars denying the private law dimension of the case. The debate about whether the *Cassis de Dijon* has or not has a private law substantive dimension is distorted by the conceptual confusion between those who argue for the modernization of private law and those who still locked in the classic private law thinking. The strongest argument in favour of the modern private lawyers is the irrefutable connection between the German law on the information duty of alcohol beverage and the ancient civil law doctrine of *culpa in contraendo*, which had been replicated in both civil and common law. See Fredrich Kessler and Edith Fine (1964).

<sup>108</sup> Case C-438/05 *Viking* [2007] ECR I-10779.

<sup>109</sup> Case C-339/89 *Alsthom Atlantique v. Compagnie de construction mécanique Sulzer SA*, [1991] ECR I-107.

<sup>110</sup> Joined cases C-6/90 and C-9/90 *Francovich v. Italy*, [1991] ECR I-5357. See also the results of the research conducted under the ERPL-ERC Project about the spillover of the *Francovich case* in the private law jurisdiction of other Member Sates. Barend Van Leeuwen and Ronan Robert Condon, Bottom up or Rock Bottom Harmonization? *Francovich State Liability in National Courts*, 2016.

<sup>111</sup> Case C-93/92 *MC Motorradcenter GmbH v. Pelin Baskiciogullari*, [1993] ECR I-5009.

<sup>112</sup> Joined cases Case C-267/91 and C-268/91, *Bernard Keck v. Daniel Mithouard* [1993] ECR I-107.

Beside the CJEU speeches, the adjudicating authority of the Commission played a role in regulating contracts through assessing the private order of contracts: freely negotiated clauses. Already in 1970s, clauses were banned for precluding *free* trade or competition in the Community. Competition rules have been part of the Treaties since the ECC.<sup>113</sup> The ECC Commission, in the exercise of its authority to issue formal decision, heeded private lawyers in the *Re the Distillers* case in 1977.<sup>114</sup> The conditions of sales and price terms established in a horizontal agreement between UK distillers, which imposed a surcharge for every Scotch whisky, were considered a violation of competition rules of the Treaty.<sup>115</sup> The *law* between the parties was nullified and excluded from the private order of the parties. With the official publication, a single decision in an individual case served as supplementary source of Article 85 EEC.

Within the framework of the ERPL Project, Hans W-Micklitz has analyzed the phenomenon of European Private Law through the lens of four parameters, one of which is *conflict and resistance*.<sup>116</sup> The aforementioned CJEU case-law on contract and tort referred to decisions within the framework of preliminary ruling procedure: the Court interprets whether State private law is in conformity with EU law but its interpretations are not coercive orders that invalidate State law. One of the reactions of national Courts was *resistance* in face of *conflict*. In the First Annual Workshop of the ERPL Project, Horatia Muir-Watt described how French judges were “horrified” by the idea of balancing and using proportionality instruments.<sup>117</sup> Daniela Caruso reported similar resistance to what concerns the rules of the Product Liability Directive.<sup>118</sup>

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<sup>113</sup> Article 85 ECC, Article 81 EC, Article 101 TFEU.

<sup>114</sup> Commission Decision of Dec. 30, 1977: *Re The Distillers Co. Ltda: Conditions of Sale and Price Terms*, O.J. 1978, L. 50/16.

<sup>115</sup> See an interesting discussion of the private law dimension of the case in Barden, *The Distillers Case and Article 85 ECC*, 1979.

<sup>116</sup> Hans W-Micklitz (2009) pp. 18-19.

<sup>117</sup> Horatia Muir-Watt’s contribution to the First Annual Workshop of the ERPL Project illustrates the parameter of Europeanization of Private Law of conflict and resistance by describing how French judges were “horrified” by the idea of balancing and using proportionality instruments. See Horatia Muir-Watt, *Conflict and Resistance: The National Private Law Response*. See also the comments by Fernando Gomes, *Conflict and Resistance*, 2013. About conflict and resistance, see also Caruso describing the resistance of French’s judges in *Applying the Product Liability Directive*, Caruso, 1997.

<sup>118</sup> About conflict and resistance, see also Caruso describing the resistance of French’s judges in *Applying the Product Liability Directive*, Caruso, 1997.

Besides resistance from national Courts, there was a second concern. Other cases invalidating national private laws, like *Cassis De Dijon*, together with the mutual recognition principle in the Treaty, could have led to a sort of *race to the bottom*: a reduction of the social justice dimension of consumer and labor protection.<sup>119</sup> All *conflict and resistance* against EU law intervening in civil laws by national Courts undermined the possibility of Integration through negative strategies, which was one reason why Brussels changed the strategy from negative to positive.

The *conflict and resistance* of national laws against the intrusion of EU law motivated an adjustment to the European integration strategy at the end of 1980s from negative to positive integration. Switching to a positive integration strategy led to what has been described as the Transformation of Europe into a non-unitary polity.<sup>120</sup> The transformation of Europe was the starting point for the expansion of the European Integration Project through Visible European Private Law. While negative integration restrained the impact on private law to coercive order forcing States to change their national private law, positive integration allowed the EU to approve its own set of rules regulating private relationships. This is the point where self-standing European Private Law started to take shape in the Energy Markets.

### *3.3. Positive Integration through Private Law: From European Private Law towards a Self-standing European Private Law*

In 1991 JHH Weiler published the iconic article about the Transformation of Europe.<sup>121</sup> *Integration through law*, which had already started through a negative integration strategy by enforcing the Treaty, changed its *modus operandi* over the 1980s culminating in the transformation of *integration through law* into a solid nonunitary political program.<sup>122</sup> Given

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<sup>119</sup> Those who claimed that the mutual recognition principle might lead to the race-to-the-bottom, restraining the motivation of States to instrumentalize private law to pursue social justice, are those who were in favour of the legal harmonization by the EU. See Giandomenic Majone *The Common sense of European Integration*, 2006 See also the counterpoints of Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?* 2006.

<sup>120</sup> Weiler, Joseph H. H. "The Transformation of Europe" 100 (1991): 2403–83.

<sup>121</sup> Weiler (1991), see Bermann, George A. "The Single European Act: A New Constitution for the Community?" *Columbia Journal of Transnational Law* Vol. 27.1989, 3, pp. 529-587, 27, no. 3 (1989).

<sup>122</sup> The expression *integration through law* (ITL) has long been familiar among EU legal scholars since 1980s. The *integration through law* was coined firstly by the academic project, called ITL Project. It aimed at comparing the *Integration Project* in the EU with the US Federalism. It was held by the European University Institute, Florence, since 1978 and directed by Mauro Cappelletti, Monica Seccombe and Joseph H.H. Weiler. In

the combination of the empirical and functional statements of the 1985 White paper and 1992 Program, which concluded with the changes to the lawmaking procedures in the European Single Act (SEA), the Community was ready to make a bold step forward to make a bold step forward towards the manufacturing of an internal market, as well as creating European Private law.

Understanding the transformation of the governance structure of the European Community into a new supranational polity during the 1980s requires a closer look into the critical conjecture whereby the 1985 White Paper <sup>123</sup> and the European Single Act were inserted, as well as the elements that boosted such a transformation. In the 1980s there was no longer a common market between the six Member State signatories of the European Community, but the European Community had expand geographically, increasing the heterogeneity of policy perceptions and cultural orientations. Concomitant with geographical expansion, the unanimous consensus politics increasingly emphasized the policymaking capacity to give response the new challenges of pursuing the common market. The cracks in the internal market became an open wound.

The European Commission, under the presidency of its French President Jacques Delors, published the 1985 White Paper outlining the 1992 Program. What could have been a policy document merely restating policies of the Treaty as the Commission's previous policy documents did (e.g. building a common and competitive market), there were two innovations in the 1985 White Paper that went beyond the concept of achieving a Europe without

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1986, the ITL Project released its conclusion, which underscored that the traditional and over-idealistic vision of the European Community as a remarkable *legal phenomenon* was over. The idea of promoting Community *integration through* enforcing the Treaty on Member States failed. The Integration Project reported how Member States retreated into protecting their national economic interests rather than pursuing the Community's interests. Politics then become essential for the success of the enterprise, which started with the Commission drafting secondary legislation speaking to the market, no longer to States. Obviously, the bold statement that the European integration was no longer a process of *integration through law* provoked an academic debate that is still alive about whether the distinction of *integration through law* and *integration through politics* could be sustained. Those who criticise the statement of ITL project do not dismiss their empirical conclusion of how the integration occurred as a matter of *fact*, but rather hold a theoretical disagreement on what law is: whether the integration described as political integration is not also an integration through law (in the form of secondary legislation). See Cappelletti, Seccombe and Weiler, *Integration through law: Europe and the America Federal Experience*, 1986. See also the contributions to the Symposium held at European University Institute on the "Heritage of Mauro Cappelletti" on 11 December 2014, some of which were published in the *International Journal of Constitutional Law*. Special attention must be given to Loïc Azoulaï contribution, in which he introduces the reasons that moved the academic debate on whether the *integration through law* statement was valid or not. Cappelletti, Mauro, M Seccombi, and JHH Weiler. "Integration through Law: Europe and American Experience." In *Integration through Law*, edited by Mauro Cappelletti, M Seccombi, and JHH Weiler, 1:3–68. de Gruyter, 1986. Azoulaï, Loïc. "Integration through Law' and Us." *International Journal of Constitutional Law* 14, no. 2 (April 1, 2016): 449–63.

<sup>123</sup> COM (1985) 310 final.

frontiers.<sup>124</sup> First, the Commission went on by releasing an additional list of “policies” that could be understood as subsidiary to the more general policies in the Treaty; for instance it set the removal of fiscal barriers (e.g. value add tax) and physical barriers (e.g. transportation) as subsidiary policies to building a *de facto* the Single Market. Second, the Commission moved even further by publishing a list of required “legislative measures” to accomplish what it has called “the well-functioning of the internal market”, an expression that has since become Commission jargon.<sup>125</sup> Making use of the technical language common to each of the functional regimes, the Commission identified 279 legislative measures that would be needed to have internal market. These two innovations inserted into the Communication of the Commission - the clear identification of the ends (functional policy goals) and the means (legislative measures) – turned the 1985 White Paper into a very persuasive political instrument.

While the Commission released the 1985 White Paper, the European Single Act (SEA) recognized the need to change the lawmaking procedures of the Council. The subsidiarity principles for the adoption of legal measures from Article 100a EEC, today Article 114 TFEU, proposed less rigorous legislative formalities. Political unanimity was no longer a viable *quorum* to approve measures of EU secondary Law. The SEA moved the decision making to some form of majority voting,<sup>126</sup> significantly reducing the rigor of the EU legislative process and permitting a quantitative and therefore qualitative increase of EU secondary legislation.<sup>127</sup> There were no changes in power-conferring rules of the Treaty. The subsidiarity principle remained the check-and-balance of the Unions’ competence. Neither there were changes in the purposes of the EU. The creation of the common market remained.

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<sup>124</sup> Weiler, Joseph H. H. “The Transformation of Europe” 100 (1991): 2403–83. See also Walker, Neil. “A European Half-Life? A Retrospective on Joseph Weiler’s ‘The Transformation of Europe.’” *Edinburgh School of Law Research Paper*, Europa Series Working Paper, no. 01 (2013).

<sup>125</sup> Private legal scholars have recently engaged with the novel concept of techno-law. For them, different than the private law in national legal systems, techno-law’s end is the “well-functioning of markets”. Whereas the former instrumentalizes private law as means to accomplish public policies or moral justice by rebalancing interest of parties, the later are means to ensuring the functional of the market laws. For Hugh Collins, “Techno-law differs [from national private law] because it is not concerned with rebalancing the interest of the parties, but rather is exclusively concerned with the goal of ensuring that the market functions efficiently. (...) Unlike private law in national legal systems, techno-law is not concerned with people and their interest as ends themselves, but rather with functioning economic entities in the market and the market itself”. Collins (2015). See also Reich, Norbert. “Economic Law, Consumer Interests and EU Integartion.” In *Understanding EU Consumer Law*, edited by Hans-W. Micklitz, Norbert Reich, and Peter Rott. Intersentia, 2009.

<sup>126</sup> SEA, Article 100a, SEA.

<sup>127</sup> Ehlermann, Claus-Dieter. “The 1992 Project: Stages, Structures, Results and Prospects.” *Michigan Journal of International Law* 11 (1990 1989): 1097–1118.

Nevertheless, the SEA did relax the legislative procedures and, therefore, political restraints. Lightening the legislative procedures was then the means to create a vast number of Directives and Regulations.

Therefore, the SEA together with the 1985 White Paper resulted in a peculiar political scenario. Legislative procedures were relaxed at the same time that technocrats provided persuasive economic reasoning for the approval of a large number of statutory acts. As JHH Weiler stated in 1991, dossiers that would have languished for years in Brussels' corridors emerged as legislation within months.<sup>128</sup> Therefore, the EU was not transformed by the SEA, but by a number of pieces secondary legislation grounded on the SEA.<sup>129</sup> Given the principle supremacy and *direct effect doctrine* of the EU legal system, the growth in the number of pieces EU legislation goes hand-in-hand with the increase of duty-imposing rules on States, individuals, and (most important for this thesis) private relationships. While public lawyers interpreted the cutting edge of the transformation of Europe through rules regulating migration, taxation, or security, private lawyers have witnessed European Private Meta-Law evolve into European Private Law. It evolved from a body of rules imposing obligations on Member States to change their private law into a body of rules directly governing individuals in their private relationships.

European of Private Law emerged with positive integration. While Welfare and Regulatory States imposed obligations on contractual relationships compromised by imbalances in bargaining power, EU Lawmakers started to some degree to mimic States at the transnational level. Within months Directives, Regulations, Decisions, Implementation, Delegating acts were approved to improve the *functioning of the internal market*. Transactions are preconditions to Markets. Obviously EU Law spills over into the private law of contracts and property rights. However, different from the vague provision of the Treaty conferring rights to citizens in general, secondary legislation regulates markets through *qualifying* individuals and private transactions on which rights are conferred.

While the Treaty refers to general obligations of non-discrimination and freedoms, the Directive on Unfair Terms addresses rights to withdrawal for consumers against sellers. Air Passenger Rights Regulation establishes compensation penalties for default in performance for Passengers against Air flight Companies. Electricity Directives have conferred rights to

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<sup>128</sup> Weiler (1991), p. 2455.

<sup>129</sup> Weiler (1991), p. 2455.

access networks for electricity undertakings against TSOs. Besides substantive obligations, those Directives and Regulations create parallel enforcement mechanisms to facilitate private enforcement of individuals' rights against other private parties. The next chapter discusses whether or not duty-imposing rules in Directives give rights to individuals against other individuals.<sup>130</sup> Yet it is incontestable that European Private Law in positive integration can be no longer defined as European Private Meta-law.

Among the various cross-sector and sector-specific Directives and Regulations, this thesis draws attention to European Private Law in Network Industries. Network industries are sectors which were operated by Vertical and State Owned Companies under granted exclusive rights until the late 1980s. Like in *Costa v. Enel*, disputes involving the supply of electricity (back then as a public utility or obligations) did not fall into private regimes, but rather public regimes. Operators of public services were considered extensions of governmental bodies. The privatization and de-verticalization of Utilities Services (gas, electricity, telecommunication, post services) replaced public operators with private undertakings, hierarchies with markets, and public regimes with private regimes.<sup>131</sup> Given that public operations were considered economic activities of "non-economic interest" until late 1980s, the integration project played no role until economic interest became evident. Since the EU removed derogation rights from network industries, the Integration Project has relied on the implementation of EU Sector-Regulations and Competition. EU Law has been a means to building competitive and integrated markets where there were no competition, no integration, and no market. If network industries have operated through a network of business-to-business and business-to-consumer relationships since 1990s, the main legal tool the competitive and internal market has relied on is European Private Law.

If European Private Law flourished with positive integration, European Private Law in network industries has taken shape as self-sufficient European Private Law. For Hans

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<sup>130</sup> The discussion on vertical v. horizontal direct effect has gone through an extensive discussion about the horizontal direct effect of provision of Treaty in cases of non-discrimination, or in cases in which directives replicated the provision of non-discrimination in Directives. The debate is still underdeveloped when Directives precisely addresses duties to private parties and specific type of market transactions. We will approach this discussion in the coming chapter.

<sup>131</sup> The division of the economic production between the rigid dichotomy market and hierarchy is borrowed from the economic literature and its most preeminent scholars. Williamson, Oliver E. *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization*. New York: Free Press, 1975. In his second big step, Oliver Williamson recognized the existence of a third key economic institution: relational contracting. Williamson, Oliver E. *The Economic Institutions of Capitalism: Firms, Markets and Relational Contracting*. New York: Free Press, 1985.

Micklitz, this is thanks to the *dynamic* changes of substantive obligations and innovative modes of lawmaking and law-enforcement of EU Law with regards to sector-Regulation and Competition.<sup>132</sup> This thesis looks at one of the network industries: the Energy Market.

In network industries, EU Law has been the main legal instrument not only in pursuing market integration, but also in constructing the market itself. Therefore, the regulatory framework of network industries has been more *dynamic* than in other regulated markets. Packages are approved and revoked within a few years. Each package has implemented a new set of rules changing the regulatory frameworks and, therefore, the behaviour of market actors so as to satisfy EU policies. If contracts are the legal instrument connecting private parties along production chains in networks, the regulation of markets would unavoidably spill over into private relationships. Since the 1990s, European Private Law has created a wide set of rules for contractual transitions between businesses, between businesses and consumers as well as rules limiting property rights. These are imposing-duty rules aiming to guide human actions when they deviate from the values of EU.<sup>133</sup>

If EU Law is *dynamic* in network industries, European Private Law is equally *dynamic*. European Private Law constantly changes the set of duty-imposing rules according to the effectiveness of the policy-oriented goals. These changes of substantive law follow other

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<sup>132</sup> Hans Micklitz (2009).

<sup>133</sup> The assertion that imposing-duties rules aims to guide human behaviours when they deviate from EU values does not mean that imposing-duties rules are means to corrects market failure. Applied the general proposition that imposing-duties rules of European Private Law are instruments to correct market failures implies that the moral ethics of the European Private Law is aligned with led-Utilitarianism approach (or moral autonomy values). This thesis is cautious in the use of the term “correction of market failure” when applied to general statements, though it uses it when it refers to a single imposing-duty rule. The reason that justifies this caution will be better explained in chapter 6. European Private Law has enacted a set of rules in which cannot be explained in the utilitarian framework. In SOS Regulation of Gas Market, the imposing-duty rules prohibiting gas suppliers to suspend gas services for consumers even in supply crises reveals a European Private Law that could tend to social values (led-duty approaches to moral ethics). Though the majority of mandatory rules in the European Private Law in energy markets tend indeed to have a led-Utilitarian approach, the SoS Regulation sustains Roger Brownsword recommendation for private lawyers in Europe. Before stepping into foregone conclusions, it is time to *stand and stare*. Brownsword (2005) and Brownsword (2011). Notably, a problem of this understanding consists in the underlying assumption that “utilitarianism” requires a strong connection between a total welfare normative foundation and the use of the market mechanism. However, both components of the assumption are debatable. In fact, the account changes significantly if “utilitarianism” is related to the use of the market mechanism as one of the possible means to maximize consumer (in a broad sense) welfare while ensuring, as much as feasible, the voluntary cooperation of their counterparties. In this sense, the SOS Regulation can perhaps be explained as the decision to limit the use of the market mechanism under severe scarcity. The importance of gas for heating can then presumably justify the allocation of gas to households in derogation of standard allocative procedures. Assessing this hypothesis requires the analysis of EU law speech acts. On these considerations, see Esposito Fabrizio and Stefan Grundmann, “Investor-Consumer or Total Welfare? Searching for the Paradigm of Recent Reforms in Financial Services Contracts”, *EUI Working Papers LAW*, 2017/5 (2017) and Esposito Fabrizio and de Almeida Lucila, “A Shocking Truth” (forthcoming).

reforms regarding power-conferring rules that (re)define the multi-level governance of lawmaking (i.e. from national legislators to NRAs, and later to European Bodies) and law-enforcement (e.g. from in-court to out-of-court). In this context, the modern concept of private law is fundamental to capturing the dynamic change of imposing-duty rules. This is the first step for any empirical investigation that tests whether these rules are committed to the moral value(s) of the EU,<sup>134</sup> or even surpasses the limits of the subsidiarity. Moreover, to have a full picture of the imposing-duties rules of European Private Law, the understanding of changes in conferring-power rules in lawmaking and law-enforcement (or adjudication) is pivotal. Here is where self-standing European Private Law starts to take shape. This is the topic of the coming chapter.

The complexity of European Private Law and its inherent pluralism represents the best picture of the puzzle in the era of pluralism. If a person tried to understand plural legal orders by putting themselves beside a promisor or promisee in a single type of transaction, they would see that a large industry buying electricity in a wholesales market, and then forming electricity supply contracts, is exposed to a plurality of legal systems. Contracts are governed by national systems of private law agreed by the parties (choice of law) or where parties are located (e.g. civil codes and regulations), EU Law (e.g. both Competition, EU Sector-Regulation, and MiFIDs), International Law (e.g. trade agreements), Self-regulation of Wholesale Markets (e.g. Standard-form contracts), and *Lex Mercatoria* (e.g. in case of Arbitration Clauses). In pluralism, conflicts between imposing-duties rules and values between overlapping legal systems do exist and, moreover, they are foreseeable. There is no controversy in the statement *we are all living in legal pluralism*.<sup>135</sup> As William Twining emphatically states, it is hard to deny as long as it is a social fact.<sup>136</sup> However, the effectiveness of plural legal systems is hampered if lawyers continue thinking in classic

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<sup>134</sup> This is aligned to what Daniela Caruso recommends as a valuable research: customizing the empirical investigation of EU markets so as to factor socio-economic asymmetries into the equation of private-law reform. Caruso (2013).

<sup>135</sup> *We are all living in legal pluralism* is an expression that is read together to the expression *we are all pluralist*. While the first make reference to the factual statement, the later has an intrinsic normative statement to law. It is important to distinguish *legal pluralism* from *normative pluralism*, in which the first is related to the overlaps of law and legal system excluding then the whole congeries of social arrangements that cannot be called “Law”. In this respect, see Haack, Susan. “The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism\*.” *Ratio Juris* 21, no. 4 (December 1, 2008): 453–80.

<sup>136</sup> Twining, William. “Normative and Legal Pluralism: A Global Perspective Annual Herbert L. Bernstein Lecture in International and Comparative Law.” *Duke Journal of Comparative & International Law* 20 (2010 2009): 473–518, p. 476. See also Twining, William. *Globalisation and Legal Theory*. London: Butterworths, 2000.

terms. Traditional thinking continues undermining the potential of private enforcement of the transitional legal system by individuals against other individuals.

If the empirical proposition that *we are all living in legal pluralism* is nowadays largely accepted, there are still two genuine controversies surrounding pluralism. One debate is about whether pluralism affects our understanding of what law is (theory of law), the other debate reflects disagreements about the normative approach to pluralism. The latter will be briefly discussed below, while the first is another story beyond the scope of this thesis. Therefore, *we are all pluralist, <sup>137</sup> aren't we?*

#### **4. Are we all pluralists? Legal Consciousness, Private Enforcement, and Effectiveness**

On one hand private legal scholars have agreed with the empirical-analytical claim that *we are all living in legal pluralism*. Yet their normative reactions to pluralism go in opposite directions. Here we have arrived precisely at the point in time that this chapter began: the DCFR and the battle between the legal pluralist and the monists.

On the one side of the spectrum, legal scholars argue that pluralism and functionalism in private law is an inescapable consequence of postmodern society, as well as the transformation of the classic concept of private law. Hence, legal pluralism is not a phenomenon exclusive to private law in Europe, but to law in general.<sup>138</sup> The increase in the complexity of voluntary and involuntary transaction, driven mostly by technology and

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<sup>137</sup> The expression “we are all pluralist” was first coined by Give Mill while describing the Modern Society. Given the anthropological approach of Give Mill’s research, he used the expression to describe societies where individuals could choose their lives and identities. The term Pluralism was later employed by sociologists, political scientists and lawyers to describe the changes in their field of research throughout the consolidation of Modern Society. This thesis uses the expression “we are all pluralist” to contrast the normative position of legal scholars concerning Pluralism. See Garver about the genealogy of the expression, Garver, Eugene. “Why Pluralism Now?,” Philosophy Faculty Publications, 1990. Weiler, J. H. H. “Prologue: Global and Pluralist Constitutionalism – Some Doubts.” In *The Worlds of European Constitutionalism*, edited by Gráinne de Búrca and J. H. H. Weiler. Cambridge University Press, 2011.

<sup>138</sup> Theory and concept of legal pluralism have long spurred discussion in legal theory, legal sociology and legal anthropology. See James Tully, *Strange Multiplicity: Constitutionalism in a Age of Diversity*, 1995. Tamanaha, Brian Z. “A Non-Essentialist Version of Legal Pluralism.” *Journal of Law and Society* 27, no. 2 (2000): 296–321. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sidney Law Review* 30, no. 3 (September 2007). Tamanaha, Brian Z., Caroline Mary Sage, and Michael J. V. Woolcock. *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge University Press, 2012.

globalization, walks hand-in-hand with the increase in complexity of how to regulate these transactions,<sup>139</sup> which is done through rules of private law. Therefore, having general principles of private law that can be applied indiscriminately to all transactions is no longer suitable in postmodern era, as it was perceived to have been by the codification projects of Roman law projects in the 19<sup>th</sup> century.<sup>140</sup> For them, the “plan of a more coherent EU Contract law” is unfeasible in an *unsystematic* law. On the same side of the spectrum, there are also private lawyers who have advocated that pluralism in private law in Europe is not only unavoidable, but is desirable<sup>141</sup>. Regardless of the justification for legal pluralism in private law, if it is unavoidable or desirable, pluralist legal scholars have vehemently rejected any attempt to systematize European Private into what could be perceived as the harmonization of European Private Law into a transnational Civil Code.

On the other side of the spectrum, there are private legal scholars who disagree with this normative pluralist approach. The vicarious opponent of any effort of European harmonization in private law has been Pierre Legrand.<sup>142</sup> Some of the drafters of the DCFR were also scholars discontent with Pluralism, who saw in the European Codification Project as a way out of pluralism and a way back to monism.

Thinking that private law in postmodern society is *per se* or should be functional and plural goes against the development of the DCFR in 2008/2009 and later the CFR in 2011 under the auspices of the Redding Commission, as well as the CESL. The major mistake of all the European Codification Projects in the 2000s has been the reliance on the *belief* that the harmonization (or systematization) of national Civil Codes at the European level would lead to the coherence of private law. Their mistake was looking at European Private law with the same lens that classic private lawyers looked at Roman law in 19<sup>th</sup> century. The DCFR then could be seen as an attempt to reproduce the same project as civil law codification in the 19<sup>th</sup> century, which could have been suitable for non-complex societies ruled by Liberal States in 19<sup>th</sup> century.

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<sup>139</sup> Twining (2010).

<sup>140</sup> Micklitz, Hans-W. “The (Un)-Systematics of (Private) Law as an Element of European Culture.” In *Towards a European Legal Culture*, edited by Geneviève Helleringer and Kai Purnhagen. Germany: Nomos Verlagsgesellschaft, Verlag C.H. Beck and Hart Publishing, 2014.

<sup>141</sup> Benda-Beckmann, Franz von. “Who’s Afraid of Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law*, December 2, 2013. Michaels, Ralf. “Why We Have No Theory of European Private Law Pluralism.” In *Pluralism and European Private Law*, edited by Leone Niglia. Oxford: Hart, 2013.

The European Codification Project was a political fiasco, as was discussed at the beginning of this chapter, and the DCFR is now relegated to scientific fiction section in bookstores. Regardless of the belief that codification might have recreated a monistic legal system, the failure of the DCFR project leads us to the conclusion that indeed *we are all living in legal pluralism* and will continue to do so.<sup>143</sup> As things stand, what is the role of European private legal scholarship in the postmodern era, when private law is unequivocally plural? To answer this question, I found inspiration in Ralf Michaels' assertion about theories on globalization. "Paradigm shifts happen neither in reality nor in ideology but in your ways of understanding the world".<sup>144</sup>

Even though the EU did not bring to life the supranational civil code, it left behind its legacy, which was the academic debate triggered by the draft proposal. The DCRF gathered private legal scholars from different Member-States and legal cultures to discuss Law, Civil Codes, and the concept of private law. Discussions and academic production about the DCFR and the private dimension of the European Integration project is the *true* legacy of EU. It is a large amount of material that serves as evidence to contest the validity of the classic concept of private law () embedded in national legal systems in Europe and abroad. This legacy needs to shift from European Legal Scholarship to national legal Scholarships within Member States and civil law countries beyond the EU.

Within States, there is a need to increase of Legal Consciousness of European Private Law. There are national Courts endorsing the direct horizontal effects of EU Law, which is combined with the EU initiative of creating procedural out-of-court mechanisms to solve private disputes. However, private enforcement will remain underdeveloped if market actors do not share awareness of the existence of their rights.

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<sup>142</sup> Arguably, the most vociferous opponent of greater European Harmonization efforts is Pierre Legrand. Legrand, Pierre. "Antivonbar." *Journal of Comparative Law* 1, no. 1 (2005).

<sup>143</sup> It is undisputable that the Euro-crisis and *Gauweiler case* revived the discussion about whether the EU legal system could still be conceived as a Constitutional plural order. Some scholars have argued that the decision of CJEU on the OMT's policy represents a new stage of constitutionalism of the EU towards a fully monist order. However, this thesis is in agreement with scholars who see it as foregone conclusion. CJEU's judgement in favour of the legality of the OMT emission was referred by the German Constitutional Court, which is still holding powers to review CJEU decisions in strict circumstances (ultra virus review, human rights review, and identify review). If indeed the German Constitutional Court decided to follow the CJEU in such controversial case, it could be seen as a treat to the European Plural Constitutional, but any conclusion is no more than speculations. C-62-14. *Gauweiler case*. See Christiaan Timmermans, *The Magic World of Constitutional Pluralism*.

<sup>144</sup> Michaels, Ralf. "Globalization and Law: Law Beyond the State." In *Law and Social Theory*, edited by Reza Banakar and Max Travers, Second edition. Hart Publishing, 2013.

The current work of European private lawyers will create a legacy for the already ongoing debate about the emergence of private law beyond the State. Different from the worldwide literature on Privatization and Globalization of Private Law, European private law emerges in a transnational legal system as a legal system beyond State, but with policy mandate. Rather than trying to stifle conflict through an imposition of Universalist harmonizing schemes (e.g. supranational constitutions or codes), EU institutions have been innovative in seeking a wide variety of procedural mechanisms and practices for managing hybridity without eliminating it.<sup>145</sup> In an era where more and more transnational legal systems emerge with policy-driven competence to build free and common markets, the EU experience will serve as blue print. These new Integration Projects replicate European *negative integration* and, sometimes, even *positive integration* (e.g. TTIP and TTP).<sup>146</sup> If one agrees that the European Integration Project will unavoidably spill over into private law, lessons from European Private Law on how to understand these modes of *transnationalization* of private law are worthwhile.<sup>147</sup>

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<sup>145</sup> Berman, Paul Schiff. "Global Legal Pluralism." *Southern California Review* 80 (2007): 1155.

<sup>146</sup> Regional Trade Agreements – like TTP (Trans-Pacific Partnership) and TTIP (Transatlantic Trade and Investment Partnership) – have raised concerns among international legal scholars with regard to the insertion of principles that have long been part of the EU legal order such as the principles of direct effect and supremacy of the supranational legal order. Since these discussions have long been in the core of the academic debate in Europe, there is a lot to learn from the old continent.

<sup>147</sup> See the infant project of Hans-W. Micklitz (2015).

– CHAPTER 3 –

**Integration through Self-standing European Private Law:**

**From the Internal Point of View**

**1. Is the obvious so obvious? An inquiry into the Ongoing Debate over European Private Law**

**2. EPL and Secondary Rule of Change: A Debate Mired in Perspectivism**

2.1. European Private Law, European Private Meta-law, and European Administrative Law

2.2. Vertical Direct Effect, Horizontal Direct Horizontal Effect, and Only Courts

**3. EPL and Primary Rules: Rethinking Law from the Internal Point of View**

3.1. Rigid Primary Rules: ex ante regulating transactions

3.2. Vague Primary Rules: ex ante implementation or ex post supplementation

3.2.1. Shrinking Vagueness: Rigid Rules in Implementing Acts

3.2.2. Shrinking Vagueness? Rigid Rules in Non-categorically Identified acts

**4. EPL and Secondary Rule of Adjudication: Beyond Courts and Vertical Effect**

4.1. Supra-governmental Adjudicating Authorities: beyond CJEU

4.2. Member State's Adjudicating Authorities: beyond National Courts

**5. From The Internal Point of View to the Harmonization?**



– CHAPTER 3 –

**Integration through Self-standing European Private Law:  
From the Internal Point of View**

“Go on. Quickly, hurry, keep thinking and keep looking beyond the purely necessary, even when you have the feeling that there is no more, no more to think, that it’s all been thought, that there’s no more to see, that’s all been seen”

Javier Marías in *Your Face Tomorrow: Fever and Spear*

The prior chapter was devoted to advancing the modern concept of private law, which defines private law as rules that go beyond States and beyond the concept of private law as an autonomous value-based system. In this chapter, this thesis now takes the concept of private law forward and contextualizes it in relation to the rules of European Private Law governing contracts in the Internal Energy Market. It does so through a discussion of the rule of recognition, primary and secondary rules, and the *Internal Point of View* as developed by H.L.A. Hart in *The Concept of Law*,<sup>1</sup> as well as through further advances within the postmodern philosophy of law.<sup>2</sup>

The aim of this chapter is to set out the main claim of this thesis. This thesis claims that European Private Law has advanced towards a *self-standing normative system of rules* in

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<sup>1</sup> H. L. A. (Herbert Lionel Adolphus). *The Concept of Law*. Clarendon Press, 1961.

<sup>2</sup> To develop Harts’ idea about the Internal Point of View, this thesis relies on Hart’s theory and postmodern philosophy of law to advance its claim. About the relevance of the “Internal Point of View”, see Patterson, Dennis M. “Explicating the Internal Point of View.” *SMU Law Review* 52 (1999); and Shapiro, Scott, *What Is the Internal Point of View?*, 75 *Fordham L. Rev.* 1157 (2006).

regulated markets. *Self-standing* European Private Law represents the emergence of a *set of rules with semantically rigid content* at the supranational normative system of EU Law. This distinct set of rules suggests *intrusion* into national system of private law and private relationships with minor *resistance* or *divergence within* and *between* Member States. Despite empirical evidence of self-standing European Private Law, the understanding of this phenomenon has not reached the debate over European Private Lawyers, nor EU Energy Lawyers. This is thanks to the way EU Law has been understood from perceptiveness, instead of the genuine discursive feature of Law; namely, the understanding of Law as a social phenomenon. To shed light on the debate over European Private Law, this chapter aims to challenge the commonly agreed metaphysical proposition of what European Private Law is. It does so by bringing Hart's great contribution to jurisprudence<sup>3</sup> to the center of the discussion on European Private Law. In so doing, it combines primary and secondary rule and, most importantly, the Internal Point of View, to European Private Law.<sup>4</sup>

The first section (1) begins by challenging the empirical assumptions that seems to be taken by legal scholars when engaging in the debate over European Private Law. Given that debates tend to oscillate between propositions about European Private Law being or not being Meta-law, and having or not having horizontal effect, scholars seem to agree with the following description. *European Private law reflects hybrid rules in the Treaty and Directives addressed to Member States (i) through setting minimum standards and policy goals (ii), which could spill over into private relationships. Given the vagueness of provisions, European Private Law has primarily proceeded through the speech acts of the CJEU (iii).* If the private law dimension of EU Energy Law Energy is framed as primary rules and secondary rules, this metaphysical proposition seems inaccurate. It cannot depict dynamic change in rules that are no longer enacted in Directives, but Regulations; no longer vague, but rigid; and no longer proceed through Courts, but Out-of-Court adjudicating authorities. The coming sections are devoted to *deconstructing* each sentence of this proposition by stressing

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<sup>3</sup> Answering about the prominence of his concept of law, Hart argued that “if we stand back and consider the structure which has resulted from the combination of primary rules of obligations with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled the jurists”. Hart (1961), p. 98.

<sup>4</sup> There are controversies about whether the proposition about the Internal Point of View was Harts' unique contribution to jurisprudence, or if Hans Kelsen had already advanced it in the “Pure Theory of Law”. Kelsen had indeed employed the concept, but it was peripheral to his sanction-centered theory. Hart, in contrast, shifted the internal point of view to the center of his theory of law. This is particular noticeable in his dedication of an entire chapter to the contextualization of the “Open Texture” of Language and how it affected Law. It is thus no wonder that Hart's theory is prized as the most influential theory of law.

inaccuracies in the context of EU Energy Law. They do so through contextualizing the private law dimension of EU Energy Law through a discussion of primary and secondary rules and, most important, the linguistic framework introduced into Hart's ideas about the *Internal Point of View*.

The second section (2) confronts the following idea: *hybrid rules in Treaty and Directives are addressed to Member States and could spill over into private relationships as they create individuals' rights*. This descriptive approach is aligned with most of the concerns discussed in the debate over European Private Law. Does EU law regulate private relationships: European Private Meta-law or European Private Law? If so, can those rights be enforced against another individual, or only against Member States (vertical or horizontal direct effect)? To argue the debate is mired in perceptiveness, this chapter develops the concept of *secondary rules of change*. Despite hybridity, it shows how valid rules in the Treaty and secondary legislation can be distinguished as rules of Administrative Law, European Private Meta-law, and European Private Law (2.1). Moreover, it also approaches the limits of the debate over vertical v horizontal direct effect (2.2). Mapping the debate throughout, this thesis shows the gaps thereof. It does not say much about the growing number of adjudicating authorities outside Court's rooms, nor does it offer words to explain how the semantic dimension of legal norms affects individuals' behavior or legal interpretations.

The third section (3) then complements the concepts of secondary rules of change and adjudication with the full account of primary rules through the linguistic framework. It does through challenging the semantic dimension of the generally agreed proposition: "rules of private law in EU legislative acts set *minimum standards* (i.e. semantically vague rules) and policy goals and, therefore, have been primarily proceeded by *CJEU*". To argue the contrary, this chapter introduces Hart's great contribution: the Internal Point of View. It develops two lines of arguments. The first arguments are based on Hart's assertions about *primary rules*, *the internal point of view*, and the *open texture of law*. The manuscript advances towards the postmodern philosophy of law to explain how language affects individuals' behaviour and legal interpretation. Putting this in the context of EU Energy Law, it demonstrates that rules of European Private law are *not* all vague as generally described, which suggests consequences for legal interpretation. They range between semantically rigid rules (3.1) and vague rules (3.2). It also illuminates the trend of enacting Implementing Acts to regulate contracts in Energy Markets with rigid rules.

The fourth section (4) then proceeds to explain the concept of *secondary rules of adjudication* to raise objections against the following proposition: “rules of European Private law have primarily proceeded through the *speech acts of the CJEU*”. The concept of secondary rules as developed by Hart explains why decisions of the Commission, ACER (4.1), NCAs, NRAs, and ADRs (4.2) are undisputable supplementary sources of primary rules of European Private Law, insofar as there are conferred powers to adjudicate. Furthermore, it shows how these new modes of adjudication boosts private enforcement of EU Law against private parties, which sum to the doctrine of horizontal direct effect.

From the analyses developed along the prior sections, the fifth part (5) concludes by explaining why the Internal Point of View is a new approach to understand Harmonization.

### **1. Is the obvious so obvious? An inquiry into the Ongoing Debate over European Private Law**

European Private Law is usually referred to as *bits and pieces*, which to some extent depicts it as a non-codified or non-systematized body of rules. *Bits and pieces* of European Private Law refer to rules in EU Legislation that impose duties on individuals while conducting transactions. *Bits and pieces* also refer to the CJEU’s judgment interpreting the compatibility of EU law with national private laws, or an authoritative Decision by the Commission prohibiting certain clauses in vertical agreements. However, *bits and pieces* is not a legal expression, nor does it have any legal meaning in itself. In legal terms, *bits and pieces* refers to set of duty-imposing rules on individuals in contractual relationships. These constitute reasons for actions to obey or to abstain. In order to illustrate what this thesis means by European Private law as reasons for actions applied to individuals, this chapter begins by narrating a hypothetical case in a very real context. It takes the private law dimension of EU Energy Law as a blueprint.

Let’s suppose that an electricity supplier A operating in the retail market of Member States X sets a business plan to expand its operations to the neighboring Member State Y in 2008. To implement this plan, managers demand that in-house lawyers draft contractual terms and conditions of supply agreements in Member State Y. Given the years of experience

operating in the European market, the in-house lawyers know in advance that the 2<sup>nd</sup> Electricity Directive had established several rules on *information duties* for supply agreements between final customers and electricity retailers, specifying when rules are addressed in general to final customers or are specific to consumers. Some of these EU rules enshrine very precise *information duties* on how parties should conduct supply contracts, like some of the semantically rigid rules listed in the Annex I (e.g. duties to inform “the identity and the address of the supplier” and “the available mechanism for solving disputes”). Other rules, by contrast, do provide clear guidelines, like the vague rules of Article 3(7) establishing the *duty of transparency* “regarding contractual terms and conditions”, or Article 3(3) and Annex I(c) establishing consumer rights for *transparent prices*. Besides the 2<sup>nd</sup> Electricity Directive, in-house lawyers were also aware of NCA’s formal decisions in the jurisdiction of Member State X, determining that supply agreements with large customers exceeding five-years’ duration violate Article 101(1) TFEU.<sup>5</sup> They were also aware of *commitment-decisions* issued by the Commission related to the same competition concerns.<sup>6</sup>

Given the semantically rigid and vague rules of the 2<sup>nd</sup> Electricity Directive on *information duties*, in-house lawyers could have inferred that rigid rules were transposed equally in both Member States X and Y, but not vague rules as *information duty on transparent prices*. The simple reading of Articles 3(7) and Annex did not provide clear lines on what kind of information should be disclosed to be in conformity with national law transposing EU law. Electricity supplier A has long performed supply agreements in the following way: an electricity bill is posted on a monthly basis informing tariffs’ costs, total volume of kilowatts (kW) consumed, and average price per kilowatt-hour in the respective month, considering average price as a middle value of prices of kilowatt variable on an hourly basis.<sup>7</sup> Would the electricity supplier A have still been in conformity with the *information duties of transparent price* if it replicated the same commercial practices in the domestic market of Member State Y?

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<sup>5</sup> The German Federal Cartel Office (FCO) (*Bundeskartellamt*) released in January 2005 a report titled “Principles of Evaluation of Long-term Gas Supply Contracts under Competition”, where a specie of “black list” of prohibited clauses were considered to be anti-competitive clauses. Following the report, gas suppliers opted to sign specie of “commitment-decisions” with NCAs agreeing to not enforce these clauses, nor to include them in future supply contracts. NCAs imposed formal decisions on gas undertakings that refused to sign the commitment, which was later confirmed by German Court.

<sup>6</sup> COMP/39.316/EDF and COMP/37.944/Distrigas cases.

<sup>7</sup> Though hypothetical, questions about how the information duties of transparent prices have been requested to the CJEU twice by the German Courts. C-92/11, *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen*; also joined cases C-359/11 and C-400/11, *Schulz and Egbringhoff*.

By searching the national law of Member State Y, in-house lawyers found the Decree-Law of Member State Y transposing the 2<sup>nd</sup> Electricity Directive. Different to Member State X, the neighboring State had transposed the Directive by imposing more rigid rules in the Charter in terms of the *information duty on transparent price*. Further to these requirements, it added the duty to inform about methods of price calculation, including marginal costs and marginal profits. Dissatisfied with the degree of intrusion of Member State Y's law into its autonomy, the managers decided to suspend the business plan to expand operations. Additionally, instead of bringing actions against Member State Y in its national jurisdiction,<sup>8</sup> it forwarded an informal complaint to the European Commission arguing the transposition of the 2<sup>nd</sup> Directive by Member State Y could be precluding the free movement of electricity suppliers. If the legal reasoning raised by the market actor had convinced the Commission, it would have had a range of plausible legal and non-legal alternatives solutions to solve the plausible regulatory barrier. Some of the solutions would have led to a change of primary rules of European private law, others not.

Despite the *electricity supplier A case* being hypothetical, the harmonization issues with transposition of the 2<sup>nd</sup> Electricity Directive are not, nor are the Commission initiatives seeking solutions. In 2009 the Commission endorsed non-binding recommendations released in the 2<sup>nd</sup> Citizens' Energy Forum, the OMC mechanism for consumer law in Energy Markets.<sup>9</sup> It established the best practices of *information duties* disclosed in energy bills expecting a voluntary convergence of national laws and market practice. The Commission also proposed the supra-governmental mechanism to monitor the transparency of gas and electricity price paid by large customers, which was approved in 2008 as Directive 2008/92/EC.<sup>10</sup> Despite the initiatives undertaken by the Commission, neither the recommendation nor the monitoring mechanism would count as primary rules of European Private Law. While the former lacks normativity, the latter does not impose duties on

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<sup>8</sup> Electricity supplier A could indeed have taken an action against Member State Y under the conditions established by CJEU in the *Paola Faccini Dori v Recreb Srl case*, whereby individuals may rely on Directives to make a claim against Member States if a Directive was transposed incorrectly. See *C-91/92 Paola Faccini Dori v Recreb Srl*, 14 July 1994.

<sup>9</sup> On 30 September 2009, the 2<sup>nd</sup> Citizens' Energy Forum established by the Commission concluded with the endorsement of recommendations containing a specific list of items to be included in the bills. The list reflected good practices already existing in some EU Countries, in particular Austria, Italy, Norway, Sweden and the UK. MEMO/09/429, Citizens' Energy Forum, 30 September 2009.

<sup>10</sup> See Directive 2008/92/EC concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users.

electricity suppliers with their contractual parties, but only between suppliers and a supra-governmental body.<sup>11</sup>

By contrast, there is an alternative solution that would indisputably change the primary rules of European Private law. The Commission could have initiated an *infringement procedure* against Member State Y.<sup>12</sup> If it had brought the matter to the CJEU, the interpretative decision of the Court would have served as a source of law supplementing the vague rules of the 2<sup>nd</sup> Electricity Directive on *information duties*. Despite the power-conferring rules, there have never been infringement procedures regarding *information duties* of suppliers. Put differently, the Commission has pursued another regulatory strategy. The Commission has pursued a new set of rules along the lines of the 4<sup>th</sup> Energy Package under the communication entitled “Delivering a New Deal for Energy Consumers”. It aims to revoke primary rules creating *information duties* and enacts a new body of law with more semantically rigid rules.<sup>13</sup> The body of new rules could be either enacted as Regulations or Implementing Acts with general application, following the same regulatory strategy applied in Network codes.<sup>14</sup>

If this thesis is committed to answer the question on how the private dimension of EU Energy Law (or European Private Law) has ruled contracts in the electricity and gas sectors since the EU has pursued the positive integration strategy, to what extent does this hypothetical case of electricity supplier A shed light on the phenomenon of European Private

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<sup>11</sup> The recommendations endorsed by the Commission in the Citizens’ Energy Forum, albeit aiming to regulate transactions, are non-binding recommendations and therefore they are not rules of European Private Law. As for the Directive 2008/92/EC, the Commission proposed a mechanism in which suppliers of electricity and gas have to provide a list of information to the Statistical Office of the European Communities (Eurostat). Despite the binding force of the Directive, it does not set a *duty of information* applied to sales agreements between energy suppliers and industrial end-users. These are rules that fall into the subject of Harmonization of Administrative Law, rather than EU Law.

<sup>12</sup> Although the Article 258 TFEU confers power for the Commission to initiate an infringement proceeding, no infringement proceeding has (yet) reached the CJEU concerning the poor implementation of *information duties* of suppliers by Member States.

<sup>13</sup> Within the Energy Union Framework Strategy (COM(2015)80 final), the Commission released the Communication on “Delivering a New Deal for Consumers”, which was the preliminary step for drafting the first Legislative act on Energy Consumer Rights. As can be seen in the first lines of the communication, the Commission identifies the lack of appropriate information on costs and consumptions as the first among six obstacles “to consumers – households, business and industry – fully benefiting from the ongoing energy transitions”. The Communication then continues by identifying a three-pillar strategy to Deliver New Deal for Energy Consumers being one of the mechanisms of empowerment of consumers by “providing frequent access, including near-time, to partially standardised, meaningful, accurate and understandable information on consumption and related costs as well as the types of energy source”. See COM(2015) 339 final, 15 July 2015, p. 9.

<sup>14</sup> Similar context has been seen with Network Codes.

Law?

To answer this question, this chapter again takes a leaf out of Javier Marias' book. *Keep thinking and keep looking beyond the purely necessary, even when you have the feeling that there is no more to think.* The hypothetical case of electricity supplier A starts to challenge the general proposition about European Private Law. If the intertwined aspect between law and language is taken seriously, the hypothetical case sheds lights on the main claim of this thesis. It provides the first hints on the foundations of the self-sufficiency of European Private Law.<sup>15</sup>

The hypothetical case of electricity supplier A illustrates European legal pluralism from the *Internal Point of View*. It explains the phenomenon of law from the view of an electricity undertaking willing to collaborate with the system of law. The Bad-man theory is not applied in this circumstance.<sup>16</sup> By doing so, the hypothetical case reveals a European Private Law in which the substantive law is more semantically rigid compared to the provision of non-discrimination. As well as it makes references to how market actors refer to decisions from the Commission as source of EU Law. With this proposition, this thesis aims to contribute to the ongoing debate on European Private Law, which seems to be mired in the perceptiveness of *direct v. horizontal* effect, *Meta-law v. Law*. In order to twist the ongoing debate from perceptiveness to a discursive discussion of the phenomenon of law, it then suggests an investigation from the *Internal Point View*.

The hypothetical case of electricity supply A resonates in two dimensions of the legal debate about European Private Law. European Private Law has long been discussed by legal scholarship and positions can be divided according to the subject of analyses. On one side of the debate, there are legal scholars looking at the *substantive dimensions* of EU Law and questioning whether there is indeed a European Private Law with duty-imposing rules to private relationships, or if it is merely a sort of European Private Meta-law with obligations on States to change their national private law. On the other side of the debate, there are claims about the *enforcement dimension* of EU Law and questioning whether there is *horizontal*

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<sup>15</sup> European Private Law as Self-standing system of rules does not mean institutional autonomy, but rather normativity autonomy.

<sup>16</sup> The bad-man theory as proposed by Oliver Wendell Homes Jr. Oliver Homes, "The Path of the Law", 1897.

*direct effect*, or it is no more than *vertical direct effect*.<sup>17</sup> This thesis claims that there are some missing points in both discussions.

Information duties in Electricity Directives are hybrid rules. While there are measures of European Private Meta-law<sup>18</sup> imposing duties on Member States to regulate terms and conditions of private transactions, there are duty-imposing rules addressing private parties: e.g. *the duty of transparent prices on electricity suppliers to end-customers*. The simple reading of the Annexes of Electricity Directives provides uncontested empirical evidence confirming the existence of European Private Law. This solves disputes on the character of European Private Law (v. Meta-law) and further suggests the lack of investigation into the private law dimension of EU Law in regulated markets.

Shifting from *substantive law* to the limits of *private enforcement*, the relevance of discussions seems contestable based on three arguments. Firstly, if one takes the position that EU Law lacks horizontal direct effect, the electricity supplier case A shows that Decree-laws transposing Directives into national laws function as a mirror of transnational law into national legal systems. They duplicate rules of EU Law into the national legal system of private law. This mirror effect is evident in the *RWE v. Verbraucherzentrale Nordrhein-Westfalen case*.<sup>19</sup> When EU Regulations are a means to enact secondary legislation, then arguments on *vertical direct effect* are not even applied. If one considers that EU Lawmakers have opted for Regulation instead of Directives, the academic debate looks even more detached from reality. Secondly, the debate has not given the correct account of how the EU circumvents the issue of *direct v. indirect* by obligating States to create parallel enforcement-mechanism systems outside Court rooms (sector-related and consumer ADRs) and how it has boosted private enforcement in both business-to-business and business-to-consumers. Thirdly, discussions appear to have eyes only for the legal issue enforcing duties of *non-discrimination*

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<sup>17</sup> See Dougan, Michael. "The Impact of the General Principles of Union Law upon Private Relationships." In *The Involvement of EU Law in Private Law Relationships*, edited by Dorota Leczykiewicz and Stephen Weatherill. Oxford: Hart Publishing, 2013. Reich, Norbert. *General Principles of EU Civil Law*. Cambridge: Intersentia, 2014. Reich, Norbert. "The Impact of the Non-Discrimination Principle on Private Autonomy." In *The Involvement of EU Law in Private Law Relationships*, edited by Dorota Leczykiewicz and Stephen Weatherill. Oxford: Hart Publishing, 2013. Whittaker, Simon. "The General Principles of Civil Law: Their Nature, Roles and Legitimacy." In *The Involvement of EU Law in Private Law Relationships*, edited by Dorota Leczykiewicz and Stephen Weatherill. Oxford: Hart Publishing, 2013.

<sup>18</sup> Collins, Hugh. "The Revolutionary Trajectory of EU Contract Law towards Post-National Law". Paper Presented in the 5<sup>th</sup> ERPL Conference, May 2016.

<sup>19</sup> C-92/11, *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen*

in Treaty and Directives, which is a vague rule. Electricity supplier A refers to information duties that are quite rigid.

Given the contextualization of the Electricity Directive, it denounces how the debate over European Private Law is mired in perceptiveness. Legal Doctrines and analyses are restrained to the speeches of CJEU, which are merely conclusive identification of the pair legality/illegality. Discussions on *European Private Law v. European Private Meta-law*, as well as *direct v. indirect horizontal effect*, have nothing to say about the set of rules that has never reached the court, how the semantic nature of rules impacts on individuals' behavior and legal interpretation, or the proliferation of Out-of-Court adjudicating-authority bodies. It lacks the Internal Point of View to understand law as a discursive phenomenon.

Asserting that Legal scholarship is mired in perceptiveness means that analyses are based on categorical identification of the source of law. We are speaking of Legal Doctrines systematizing the phenomenon of law through analyses of speeches of Courts. This has nothing to say about how Court decisions affect legal interpretation of national courts and NRAs, nor how EU Law affects individuals' behavior when business-to-business relationships are relational contracts. The case of electricity supplier A also sheds light on the other aspect of European Private Law that goes further than the duel *direct v. indirect horizontal effect*. It challenge criteria of validity based on conclusive identification.

In contrast to propositions about the direct horizontal effect, the Electricity Directive shows that those hybrid measures of EU Energy Law range between vague and rigid commands about what to do or abstain from, hereinafter identified in between two extreme models: *semantically vague and rigid primary rules*.<sup>20</sup> Moreover, the hypothetical case also

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<sup>20</sup> At this point, it is fundamental to make a clarification about the concepts of two terms applied throughout this thesis – rigid and vague rules – and the justification for using this terminology. In *Concept of law*, Hart argues that in any large group of general “Rules, Standards, and Principles” are the main instrument of social control. See Hart, *Concept of law*, op. cit., p. 125. Like Hart, there is consensus among legal theorist in classifying primary rules in legal system as Rules, Standards, and Principles. General rules are legal texts that provide bright lines to individuals' behaviours (e.g. driving a car over 110km/h violates rules establishing speed limits of 100km/h), whereas standards are legal texts that leave space for interpretation, which offers the possibility of disagreement about propositions of law (e.g. consumers have the right to reasonable electricity prices, but what precisely is a reasonable price?). However, this thesis is using the term “rigid rules” and “vague rules” to refer to both “rules” and “Standards”, in which “Standards” refers to very vague rules as this thesis points out in the subsection on vague EU primary rules. Notwithstanding the predictable misunderstanding that this terminology could cause, there is justification for it. This thesis aims to avoid misunderstandings originating from the undeniable ambiguity of the term “Standard”. As the term Standards is defined by WTO rules (TBT Agreement, Annex 1, paragraph 2) as a body of norms made by private bodies that are by their nature non-binding, this latter definition of Standards has been commonly finding in works of trade lawyers, international private lawyers, and transnational private lawyers, those who are part of the academic debate about the emergence of private law

suggests that there is a trend towards increasing rigidity. While the 1<sup>st</sup> Package was composed solely by Directives on general issues of the internal market with vague rules, the subsequent 2<sup>nd</sup> and 3<sup>rd</sup> Packages went on to approve a growing number of Regulations, Decisions, and particularly Implementing Acts imposing more semantically rigid rules addressing contracts.

If this thesis aims at an in-depth investigation of the intersection of EU Energy Law and European Private Law, and how they interact with national legal systems, it departs from the assumption that rules of EU Law range *between semantic vague and rigid rules*. When EU legislation and EU adjudicating authorities create rigid rules, this shrinks possible divergent legal interpretation by officials, legal scholars, and individuals within Member States. This is when Self-Standing European Private Law takes shape. In European legal pluralism, the enactment of semantically rigid rules and the increasing number of disputes needing adjudication in EU Energy Law suggests the intrusion of European Private Law into national legal systems of private law. Self-Standing European Private Law takes place when primary rules of European Private Law provide rigid and objective reasons for action. The *Internal Point of View* is the key element to the comprehension of the phenomenon.

The reasons for introducing this chapter with the hypothetical case of electricity supplier A is to bring into question the shared understanding of what European Private Law is. This justifies this own section's subtitle: *is the obvious so obvious?*

To identify the EU system of rules in private law creating duties on individuals in the Energy Internal Market, this thesis pursues analysis of EU Energy Law grounded in the concepts of primary and secondary rules, which refers to the perspective dimension of law. The discursive element of law comes into the investigation of how semantically rigid rules entrench legal argumentation as a means of constructing legal discourse. Within this theoretical framework, (i) *duties* (and rights) are created by primary rules that propose normative *reasons for action* (or conduct) for individuals *qua* individuals (normativity of law); (ii) primary rules are legally validated by secondary rules (validity); (iii) primary rules might communicate *duties* through vague language, opening a range of possibilities for interpretation on how to conduct in conformity with primary rules (discursiveness), and; (iv) the semantic vagueness of primary rules are supplemented by authoritative determinations of what law is in a concrete case, which are equally primarily rules (rule of adjudication).

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beyond States. This justifies the use of the term “rigid rules” and “vague rules” to identify legal texts that provide bright lined and fuzzy lines, respectively.

Yet, it is important also to emphasize this thesis does *not* dare formulate any theory of law. Neither does it claim that Harts' theory is the better account explaining a plural legal system.<sup>21</sup> Nevertheless, this manuscript endorses Hart's positivism for his phenomenological approach to law from the *Internal Point of View*.<sup>22</sup> His explanation of legal systems based on secondary rules of recognition as the grounds of legal validity of primary rules from the view of a market agent suits better this thesis purposes. It is still the best conceptual framework to lawyers identify duties and rights and it is particularly valuable in transnational laws that does not communicate rules through private and public law divide. As Hart prized his own theory, and this thesis agrees, "if we stand back and consider the structure which has resulted from the combination of primary rules of obligations with the secondary rules of recognition, change and adjudication, it is plain that we have here [...] the most powerful tool for the analysis of much that has puzzled the jurists and political theorists"<sup>23</sup> about what are obligations and rights, validity and source of law. Moreover, this thesis acknowledges the *theoretical disagreements* brought by Ronald Dworkin<sup>24</sup> about positivistic criteria of legal validity that, since this time, have set the cadence of the music that has played in the intellectual contest that has become known as the Hart-Dworkin debate.<sup>25</sup> However, this chapter does not build normative arguments. It does not aim to assess law to find the *values* in the EU, nor the truth in law. For this thesis, the legal positivism of Hart provides the conceptual framework to recognize valid rules, which is the preliminary stage to further systematic conclusions about the values of the EU in private law. Furthermore, if Law provides reasons for actions, governing somebody to take action or to abstain from it, the Internal Point of View leads to a comprehensive understanding of the legal system from the

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<sup>21</sup> There has long been an academic debate discussing the question of whether legal positivism concepts associated with Hans Kelsen and H. L. A. Hart remain of any relevance for international law, EU law or any transnational law in the postmodern age. The topic was debated by a group of legal scholars in the edited book by Jörg Kammerhofer and Jean D'Aspremont entitled "International Legal Positivism in a Post-Modern World". The disagreement between the contributors illustrates the divergent position about the fitness of Hart's theory to explain phenomenon of international law. This thesis takes a clear position defended by Jean D'Aspremont. This thesis argues that legal positivism still account as metaphysical proposition of EU law. It does so through by stressing the *sui generis* features of EU law, and the trend to enact more semantically rigid rules. Aspremont, Jean d'. "Herbert Hart in Today's International Legal Scholarship." In *International Legal Positivism in a Post-Modern World*, edited by Jörg Kammerhofer and Jean d'Aspremont. Cambridge University Press, 2014.

<sup>22</sup> See footnote 2.

<sup>23</sup> Hart (1961), p. 95

<sup>24</sup> Dworkin, Ronald. *Law's Empire*. Hart, 1986.

<sup>25</sup> Patterson, Dennis M. "Dworkin on the Semantics of Legal and Political Concepts." *Oxford Journal of Legal Studies* 26, no. 3 (2006): 545–57. Shapiro, Scott J. "The 'Hart–Dworkin' Debate: A Short Guide for the Perplexed." In *Ronald Dworkin*, edited by Arthur Ripstein, 22–55. Cambridge: Cambridge University Press, 2007. Brian Leiter (2007).

perspective of the addressee of duties and rights. Identifying duty-imposing rules addressed to contracts, property, and liability does matter to European Private Law. Moreover, even though the application of Hart's theory beyond national legal systems is contestable, the Constitutional character of the EU Legal System upholds this thesis' theoretical framework. The following sections will elucidate this proposition.<sup>26</sup>

## **2. EPL and Secondary Rule of Change: A Debate Mired in Perspectivism**

In the prior chapter, this thesis introduced the phenomenon of Integration through Private Law with the statement of Professor Kaarlo Tuori about the two intertwined aspects of the European Constitution: formal and substantive aspects. While the prior chapter developed the institutional aspect of EU law, this chapter aims to advance the substantive aspect as long as it is closer to what legal theorists have called primary rules. Kaarlo Tuori argues that “the substantive aspect relates to the European Economic Constitution: elaborating the doctrine which specified and complemented the often vague and ambiguous Treaty Provisions (...), [which] has primarily proceeded through the constitutional speech acts of the CJEU”. While the substantive aspect of the European Constitution is grounded in the Treaty's provisions, the Court's judgments, and legal scholarship as part of the legal discourse, he later mentioned the significance of secondary legislation following the “political deadlocks hampered pursuit of Community objectives”.<sup>27</sup>

This chapter endorses the assertion that the substantive aspects of EU law are found in the combination of the recognition of valid rules and of how those rules are endorsed in legal discourses. Valid rules are so recognized through the concept of primary and secondary rules to identify EU law enshrining duties and rights applied to private relationships.<sup>28</sup> At this

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<sup>26</sup> Despite the theoretical debate over whether the coercive element is the fundamental feature of law, this thesis belongs to the legal scholarship that identifies law as much broader in scope than sanction-threatening, but rather obligation. The EU legal system being a genuine Economic Constitution, the secondary rules of change are well defined in the Treaty and private persons and officials are provided with authoritative criteria for identifying primary rules as duty-imposing rules. Hart (1961), p. 100.

<sup>27</sup> Tuori, Kaarlo. *European Constitutionalism*. Cambridge University Press, 2015, p. 149.

<sup>28</sup> EU legal scholars distinguish “EU Primary and Secondary Law” according to the type of statutory act approved to communicate duties, excluding from this strict concept Implementing acts or authoritative adjudication. On the other hand, legal theorists distinguish “primary rules” and “secondary rules” according to duty-imposing or power-conferring rules. To avoid any misunderstanding caused by the ambiguity of the terms

moment, the intertwined aspects of law, language, and legal argumentation will be put aside and the focus will remain on the first dimension: validity. Even though the discussion on the criteria of validity could be seen as an obvious and uncontroversial distinction at the first sight, it has been the ground of many academic battles when European legal scholars makes propositions like *integration through law* in opposition to *integration through politics*,<sup>29</sup> or *integration with law* in opposition of *integration without law*.<sup>30</sup> Therefore, this manuscript starts from the less controversial dimension of the subject – how to identify *authoritative* statutory acts of EU Law – and advances a not-so-uncontroversial proposition concerning the impact of the European Integration project upon private law.

If one asks a legal practitioner to recognize EU legislative acts, she may expect a very objective answer: the TFEU as EU Primary Law, and Directives, Regulations, and Decisions<sup>31</sup> as Legislative acts of EU Secondary law. What justifies the objective reply are the rigid rules written in Article 288 of the TFEU. Article 288 of the TFEU clearly establishes that to exercise the Union’s competence, EU institutions should adopt Regulations, Directives, Decisions, Recommendations and Opinions, the first three being with binding force and the last two with non-binding force. Firstly let us focus on the criterion of legal validity of Legislative acts, which are binding legal acts according to the conclusive identification in the TFEU.<sup>32</sup> At the moment, this thesis asks permission to *temporarily* put aside questions about the role of Recommendations and Opinions, which will be considered below while addressing the role of non-EU Legislative acts: delegated acts (Art. 290 TFEU) and implementing acts (Art. 291 TFEU). Moreover, this thesis also gently asks the reader’s permission to put aside questions with respect to the Union’s competence (e.g. subsidiarity and proportionality) or

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“primary” and “secondary” when applied by legal theorists and European Lawyers, this thesis avoids the use of the terminology “EU Primary and Secondary Law” as it does not serve this thesis’ purposes.

<sup>29</sup> See footnote in the prior chapter on *integration through law* in opposition to *integration through politics*.

<sup>30</sup> See Jan Smits reactions to Hans-W. Micklitz’s paper on the Visible Hand of European Private Law in Micklitz, Hans-W., and Yane Svetiev. “A Self-Sufficient European Private Law - a Viable Concept?” *EU Working Papers Law* 2012/31 (2012).

<sup>31</sup> Although the term “Decision” could mislead the reader to think of it as interpretation of law in individual cases like a judicial decision, it is not. They are binding legislative acts according to Article 288 TFEU approved by the European Parliament and Council and, therefore, a source of law as much as Directives and Regulations. Moreover, the CJEU confirmed that those Decisions of Article 288 TFEU can produce direct effects, creating rights for individuals as much as Directives and Regulations. See *C-9/70 Franz Grad v Finaanzamt Traunstein* [1970]; and joined cases *C-100/89* and *C-101/89, Peter Kaefer and Andréa Procacci v French State* [1990].

<sup>32</sup> This thesis uses the term Legislative act to refer exclusively to legal acts with binding force according to Article 288 TFEU in order to create a semantic coherence to this manuscript. Although the Article 288 TFEU starts with the statement that “legal acts are Regulation, Directives, Decision, Recommendations and Opinions”,

strategy of harmonization adopted in each Legislative act (e.g. minimum or full harmonization of Directives, Unification by Regulation or Decisions). Both governance and harmonization will also be addressed in the coming sections and chapters. By moving these parallel *though* pertinent enquiries to the side for now, the thesis can concentrate on the substantive aspect of EU legislative acts, which represent *part of* the primary rules of the EU legal system as long as secondary rules rooted in the EU legal system validate them as such. In the most simplistic version of secondary rules in modern legal systems, Legislative acts are then binding because of the conclusive identification of their text as an authoritative text by the TFEU.

By Applying the theoretical framework, one could argue without raising controversies that Article 288 TFEU could be refers as one of the dimension of secondary rules of recognition according to Hart's definition: "what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, e.g. as the *proper* way of disposing of doubts about the existence of the rules [emphasis in the original]".<sup>33</sup> This is the functionality of Article 288 of the TFEU when it refers to inscriptions called EU Regulations, Directives or Decisions as authoritative, which is a very simple secondary rule that confers "conclusive identification of primary rules" as Hart's states.<sup>34</sup> Nevertheless, the legal philosopher also acknowledges that in developed legal system rule of recognition are more complex than simple conclusive identification by reference to a title in a text. Rule of recognition in complex legal system then may also refer to rules concerning how primary rules should be enacted and by whom. Hart defines these rules as secondary rules of change. For Hart they are the "remedy for the static quality of the regime of primary rules".<sup>35</sup>

"Such rule of change may be very simple or very complex: the power conferred may be unrestricted or limited in various ways: and the rule may, besides specifying the persons who are to legislate, define in more or less rigid term the procedure to be followed in legislation."<sup>36</sup>

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it also clarifies that Recommendations and Opinions have non-binding force while Regulation Directives and Decisions have binding force.

<sup>33</sup> Hart (1961), p. 95.

<sup>34</sup> Hart (1961), p. 95.

<sup>35</sup> Hart (1961), p. 96.

<sup>36</sup> Hart (1961), p. 95-6.

If secondary rules of change are rules determining legislative procedures to enact primary rules, then there is no genuine disagreement in the claim that legislature procedure written in the Article 294 and 89 of TFEU could also be referred as secondary rules of change and serve to test the legal validity of legislative acts. Therefore, EU legislative acts have legal status having passed either the ordinary or special legislative procedure of Article 294 or Article 89 TFEU, respectively. These rigid rules of the TFEU are then formal rules addressing how bills must be drafted and then promulgated by the European Parliament and Council.

Given the first lead about the theoretical framework of this thesis, it moves to answer the following questions. If the Treaty, Regulations, Directives, and Decisions are recognized as valid statutory acts, can they justify reasons for actions applied to individuals in private relationships? The answer to this proposition is surely *yes*, but positive answers could diverge about how. One could answer *yes* saying it does so through imposing duties on Member States to regulate private law, another could go beyond asserting that rules refer to private relationships between individuals. This brings this thesis to contrast European Private Law, European Private Meta-law, and European Administrative Law.

### *2.1. European Private Law, European Private Meta-law, and European Administrative Law*

Secondary rules of change matter for recognition of valid rules in between bits and pieces of EU legislation that refers to primary rules. Primary rules provide reasons for actions – reason to do or not to do something – and can be distinguished according to the addressee of the command. There are rules providing reasons for action in several circumstances: individuals *qua* individuals (e.g. duty of suppliers to inform customers of price calculations); officials *qua* individuals (e.g. obligation of Member States to legislate regarding information duties applied to supply contracts), individuals *qua* officials (e.g. obligation of suppliers to inform NRAs about negotiated prices with customers); or officials *qua* officials (e.g. obligation of NRAs to report to the Commission about negotiated prices). For this thesis, European Private Law falls into the first two types, but this assertion is not immune to criticism. Some Legal Scholars agree that European Private Law is in fact a Meta-law. It force States to regulate private law matters, but does not create private rights for individuals. This thesis rejects the characterization of European Private Meta-law and it does so through

contextualizing the impact of EU Law upon private law in the Energy Market: the private dimension of EU Energy Law.

Firstly, legal scholars claim that the European integration project would sooner or later have an impact upon private law.<sup>37</sup> This assertion is valid, since the early years of the European Constitution created measures in competition law, but not to Utility Services or the Energy sector. Until the late 1980s, Public Utilities' operations were perceived as activities of non-economic interest and, therefore, exempted from the market integration project. This conjuncture changed in the late 1980s and Art. 106 TFEU assured the application of competition law provisions to both public and private undertakings. Since then, the constitutional background to law on energy markets has laid in the competition law provisions. Both public and private enforcement of EU Competition Law constitute supplementary sources of European Private Law. When Article 101(1) of TFEU states that agreements which may affect trade between Member States or competition within the internal market should be prohibited, it clearly intends to rule contacts: terms and conditions of transactions. By simple reading of the text of Article 101(1), one could claim that an electricity generator in Germany has to consider the letter of the competition rules of TFEU while drafting a sales (or supply) agreement with a Dutch buyer. Would a long-term supply agreement with a 10-year clause violate EU competition Law? Authoritative Decisions answering this proposition would be referenced as a source of law to further agreements.

Secondly, European Private law is found in cross-sector secondary legislation. There is secondary legislation, like the Directive on Unfair Terms in consumer contracts, which does not target specific sectors, but rather consumers in general. Electricity and Natural Gas are Services of General Economic Interest according to the Protocol no. 26, but it does not exclude the application of unfair terms to supply contracts of electricity and natural gas with consumers. The CJEU confirmed this position in the *RWE case*,<sup>38</sup> when the Court decided that consumer contracts of natural gas violated both the Unfair Term Directives and Gas Directives regarding the unilateral variation of prices.

Thirdly, in parallel to cross-sector secondary legislation, there is also sector-related secondary legislation with a private law dimension. Since the 1990s, the European Parliament and Council have approved a sequence of three Energy Packages. Directives, Regulations,

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<sup>37</sup> Duncan Kennedy (1997).

<sup>38</sup> C-92/11, *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen*

and Decisions have created and changed a set of rules with the aim of accomplishing the Union's objective of building a competitive, secure and integrated market for energy. In between measures, there are power-conferring and duty-imposing rules, in which the latter can be discerned between rules of public law and private law. Measures in secondary legislation are indisputably recognized as sources of EU law, but contrasting measures, such as rules of public and private law, are not an obvious exercise, particularly in the Energy Market. This is the reason *why* this thesis proposes an approach to private dimension of EU Energy Law through the prior identification of types of contracts.

The hypothetical case of electricity supplier A in the beginning of the chapter shows that the Directive created a set of information duties addressing suppliers in contracts with end-costomers.<sup>39</sup> However, contracts between supplier and end-costomers have always been transactions even before the liberalization, though public contracts in some jurisdictions.<sup>40</sup> With privatizations, de-verticalizations, and legal unbundling, within firm operations were replaced by business-to-business relationships. Besides duty-imposing rules for business-to-consumers relationships, there are rules addressing those business-to-business relationships. Both Electricity and Gas Directives on common rules for the internal market, as well as Regulations on access to networks, enshrine non-discrimination duties applied to TSOs and DSOs. TSOs and DSOs operate transmission and distribution systems. Following the legal unbundling, all gas undertakings accessing the grid are parties in transmission service contracts with TSOs. Although the non-discrimination principles in the Treaty has no direct effect, it changed when the EU Lawmakers approves non-discrimination duties in Directives and Regulations and explicitly addresses these duty to private relationships.<sup>41</sup>

If the private law dimensions of EU (Energy) Law seem evident, what is the proposition about European Private Meta-law and what is the relevance of the discussion for this thesis? Statements diminishing European Private Law as a Meta-law do not deny the private law dimension of EU Law, but picture measures as duty-imposing rules applied to Member States about how to regulate national private law. The Meta-law claim could come from two different angles. One could argue that EU Law does not govern persons while engaged in

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<sup>39</sup> Directive 2009/72/EC, Article 37(g-j),

<sup>40</sup> In *Law in Changing Society* of 1964, Wolfgang Friedman describes how French Law distinguished public service obligations as administrative contracts, different to private contract rules by civil law. Wolfgang (1964), p. 373.

<sup>41</sup> De Mol, Mirjam. "The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principles of Non-Discrimination: (Unbrideled) Expansion of EU Law?" *Maastricht Journal*, 2011.

transactions. The other acknowledges the set of rules addressing transactions, but rejects the idea that they create mandatory rules and, therefore, remedies. To undermine the Meta-law characterization, contextualization is again required. European Public law, European Private Meta-law, and European Administrative law will be underlined from one provision of the Directive establishing common rules for the gas market.

In 2009, the 3<sup>rd</sup> Gas Directive<sup>42</sup> established that all Member States should delegate to NRAs minimum monitoring obligations and minimum harmonization of law-making authority. Provisions in Article 41 set out general duties and powers of NRAs, while Article 41(6)(a) specifies that NRAs should have power to “establish terms and conditions for connection and access to national network, including transmission and distribution tariffs” or methodologies to calculate tariffs. Putting Article 41(6)(a) in context, it illustrates how provisions of EU (Energy) Law are hybrid. Yet hybridity does not mean provisions cannot be read through the lens of private law. On the one hand, the Gas Directive imposes the obligation on Member States to delegate lawmaking authority to NRAs. This evidences the Administrative law dimension of EU Law interfering in the lawmaking governance of Member States. On the other hand, Article 41(6)(a) could be read from the twofold dimensions of European Private Law. When NRAs establishes *terms and conditions* for connection and access networks, those are *terms and conditions* of transmission and distributions contracts between TSOs/DSOs and gas undertakings. Moreover, tariffs represent the regulatory choice of EU Lawmakers to restrain the freedom of parties in negotiating prices.

The simple reading of Article 41(6)(a) is sufficient to undermine the claim that EU Law does not regulate individuals or private relationships. Therefore, the claim categorically dismissing the substantive dimension of private law is easy to counter-argue. The second layers of propositions acknowledge measures with a private law dimension, but describe them as European Private Meta-law. From the perspective of those scholars, duty-imposing measures on NRAs to establish terms, conditions, and tariffs to access networks are provisions forcing Member States to regulate national private law. They argue these measures are binding only to Member States. If so, poor implementation of Directives would confer rights to TSOs or gas undertakings against States, but not gas undertakings against TSOs. This thesis claims that this characterization is incomplete and requires a better understanding

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<sup>42</sup> Directive 2009/73/EC.

of the EU Legal System regarding procedures and substantive law. Firstly, Article 41(6) indeed imposes duties on States to regulate terms, conditions, and tariffs, which became *mandatory rules* of transmission and distribution contracts with the possibility of creating private rights and remedies. If by mistake TSOs charge tariffs based on different methods of calculation than those approved by NRAs, the wrongdoing represents a violation of EU Energy Law, determining the obligation of tariffs, as well as national laws enacting methods of calculation. TSOs mistakes then confer rights on both public and private enforcement. Gas undertakings accessing the network could claim compensation for overcharge of tariffs, while Member States could fine TSOs for wrongdoing. To strengthen this argument, one could add to this description the empirical claim that the regulatory framework has changed through 2012 and 2013. Some of the competences to regulate terms and conditions for connection and access networks have been (re)delegated to the Commission, which does so through the comitology process of Network codes. If so, even terms and conditions have become part of the substantive law of the EU. Therefore, the counter-claim to the characterization of European Private Meta-law first stresses its lack of an Internal Point of View.

Going through all the Directives and Regulations in Energy Markets to expose the private law dimension of EU Energy Law is pointless for the purposes of this section. The purpose of this section has been to prove that the simple categorical identification of a valid source of EU (Energy) Law is sufficient to uncover its European Private Law Dimension. If so, this section is important to empirically test the claim that European Private Law intersects with EU Energy Law.

## *2.2. Vertical Direct Effect, Horizontal Direct Horizontal Effect, and Only Courts*

Given the factual claim, this thesis then advances a discussion from EU Energy Law to the more abstract doctrinal theories of European Private Law; namely, the ongoing debate between European legal scholars on the *indirect horizontal effect* and *direct horizontal effect* of EU Law. It does so to argue that doctrines about the effects of EU Law upon private law have long been centered in the perceptive side of understanding law.

Treaty provisions on non-discriminations and freedoms, as well as Directives, have long been perceived as rules with *vertical direct effect*. In principle, Directives cannot be invoked against other individuals. Their measures are binding on Member States and individuals can

invoke EU Law against Member States. This is the common understanding of the EU legal system among public lawyers. Contrary to this view, private lawyers have presented propositions that categorically reject the notion of *horizontal effect*. They do so by pointing out decisions of the CJEU recognizing the direct effect of cases. Besides factual claims, this thesis would like to raise three arguments as to why the debate over horizontal v. direct effect of EU Law is mired in perceptiveness.

First, some EU lawyers reply to categorical claims about the *vertical direct effect* of EU Law by stressing the constitutional character of the Treaty discussed in the prior chapter. Kaarlo Tuori argues that the “lack of horizontal direct effect has been counterbalanced by what has sometimes been called “indirect” horizontal effect: namely, the duty of national courts to employ even unimplemented directives as standard for interpreting national legislation”.<sup>43</sup> Furthermore, aligned to the arguments of *indirect horizontal effect*, legal theorists would also reject the argument of vertical direct effect based on Joseph Raz’s pre-emption thesis. For this thesis’s proposition about law (i.e. law’s purpose is to create reasons for action), the Constitutional character of ten Treaty and the legal effects of EU secondary legislation would satisfy the conditions of the pre-emption thesis of Joseph Raz.<sup>44</sup> In the Energy Market, the aftermath of the *Federutility case* provides an example in which CJEU’s preliminary ruling worked as to create “second order” reasons for individuals and officials overcoming national laws that resist EU law intrusion. By interpreting rules of private law on duties to provide reasonable gas price to consumers (also i.e. rights to consumers), the CJEU constructed strict rules on regulated prices. Within four years, both the Commission and individuals have taken action against Member State’s laws that have sought to retain regulated prices. This illustrates what Raz calls the recognition of “second order” reasons for actions.<sup>45</sup>

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<sup>43</sup> Tuori (2015), pp. 63-64.

<sup>44</sup> The pre-emption thesis holds that law functions to replace reasons that apply to individuals qua individuals through the provision of second-order reasons in the form of legal norms. Within these terms, if Member States do transpose Directives, but do so poorly, the legal doctrine of the CJEU would serve as a formal mechanism for individuals not only to recognize the second-order reason, but also to impose this second-order on Member States. Raz, Joseph. *The Morality of Freedom*. Oxford University Press, 1988, p. 53.

<sup>45</sup> One possible example of the *conflict and resistance* dimension in the Energy Market could be seen in the sequence of cases decided by the CJEU in which the core of the preliminary references laid on the teleological, and to some degree meta-teleological, interpretation of Article 3 and Article 23 of the 2<sup>nd</sup> and 3<sup>rd</sup> Gas Directives. Article 3 of Gas Directives, like the same paragraphs of Article 3 in Electricity Directives, establishes customer right for “reasonable prices”. On the other hand, Article 23 concerns the target that by 1 July 2007 all customers should have been considered eligible customers, which means customers who are free to purchase gas from the suppliers of their choice (Article 2(28)). The first case – the *Federutility case* – was referred to the CJEU by the

Besides Theories of *indirect horizontal effect*, there are two additional arguments to claim that the debate over European Private Law is inconsistent with European Private Law in regulated markets.

Secondly, European Private Law has recently been enacted mostly through Regulation, what Christian Twigg-Flesner cast with a keen sense of humor as “Good-bye Harmonization by Directives, Hello Cross-Borders only Regulations”.<sup>46</sup> In Energy Markets, if one takes into account Implementing Acts (i.e. Network codes), market actors in Electricity and Natural Gas have to comply with more than twenty (20) pieces of secondary legislation regulating market operations, transactions, Regulators and European Agencies. Among this secondary legislation, only two (2) legislative acts are Directives. If Regulations have general application, which means that rules are immediately incorporated into national legal systems, the discussion on *direct v. horizontal effect* cannot picture the market transformation occurring through Regulation.

Thirdly, discussion on *vertical v. horizontal direct effect* could not depict disputes in which EU Law creates mandatory rules applied to contracts and violations leads to private remedies enforced through private enforcement mechanisms. Directives and Regulations indeed impose duties on Member States to rule contracts. When States have to transpose Directives, Decree-Laws transposing Directives are mandatory rules for contracts and violations could fill claims in law based on contractual remedy (e.g. breach of contract). This is a similar effect to that explained by Tuori as “indirect horizontal effect”. Furthermore, in

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Italian *Tribunale amministrativo regionale per la Lombardia* following the issue brought by gas suppliers against the Italian NRA (AEEG) power for setting “reference prices” for sale of gas to certain customers. The questions referred concerned the extent to which the “reference prices” set by the Italian NRA were in breach of the Gas Directives if Article 3 (reasonable price) was read in combination with Article 23 (factual competition in the retailer market). In 2010, the CJEU decided the *Federutility case* with a landmark judgment. The Court decided that the Italian NRA was not in breach of EU law as long as three conditions were satisfied: the setting of reference prices at a reasonable level, in a transparent way, and for a limited period of time. Since then, these three conditions have been the reference to assess whether the permanence of regulated prices in retail markets violates EU law or not. The judgment of the CJEU in the *Federutility case* illustrates what has been discussed as a decision that supplements the vagueness of EU primary rules in individual cases. Although the *Federutility case*’s judgment happened on 10 April 2010, the CJEU has been recently referred in two other new cases dealing with the same issue on the legality of setting regulated prices. One was the *Commission v Poland case* decided on 10 September 2015, the other is the French *ANODE case* decided on 7 September 2016. One could claim that the latter two cases in 2015 and 2016 evidence the resistance of Polish and French legal orders to implementing EU law according to the further supplementation of the CJEU, which is unanimously a source of EU law. This thesis would agree that the French and Polish cases could be evidence of the *conflict and resistance* of Harmonization of Private Law. See C-265/08, *Federutility and Others* [2010]; C-36/14, *Commission v Poland* [2015]; C-121/15; C-121/15, *ANODE case* [2016].

<sup>46</sup> Twigg-Flesner, Christian. “Good-Bye Harmonisation by Directives, Hello Cross-Border Only Regulation?” – A Way Forward for EU Consumer Contract Law.” *European Review of Contract Law* 7, no. 2 (2011).

private disputes, complaints based on contractual remedies are likely to be solved Outside-Courts through negotiations, mediation, and arbitrations.<sup>47</sup> In addition to contractual remedies, debates over direct v. horizontal effect fail to capture the private enforcement of secondary legislation through sector-related and problem-related ADRs. In the same 3<sup>rd</sup> Gas Directive, Article 34(3) imposes on Member States the duty to have dispute-settlement arrangements in place to solve disputes related to access to upstream pipelines networks. Therefore, if TSOs refuse access, the reasons of refusal could be challenged by gas undertakings based on a wide set of rules of EU Law regulating access to networks in Network Codes. It is harder then to ignore the role of ADRs as procedural mechanisms enabling private enforcement of EU Law, where litigation is undoubtedly between two private parties: gas undertakings requesting injunction against TSOs. The regulatory choice of increasing the effectiveness of sector-related legislation then erodes any factual claim on the Meta-law character of European Private Law, as well as the restricted direct effect of EU Law.

Despite the discussion on whether rules in Directives are reasons for actions, what matters most at this first step of the chapter is to lay out a convincing argument that, by a simple reading of the legal text of the Treaties, Directives, Regulations, and Decisions in Energy, one could grasp *law in letter* ruling transactions between private parties, which sustains the first aspect of the claim: EU law has indeed a private law dimension and, moreover, it is far from being an insignificant dimension. However, if one stops at this narrow stage and restricts the substantive dimension of European private law to written text in legislative acts, one will have just observed the tip of the iceberg.<sup>48</sup>

Having in mind this first non-controversial part of the thesis, this chapter moves to its second part, and asks: are legal texts in those EU Legislative acts providing clear communication to private parties about what terms and conditions are prohibited or obligatory in certain types of agreements; what are indeed prohibited clauses in contracts? Recalling the hypothetical case that introduced this chapter, and knowing that the Electricity Directive set

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<sup>47</sup> Discussion on the Private enforcement of EU Law has gained the attention of European legal scholars since EU Lawmakers conferred rights to compensation in cases involving violation of completion rules in Regulation 1/2003, Article 7. Studies on the private enforcement of EU secondary legislation in regulated markets is still in infant stage. Yet this thesis has taken a substantial contribution from the work developed by Folkert Wilman in his PhD on the “Private Law Enforcement of EU Law before National Courts”. Like Folkert Wilman, this thesis has the view that the effectiveness of private enforcement depends mostly on private parties being aware of provision of EU Law that refers to mandatory rules for contracts. Wilman, Folkert. *Private Enforcement of EU Law before National Courts : The EU Legislative Framework*. Edward Elgar Publishing, 2015.

<sup>48</sup> Hart goes further by claiming that this is a vertical or “top-to-bottom” image of law-making, which is attractive in its simplicity but, on the other hand, cannot picture entirely the rule of law. Hart (1961), p. 42.

final customer rights for transparent prices, would an electricity supplier be in conformity with EU law if the bill stated the consumed volume and price per megawatt, but not the costs of network tariffs? If one wants to observe whether law answers this question (and if so, how), one needs to discern *law beyond letter*. As Hart claims, one needs to perceive law as duty-imposing rules that control, guide, and plan social life.<sup>49</sup>

This is the starting point of the next subsection, in which this thesis attempts to reconcile scholarship on EU law with modern Legal Theory, dismissing *a priori* any possible genuine disagreement departing from traditional formalistic understanding of law.<sup>50</sup> *At this point*, we have so far defined the narrow dimension of the substantive aspect of EU law. The rule of recognition can thus still be understood at its less complex level. Rules have been identified exclusively by reference to Article 288, which have had their legal validity tested by conclusive identification of Treaty, Directive, Regulation and Decision. *At this point*, we could already raise more complex questions about whether these legislative acts are valid or not based either on formal justification (e.g. was the legislative procedure respected?) or content justification (e.g. was the Union competent to set certain primary rules?). Yet this thesis does not attempt to answer normative claims about whether the EU has surpassed the boundaries of its competence. Rather, it aims to describe European Private Law as it stands, as it currently rules transactions. Bearing this in mind, this chapter then moves to the second step. It builds its theoretical framework on the second layer of legal positivism that embraces philosophy of language to explain the legal content into legal text: the *law beyond letter*.

### **3. EPL and Primary Rules: Rethinking Law from the Internal Point of View**

While private legal scholars in early 20<sup>th</sup> century begun to challenge the classic thinking of private law by replacing “law in books with law in practice”, legal philosophers

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<sup>49</sup> Hart (1961), p. 44.

<sup>50</sup> This statement could be contradicted by Legal formalists who rejected the possibility of teleological disagreement in the adjudication of law. These are the scholars who assume that institutions with adjudicating authority, like judges, should decide cases by the application of uncontroversial meaning of law to the facts. This thesis departs from the assumption that legal formalist propositions about law are incomplete for not taking seriously the intertwined aspect of law and language. See Ronald Dworkin’s answer to legal formalists represented by the judge Hercules. Dworkin, Ronald. *Taking Rights Seriously*. New impression, With a reply to critics. Duckworth, 1978.

concomitantly started to replace formalistic understanding of “law in letter” by “law and language”. The forces of change in mainstream thinking in theory of law are driven concomitantly from two sides: one from philosophy of language with the development of pragmatics as a discipline in linguistics; the other from the side of philosophy of law with particular attention to Hart’s contribution.

Obviously Hart was not the first legal scholar to observe the intertwined aspect of law and the *open texture* of language (e.g. transparent prices duty), which had been stressed before by Jeremy Bentham and John Austin. Yet Hart’s theory was a landmark in jurisprudential thought since 1960s for two reasons. First, it did not use normative language to explain the normativity of law,<sup>51</sup> nor empirical referents to uncover the customary use of words.<sup>52</sup> Instead Hart’s positivism profited from the insights of pragmatics in philosophy of language. Whereas the undisputable statement that the *open texture* of language leaves open a range of possibilities for interpretation,<sup>53</sup> pragmatics contributed with the idea that only propositions depicting facts supplement the semantic indeterminacy of communication.<sup>54</sup> Second, Hart’s positivism challenged the distinguished feature of law as *coercive-threatening order*.

Considering that Hart’ insights from pragmatism of language will be better developed in the coming subsection on vague rules, let’s start by presenting Hart’s claim on the concept of law and the novelty of it. Like his predecessors, Hart reinforced the pre-existing consensus about normativity of law in terms of its binding nature; the normativity of law as reason to obey. But he went on by challenging sanction-centred theories of law for reducing law to *coercive-threatening order*, making this the distinguishing feature of law.<sup>55</sup>

Language being the means that legal texts use to communicate duties and obligations, and legal text being fundamentally a source of metaphysical propositions of law (e.g. the

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<sup>51</sup> For Hart, Austin’s command-duty-sanction thesis fails by trying to explain the normativity of law through normative language. By doing so, it cannot explain why if a gunman threatens X with ‘Your money or your life’, X may be obliged to hand over his purse, but has no obligation to do so. Hart (1964).

<sup>52</sup> For Hart, Bentham took from empiricism and philosophy of language the misleading understanding of logic and language: namely, the assumption that the metaphysical proposition of ontology based on customary use of language would satisfactory fill the open texture of words

<sup>53</sup> See Hart account about the open-texture of legal norms. Hart (1964)

<sup>54</sup> Wittgenstein, Ludwig. *Tractatus Logico-Philosophicus*. Routledge, 1975. See also Patterson, Dennis M. (Dennis Michael). *Law and Truth*. Oxford University Press, 1996, p. 380.

<sup>55</sup> Held by Oliver Wendell Holmes, Kelsen, and Austin.

Electricity Directive imposes duties of transparent price), Hart reinforced the understanding that individuals guide their behaviour according to general primary rules creating duties and obligations, like those written in the above Legislative acts; as well as by observing *authoritative decisions* interpreting general rules, case by case, as a supplementary source of law, and therefore primary rules. However, the distinguishing feature of law is not attributed to the fact that individuals “feel bound” to obey as sanction-centred theories of law would have it. “Such feelings are neither necessary nor sufficient for the existence of binding rules”.<sup>56</sup> Rather the distinguishing feature of law is attributed to the fact that primary rules – duties and sanctions for their breach – tend to be “definite and officially organised” by rules of secondary type: Rules of Recognition.<sup>57</sup> “There is a massive and persuasive agreement about law throughout the system”.<sup>58</sup> For Hart, the secondary rules of recognition, composed by secondary rules of change and adjudication, are at the same time both criteria of legality and a distinguishing feature of legal systems. This justifies Hart’s most important contribution, his claim of *law as power-conferring and duty-imposing rules* (i.e. secondary and primary rules).

To identify the *duty-imposing rules* of European Private Law affecting transactions in the Energy Market, this thesis needs to incorporate in its theoretical framework the theory of law that has discerned the difference between *secondary and primary rules*, and also the differences between the types of primary rules and types of secondary rules.

Besides the already mentioned *secondary rules* and its layers of *secondary of change and adjudication*, such as the test of the *normativity of law*, this thesis needs to underline the types of primary rules in layers as Hart proposes.<sup>59</sup> Written legal texts comprise rules of

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<sup>56</sup> Hart (1961), p. 57.

<sup>57</sup> Hart reinforced the idea that sanctions are important as a “guarantee that those who would voluntarily obey shall not be sacrificed to those who would not”, but maintained that sanctions are not the distinguishing feature of law. Hart, p. 198. About primary rules being definite and officially organized, see Neil Duxbury, the nature and authority of precedent. Duxbury, Neil. *The Nature and Authority of Precedent*. Cambridge University Press, 2008, p. 20.

<sup>58</sup> Which is the assumption also shared by legal realists like Brian Leiter (2009).

<sup>59</sup> In *The Concept of Law*, Hart equally discriminates between two different type of primary rules, which he called rules that are in a sense parasitic for providing that human beings may by doing or saying certain things that introduce new rules of a primary type: “It is true that the idea of a rule is by no means a simple one [...]. Under rules of the one type, which may well be considered the basic or primary types, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type provide for operations which leads not merely to physical movement or change, but to certain or variation of duties or obligations.” Hart (1961), pp. 80-81.

primary type that use either rigid or vague language to communicate duties and obligations, in this chapter identified as rigid and vague rules.<sup>60</sup> The reading of both rules of primary type, detaching from fact, grounds metaphysical propositions of law. Whenever a legal text uses vague language (open texture) to communicate binding duties, like in the hypothetical case of electricity supplier A, the vagueness of language entails vague duties that open a range of possibility of interpretation. Vague rules are then duty-imposing rules that use open texture language to communicate obligations. If this is so in all legal systems, the more rules use vague language to communicate duties, institutions with adjudicating authority could supplement semantic indeterminacy of duties. This supplementary layer of primary rules are primary rules themselves and ultimately a source of law.<sup>61</sup>

By applying the lesson of legal philosophers of the 20<sup>th</sup> century to understand *European Private Law* in Energy Markets, one could easily argue that the Treaty and Legislative acts, as in any other statute, have rules using rigid and vague language to *ex ante* communicate orders affecting transactions, being those rules of a primary type. Some EU legislative acts using rigid language regulate transactions by providing clear, objective and precise duties about terms and conditions of contracts (3.1). Besides rigid rules, Legislative acts also use vague language to communicate duties and, when doing so, these rules still regulate transactions but by providing a less clear guide than rigid rules do. The *open texture* of their language leaves open the possibility of having the content of vague terms filled by institutions with law-making or adjudicating powers for making law<sup>62</sup> through *implementing* or *supplementing*

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<sup>60</sup> See footnote 20.

<sup>61</sup> Hart (1961), p. 96.

<sup>62</sup> Legal theorists use to distinguish modes in which adjudication supplement primary rules: by interpretation or by construction. If one says that legal texts (or rules) are ambiguous, the concept of interpretation then explains the method to determine which meaning must be applied in the legal text. Using the example given by Lawrence Solum, domestic violence could mean either physical or moral aggression whereby victim and suspect are members of the same nuclear family; or could also refer to statistics of violence within a country. On the other hand, constructivism is the means used by judges to devise a supplementary rule or procedure that resolves vagueness. If one claims that protesting on behalf of the feminist movement by standing naked in a public space should be allowed because of Constitutional rights of freedom of speech, a judge needs to do the translation of the semantic content of the term “freedom of speech” into legal content enabling the application of the text this particular case. Is a silent protest covered by the fundamental freedom of speech rights? Answering similar questions, legal theorists claim that judges are engaging in a constructivist activity of rules. Although this distinction matters for the theory of legal argumentation and interpretation, this thesis uses the term interpretation as a means to construct the vagueness of rules, as well as supplementation. See Poscher, Ralf. “Ambiguity And Vagueness In Legal Interpretation.” In *The Oxford Handbook of Language and Law*, edited by Lawrence M. Solum and Peter M. Tiersma, 2012.

vagueness, respectively (3.2).<sup>63</sup> Given this manuscript is focused on European Private Law *as reasons for action* recognized by the EU legal system,<sup>64</sup> it is interested in revealing the *primary rules* issued by EU institutions that implement or supplement vague rules of EU legislative acts with more rigid rules or precise legal content at the supranational level.<sup>65</sup> Therefore, EU institutions with delegated *law-making power* to issue Implementing Acts are the subject of this study, as their more rigid orders are rules of primary type as much as Legislative acts are (3.2.2). In parallel, EU Institutions with *adjudicating power* – those which make authoritative determinations of questions whether a primary rule has been broken on particular occasions or not – are equally investigated as their decisions ultimately supplement vague language with meaningful legal content, case by case. These judicial or non-judicial decisions, which are ultimately authoritative claims in law depicting facts, are what Hart distinguishes as second layers of rules of a primary type; duty-imposing rules that *ex post* regulate transactions through enforcing rules in individual cases (4).<sup>66</sup> The adjudication of vague rules then requires the interpretation of law, which goes beyond the mere *application of law*.<sup>67</sup>

The next two subsections of the manuscript have two purposes. First, the intertwined aspect of law and language and how pragmatism in philosophy of language sharpened the perception of the phenomenon of law will be better explained. Second, given this thesis aims

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<sup>63</sup> The authority for “making law” is then determined by rules conferring *law-making power* (secondary rule of change) and *duty-impose rules* (secondary rule of adjudication). Having in mind the legal theoretical framework of this thesis, the author considers the authority of “making law” broader than the “law-making power”.

<sup>64</sup> Institutions with authority for implementing vague rules are those with *law-making power* to approve legal statutes, which ultimately reduce the degree of vagueness of EU Legislative acts. If one considers the large picture of the EU as a multi-level structure of legal systems, Member States originally held the authority for implementing vague rules within their territorial jurisdiction (Art. 291 TFEU). Nevertheless, the multi-level dimension of the EU falls outside the scope of this thesis.

<sup>65</sup> In energy (i.e. gas and electricity) markets, the European Parliament and Council have never approved Delegated acts with regards to Art. 290 TFEU.

<sup>66</sup> Legal philosophers have used various terms to distinguish the degree of complexity of adjudicating activity when individual cases are subjected to either rigid rules or vague rules. In *The Authority of Law: Essays on Law and Morality*, Joseph Raz defines as regulated disputes cases in which a judge is requested merely to *apply* rigid rules; while unregulated disputes are cases in which the judge is requested to interpret vague rules in concrete cases. Raz then claims that only in the latter case do the Courts bear a law-creating role. This thesis is not using the terms unregulated and regulated disputes as used by Joseph Raz in order not to create misunderstandings with the distinction between regulated and unregulated markets usually adopted by economists. Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Clarendon, 1979, p. 183.

<sup>67</sup> Throughout this thesis, the author will use the term *application of law* exclusively to explain the role of an institution with adjudicating authority when applying rigid rules in individual cases, which is more diverse than the role of these institutions when constructing the meaning of vague rules in individual cases. The reason for this is that the term *application of law* is commonly associated to the formalistic and simplistic understanding of the role of adjudication in legal systems (identify the law, determine the facts, and apply the law to the facts). It does not depict the law-creating role of institutions while adjudicating disputes.

to shed light on the private dimension of EU energy law, the intertwined aspect of law and language will be explained in the context of *European Private Law* in regulated-markets. It begins by focusing on the written text of the Treaty and EU Legislative acts and later moves to Implementing acts.

### *3.1. Rigid Primary Rules: ex ante regulating transactions*

While writing statutes, legislators make choices to use either a language that communicates more rigid duties, or a language that communicates more vague and imprecise obligations. While the semantic indeterminacy of the latter leaves a range of possibility for further interpretation, the former rigid rule does not (or if it does, only to a minimal degree). The best way of describing what this thesis means by more rigid rules is to contextualize it by borrowing an example not from the Energy Markets, but another regulated market that falls within the category of Services of General Economic Interest. Such an example can illustrate an extreme case of rigid duties.

The Air Passenger Rights Regulation states in Article 6 that an operating air carrier must consider a flight delayed when it departs two or more hours late for flights with a distance of 1.500 kilometers or less.<sup>68</sup> Moreover, Article 7 of the same EU Regulation also determines beforehand the *condemnatio pecuniaria* of 250 euros for flights delayed two or more hours with a distance of 1.500 kilometers or less.<sup>69</sup> The simple reading of the text in the EU Regulation objectively informs air flight companies about their *penalty duty* for breach of contract between them and passengers. If a departure of a flight with 1.500km or less distance is delayed for two hours or more, its passengers would have compensation rights in which the bottom *quantum* is previously determined. The language adopted by the EU legislator leaves no semantic indeterminacy for further interpretation.

Louis Kaplow rightly states that rigid rules, such as those in the legal text in the Air Passenger Rights Regulation, are *ex ante* regulating transactions. This rigid rule being written with legal validity, it provides detailed mandatory terms and conditions that could either expand or restrict autonomy of individuals in transactions. For legal philosophers, one of the

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<sup>68</sup> Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, 11 February 2004, Article 6.

<sup>69</sup> Regulation 261/2004, Article 7.

consequences of rigid rules is that their adjudication requires merely *application of law*: identify the law, determine the facts, and apply the law to the facts.<sup>70</sup> For economists, rigid rules increase the certainty of transactions, which is an opposite variant to supplier's risk.<sup>71</sup>

Notwithstanding the *pros and cons* of rigid rules, determining the texture of terms used in legal communication is a complex choice with different varieties: legal (e.g. Does the EU have competence?), economic (e.g. Does it increase welfare?) and political (e.g. Would the European Parliament and Council approve it?). Let's suppose that the Air Passenger Rights Regulation had been approved slightly differently. Instead of determining the precise distance of 1.500 kilometers, EU lawmaker had chosen the term "short distance": short flights would be considered in breach of contract after two hours or more. Choosing the term "short distance", instead of 1.500 kilometers, would then have decreased the degree of objectivity, clearness and certainty of the rule. Consequently, economists would have had to increase the risk of air passenger suppliers in transactions, or adjudicating institutions would have borne the responsibility of *ex post* interpreting the meaning of "short distance" case *by case*. Would flights of 1.500 kilometers have been considered short distance flights or not? Are flights from Palermo to Tunis, which are intercontinental flights but of 400 kilometers, short distance flights or not? Despite the possibility of approving a legislative act with less rigid rules, this was not the choice of EU legislators for setting Air Passenger Rights.

Yet finding rigid rules in a EU Legislative act with such objective duties as the penalty duties in the Air Passenger Rights Regulation is not common and this is justified by economic, political and legal variants of EU governance. We will return to this topic on the EU governance of rule-making power in the coming subsection, as well as in the next chapter while explaining Integration through Private Law in the Energy Market. At this stage of development of this thesis's theoretical framework, the focus is on the substantive aspect of European Private Law and, as it stands, there are more legal texts in EU Legislative acts that

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<sup>70</sup> Joseph Raz associated this as a classic image of judges for legal formalists, which he argues that it is misleading understanding of what the adjudicative functions of judges. Joseph Raz (1979).

<sup>71</sup> In the economic analyses of law proposed by Louis Kaplow, the author claims that the choice between rules and standards affects costs, which is translated by this thesis as the choices between vague rules and rigid rules. While rigid rules are costlier to draft, they increase the certainty of transactions and reduce the merger of risk of economic actors as long as individuals determine more precisely the application of rules *ex ante*. Vague rules, by contrast, are less costly to draft, but they increase the uncertainty of market actors and therefore their merger of risk as long as the precise application of law is determined *ex post*. Kaplow, Louis. "Rules Versus Standards: An Economic Analysis." *Duke Law Journal* 42, no. 3 (1992): 557–629.

fall into this category of vague rules than rigid rules. This brings the thesis to the second type of primary rule with a private law dimension: EU vague rules.

### 3.2. *Vague Primary Rules: ex ante implementation or ex post supplementation*

Communication in all its forms “may leave open ranges of possibility, and hence of doubts, as to what is intended even as to matters which the person seeking to communicate has himself clearly envisaged”.<sup>72</sup> Language being the means to communicate duties and obligations to individuals in any legal system, its semantic indeterminacy may leave open the range of possibility for further interpretation. Different than the Air Passenger Right Regulation, the Gas and Electricity Directives set supplier’s duties *to provide transparent or reasonable prices*, or the TSO shall give access to network on a *non-discriminatory basis*. The semantic meaning of the words “non-discrimination”, “transparence” and “reasonability” (ontology) leaves an open range of possibility, and hence uncertainties, on how TSOs or energy suppliers must guide their transactions to be in conformity with vague duties: “duty of providing network access on a non-discriminatory basis” or “duty of revising transparent prices”. This semantic indeterminacy is caused then by the *open texture* of words, which is not a phenomenon exclusive to law but in all forms of communication through language.

The account about the *open texture* of words when language is used to communicate acts can be inferred by anyone in his or her everyday life.<sup>73</sup> Obviously, philosophers of language and legal philosophers<sup>74</sup> have considered this semantic account of logic and

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<sup>72</sup> Hart (1961), p. 125.

<sup>73</sup> Consider a hypothetical example inspired by the everyday life of a PhD Candidate in an international institution. One sends a birthday invitation to a group of colleagues scheduling a dinner at 7:00 pm and requesting “no excessive delays”. It is possible that a British guest could receive the message thinking that if one arrives 7:02, he or she would be in breach of host’s rule on “no excessive delays”. A Brazilian guest, in turn, could think that only if one arrives after 7:10, then he or she would be in breach of the host’s rules. All philosophers of language would agree that the host’s obligation-imposing rule is vague, but they would disagree about how one could fill the uncertainty in what it is that the host is seeking to communicate. On the one hand, empiricists would claim that an investigation about what members of the community think that is an excessive delay could serve to fill the open texture of the language used by the host in this act of communication. Members of the community could be either the guests for the party or the broader community of members working in this international institution. Pragmatists of language like Wittgenstein, on the other hand, would disagree with the empiricist approach. For them, the only possible way of having a meaningful proposition is one based on contingent facts: the host reprimands one guest for arriving at 7:10; the host does not reprimand a guest for arriving at 7:05. In this context, guests would then receive the secondary information that arrivals at 7:10 or later are in breach of the host’s rules of non-excessive delays.

<sup>74</sup> Like Jeremy Bentham and John Austin in the 18<sup>th</sup> century and J.L. Austin in the 20<sup>th</sup>.

language over centuries. Thus, the remarkable contribution of philosophers of language in the 20<sup>th</sup> century was the change in the way other fields perceived their own subjects.

Wittgenstein and later scholars studying the pragmatics of language challenged the theory of meaning in the field of semantics that, as Wittgenstein put it, had a fundamental “misunderstanding of the logic of our language”.<sup>75</sup> According to pragmatism in philosophy of language, when the field of semantics attempts to give meaning to linguistic expressions (e.g. the meaning of words “discrimination” which anyone could find in legal or non-legal dictionaries), their propositions on the meaning of words “is not false but senseless” as they are still *metaphysical propositions*.<sup>76</sup> Wittgenstein’s pragmatism in philosophy of language was breathtaking for its most provocative thought: propositions are meaningful *only if* they depict facts. For pragmatics of language, then, the only entirely meaningful proposition about a *non-discrimination duty* is the one that depicts facts: (e.g. Was TSO A in breach of non-discrimination rules when it refused access to Firm B under the argument that 40% of the shares of Firm B are owned by an entity listed in the EU terrorist list? Yes or no?).<sup>77</sup> Propositions that depict facts are different from general proposition like propositions of law<sup>78</sup> found in legal texts (e.g. TSOs shall provide access in non-discriminatory basis). Also propositions that depict facts are different from propositions that depict the customary use of language<sup>79</sup> (e.g. TSO A, B and C do not consider the refusal of network access for undertakings listed in the EU terrorist list a breach of non-discrimination rules, therefore the

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<sup>75</sup> Wittgenstein introduced his *Tractatus Logico-Philosophicus* with the following statement: “this book deals with the problem of philosophy and shows, as I believe, that the methods of formulating those problems rest on the misunderstanding of the logic of language”. Wittgenstein (1975).

<sup>76</sup> “Most propositions and questions that have been written about philosophical matters are not false but senseless. We cannot, therefore, answer questions of this kind at all, but only state their senseless. Most questions and proposition of the philosopher result from the fact that we do not understand the logic of our language. They are of the same kind as the question whether the Good is more or less identical than beautiful” Wittgenstein (1975).

<sup>77</sup> The EU Terrorist list includes persons and entities suspected of being involved in terrorist acts.

<sup>78</sup> The expression “propositions of law” is not quoted from Hart’s work, but rather Ronald Dworkin’s Law Empire. As put by Dworkin, propositions of law are “statement and claims people make about what the law allows or prohibits or entitles them to have”. Dworkin distinguishes propositions of law as general propositions (e.g. discrimination is prohibited by EU Law), or very specific ones, such as those depicting facts (e.g. electricity distributor A violates rules of discrimination when refusing access to the network). In Hart’s theory, “authoritative determinations” or coercive orders could refer to very specific proposition of law depicting facts insofar its validity lays on secondary rules. Therefore, this thesis either uses the terms “authoritative determinations”, “coercive orders”, and “authoritative proposition of law” as reference to rules of adjudication as it will be explained over this chapter. Dworkin (1986)

<sup>79</sup> For Hart, Bentham’s borrowings from empiricism and philosophy of language led to a false understanding of logic and language: the assumption that the metaphysical proposition of ontology based on customary use of language would satisfactory fill the open texture of words.

refusal of access for undertakings in the EU terrorist list is not discrimination). Even propositions describing the use of language, questions can still be raised about the appropriate conduct of market actors (e.g. should a TSO provide access to an undertaking that, though not list in the EU terrorist list, has listed shareholders? And if the listed shareholder owns 1% of the undertaking's shares?).

In *The Concept of Law* we find the influence of the Oxford and Cambridge linguistic philosophers who founded pragmatism and who were Hart's contemporaries. Of the latter, Hart stated that "only since the beneficial turn of philosophical attention towards language that the general features of have emerged of that whole style of human thought and discourse which is concerned with rules".<sup>80</sup> Therefore, pragmatism of language did not change the essence of the normativity of law as binding norms, but it indeed threw lights on the importance of rules in social life. Among the many legacies of Hart's positivism left to jurisprudence, his approach to the intertwined aspect of law, language, and knowledge is key for this thesis. His account of how individuals receive and react to information about duties in legal systems is key to this thesis's account of how individuals receive information about duties and obligations in the EU legal system while making transactions in Energy markets.

By distinguishing between the *external* and *internal point of view*<sup>81</sup> of individuals within any legal system, Hart stressed that rules generally regard as reasons or justification for action because member of the community can recognize binding rules among other types of commands.<sup>82</sup> This is an important feature of social rules to distinguish between *behavior according to rules* with *habitual behavior*.

Having these in mind, Hart made two important assertions. First, the semantic (or texture) of words in language could range from rigid to vague rules (open texture). This does not mean that very undetermined vague rules, identified by Hart as standards, do not guide

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<sup>80</sup> Hart, *Definition and Theory in Jurisprudence*, Hart, H. L. A. *Essays in Jurisprudence and Philosophy*. Oxford University Press, 1983.

<sup>81</sup> Patterson, Dennis M. "Dworkin on the Semantics of Legal and Political Concepts." *Oxford Journal of Legal Studies* 26, no. 3 (2006): 545–57; Shapiro, Scott J. "What Is the Internal Point of View?" *Fordham Law Review* 75 (2006)

<sup>82</sup> As Hart put it, "If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from the certain conduct when occasion arose, nothing that we now recognize as law could exist. Hence the law must predominantly, but by no means exclusively, refer to classes of persons, as to classes of acts, things, and circumstances; and its successful operation over vast areas of social life depends on widely diffuse capacity to recognize particular acts, things, and circumstances as instances of the general classification which the law makes". Hart (2006), p. 124.

individuals' behavior at all (e.g. *non-discrimination duties*). Vague rules are necessary in view of the highly variable nature of possible combinations of circumstances. Second, as much as vague rules are necessary in legal systems, *coercive orders* or authoritative determination are supplementary sources of primary rules that are vague, ambiguous or conflicting. Being coercive orders, meaningful propositions of law answer whether the law has been violated; they represent a second layer of primary rules. A proposition like *TSO A was not in breach of non-discrimination rules when it refused access to Firm B under the argument that 40% of the shares of Firm B is owned by an entity listed in the EU terrorist list* represents an example of primary rules supplementing the vague rules informing the obligation of *non-discrimination*.

Starting then from vague rules of EU legislative acts to explain European Private Law, one could spot vague rules in the EU legislative act that, albeit affecting transactions, does not provide clear information on how market actors should or should not behave in transactions. Again, allow this manuscript to step back from the abstraction of theoretical propositions about law in order to provide context about what is meant by vague rules in EU legislative acts with a private law dimension.

Looking into innumerable Treaty Articles and EU legislative acts, it is easy to spot vague rules that indirectly affect individuals' behavior while conducting transactions, starting then from competition rules in the Treaty. If Article 101(1) TFEU prohibits agreements that preclude competition or trade between Member States, one could rightly argue that language in the Treaty provides only fuzzy lines for private actors conducting their transactions. Vague rules of European Private Law are also commonly spotted in the Legislative acts. To illustrate how vague EU rules influence transactions in functional sectors, allow me to anticipate in a nutshell a legal text that will be investigated in-depth in the coming chapter (Case I). As in the given example above, the 1<sup>st</sup> Directives on the completion of the internal of gas and electricity market and the EU legislative acts established a *non-discrimination duty*: network access should be provided on a non-discriminatory basis by TSOs.<sup>83</sup> Later the both Directives were replaced by the 2<sup>nd</sup> Package, which extended the negative duty of *non-discrimination* by TSOs in gas and electricity toward positive *duties to provide access* to network: what is called Third Party Access (TPA) rights.<sup>84</sup>

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<sup>83</sup> 1<sup>st</sup> Gas Directive 98/30/EC, Article 13(3).

<sup>84</sup> 1<sup>st</sup> Gas Directive 98/30/EC, Article 18.

Legal texts establishing negative duties of non-discrimination and positive duties in TPA rights, as well as the competition rules of Article 101(1) TFEU, provide merely fuzzy lines about how law has ruled contracts between TSOs and undertakings. The vagueness of the rule does not give precise duties to TSOs about what clauses are allowed or forbidden in their service contract. What are the terms and conditions of providing service contracts that are in conformity with both competition rules of the Treaty and TPA rights of EU Legislative acts? Would TSO A breach EU law if it reserves for 5 years 30% of a network's capacity for undertaking X in exchange for a parallel loan agreement that would improve the quality of TSO's infrastructure? Would this reservation capacity agreement violate the TPA rights of undertakings Y and Z, who would then have less capacity available in the network? And if TSO A reserves for 5 years 10% of the network capacity, instead of 30%, would it still violate TPA rights? <sup>85</sup>

A simple reading of the legal text on TPA rights does not provide bright lines about how a TSO should or should not draft its service agreements with market incumbents; nor does Article 101(1) Treaty. Similar vague rules have also been given in prior example to illustrate the doubts of an electricity retailer on its *information duties* to be in conformity with European Private law setting consumers' right to *transparent and reasonable prices*. Both these vague rules are evidently diverse from the rigid rules described in the Air Passenger Rights Regulation, which provides bright lines about the mandatory terms and conditions binding for sales agreements between air flight companies and passengers.

Yet by giving the *non-discrimination duty* and the *right to transparent prices* as examples of vague EU rules in Energy Markets, this thesis has no intention of inferring that all EU rules of law in Energy Markets use language as vague as those examples, which a legal philosopher would define as general standards. In fact, vague rules like the *non-discrimination duties* have over decades been implemented by new EU rules that are far more tacit. Over time, the replacements of the 1<sup>st</sup> Package of Legislative acts by the 2<sup>nd</sup>, and later the 2<sup>nd</sup> by the 3<sup>rd</sup> Package, have occurred in two dimensions: a quantitative increase of legislative acts with general application, and a qualitative reduction in the degree of vagueness in the language of duty-imposing rules for regulating some transactions (e.g.

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<sup>85</sup> These questions related to hypothetical cases between TSO A and undertakings X, Y, and Z are just adequate enough to build my argument about the lack of meaning of vague rules. Nevertheless, one has to bear in mind that the level of complexity of the real market is significantly greater. In the real world, there are several other variants that could affect the institutions with adjudicating authority. What is the market share of undertaking X compared to its competitor? How could this reservation capacity agreement affect cross-border trade?

providing service agreements to access network systems). For example, if in the 1<sup>st</sup> Package providing service agreements between TSOs and undertakings had to consider only the vague *duty of non-discrimination*, the 3<sup>rd</sup> Package has established rules that communicate much more precise duties like the *duty of use-it-or-lose-it*: if undertakings do not use the reserved network capacity, it should surrender it for use by third parties.

Yet (again) by stating the evident differences of legal instruments and language used by EU legislator to communicate duties from the 1<sup>st</sup> to the 3<sup>rd</sup> and soon 4<sup>th</sup> Energy Packages, which will be investigated in-depth in the coming chapter, the thesis also does *not* claim that *all* EU rules have tended to be as strict as the *compensation duties* in the Air Passenger Rights Regulation. In fact, the coming chapter of this thesis proves the contrary. While EU lawmakers have approved statutory acts with more rigid rules regulating the provision of service agreements of TSOs over time, EU lawmakers have been more cautious in ruling on sales agreements between gas producers and buyers with tacit rules. Therefore the reminiscent *open texture* of language of EU Legislative acts may still leave a range of possibilities for further implementation or supplementations of vagueness by *other* sources of law issued either by EU supranational institutions (e.g. Implementing Acts, or CJEU and Commission adjudicative decisions) or Member States (e.g. State-Decrees, or NRAs' adjudicative decisions).

This thesis is ultimately committed to understanding the intertwined aspects of substantive and formal aspects of European Private Law, which can be read as primary and secondary rules embedded in the *genuine* EU Legal System. The coming two subsections are exclusively focused on the implementation of vague rules by EU non-legislative acts (3.2.1), and the construction of legal content from vagueness by EU institutions with adjudicating authority (or legal officials) (4).

### *3.2.1. Shrinking Vagueness: Rigid Rules in Implementing Acts*

In EU governance of overlapping legal systems, the approval of vague rules by EU legislators, like the *duty of transparent prices for electricity suppliers*, primarily suggests that Member States have a wide range of discretion in implementing EU rules within their territorial jurisdiction. Member States, by implementing Directives through State laws, *instrumentalize* private law to accomplish the ends of the Union and the ends of Member

States as long as they are compatible. This was what the hypothetical case of electricity supplier A taught us. Member States, by transposing the EU Electricity Directives, could indeed approve more rigid rules on *duties of transparent prices* to protect final customers within its territorial jurisdiction. But this is not the end of the matter. Later the same hypothetical case also showed that these more rigid rules recognized within Member States could conflict with other Union rules (e.g. freedom of movement). In these contexts, EU Lawmakers, while drafting new series of Packages, would be provided with convincing legal reasoning to regulate the issue at the supranational level by approving more tacit rules, which could be done directly in the legal text of a new Regulation or by delegation of law-making power to the Commission, a supranational non-legislative body.

The case of electricity supplier A, though hypothetical, sheds light on regulatory choices in which the Union's competence is legally reasonable, but where an EU Legislator may lack technical capacity to deal with issues in functional areas that grow in complexity as more rigid rules are requested by market actors.<sup>86</sup> The hypothetical case depicts circumstances in which EU Legislators invoke Article 290 or Article 291 TFEU. While Article 290 TFEU sets the conditions for the delegation of law-making power so that the European Commission may issue Delegated acts with binding force, Article 291 TFEU sets conditions for the Commission or the Council to issue equally binding Implementing acts. In EU jargon, both Delegated acts and Implementing acts are considered species of the genus *Regulatory acts* as long as the meaning of Regulatory acts in Article 263(4) TFEU refers "to all acts with general application apart from Legislative acts".<sup>87</sup>

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<sup>86</sup> Discussed in the previous chapter in the subsection "Are we all pluralists?".

<sup>87</sup> Since Article 263(4) TFEU states that a natural or legal person could institute proceedings against a "Regulatory acts", in the *Inuit Case* the CJEU confirmed the meaning of "regulatory act", stating it must be understood as covering "all acts of general application apart from legislative acts". Therefore, in principle "regulatory acts" would include both Delegated acts of Article 290 TFEU and Implementing acts of Article 291 TFEU. However, Article 263(4) TFEU also excludes the possibility of direct action for judicial review of "implementing measures", which left open the question whether the Lawmakers of the Treaty did not exclude the Implementing acts from the scope of Article 263(4). In this regard, in 2011 the General Court decided in the *Microban case* that Implementing acts issued by the Council according to Article 291(3) are different than "implement measures". Later, in 2015, the CJEU's judgement in the *T&L Sugar case* confirmed that Implementing acts issued by the Commission are also different than "implement measures" for Article 263(4). Therefore, Delegated acts and Implementing acts are indeed "Regulatory acts" with general application. As Steven Peers and Marios Costa argue, the See Case C-274/12 *Telefónica SA v European Commission*, 19 December 2013, EU:C:2013:852; Case T-262/10, *Microban v Commission*, 25 October 2011; and Case C-456/13 *T&L Sugars and Sidul Açúcares*, 28 April 2015. Steve Peers and Maria Costa, *Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T- 262/10 Microban v. Commission*. *European Constitutional Law Review*, 8(1), 2012, pp. 82-104.

In the Energy Markets of gas and electricity, the EU legislator for the first time invoked the delegation of law-making power to the Commission in 2003: the 2<sup>nd</sup> Energy Package. Both Electricity<sup>88</sup> and Gas<sup>89</sup> Regulations on conditions for access transmission network systems established the delegation of law-making power to the Commission for issuing Implementing acts, known in the EU jargon as *Guidelines* despite their binding force. Based on the delegated authority, the Commission issued some rigid rules regulating provision of service agreements between TSOs and undertakings, like the *duty to use-it-or-lose-it* described above that was approved in a Commission Decision with general application and binding force.<sup>90</sup> In the 3<sup>rd</sup> Package, the EU legislator replaced both Electricity and Gas Regulations by new Regulations<sup>91</sup> with rules even more sympathetic to the delegation of law-making authority at the supranational level, which results in the approval of a very peculiar scheme for drafting and approving Implementing acts known as Network Codes or Guidelines. Since 2006, and with more intensity from 2012 on, Commission Guidelines or Network Codes have ruled a large scope of functional areas to fill the Commission's "annual priority list" of regulatory issues, in which some of them have a clearly private dimension. Rules of long-term capacity allocation contracts and rules regarding harmonizing transmission tariffs in 2013,<sup>92</sup> or rules for trading with harmonization of "contracts as regards with firmness, restrictions to allocation or secondary market"<sup>93</sup> are key examples. Until November 2016, there had already been approved as an Implementing act six Guidelines and Network codes in Gas,<sup>94</sup> six in Electricity,<sup>95</sup> and more five Networks Codes are pending,<sup>96</sup> which could become statutory laws in the coming months.

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See also Agne Limante, "All Included": *The ECCJ Clarifies the Notion of 'Implementing Measures' within the Meaning of Article 263(4) TFEU*, Columbia Journal of European Private Law, 24 September 2015.

<sup>88</sup> Regulation 1228/2003, Article 8.

<sup>89</sup> Regulation 1229/2003, Article 8.

<sup>90</sup> Commission Decision 2006/770/EC, Annex (2.5).

<sup>91</sup> Regulation 715/2009.

<sup>92</sup> Commission Decision 2012/413/EU on the establishment of the annual priority lists for the development of network codes and guidelines for 2013, 19 July 2012, Article 1.

<sup>93</sup> Commission Decision 2012/413/EU on the establishment of the annual priority lists for the development of network codes and guidelines for 2014, 21 August 2013, Article 2.

<sup>94</sup> Commission Regulations (EU) 2015/703 establishing a Network Code on interoperability and data exchange; Commission Regulations (EU) 2014/312 establishing a Network Code on Gas Balancing of Transmission Networks; Commission Regulations (EU) 984/2013 establishing a Network Code on capacity allocation mechanisms in Gas Transmission System; Commission Decision (EU) 2015/715 amending Annex I to Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks; Commission Decision (EU) 2012/490 on conditions for access to the natural gas transmission networks.

The substantive aspect of both Commission Guidelines and Network Codes, with regards to their rigid rules applied to contracts will be substantially investigated in the coming chapter 4. At this point, this chapter is focused on developing the theoretical framework that grounds the thesis' propositions on what law is. As such, it is committed to frame the Implementing acts as duty-imposing rules in line with the concepts of primary rules and secondary rules of change, addressed before. Since the EU Legislator has never invoked Article 290 TFEU (Delegated acts) in the Energy Markets of electricity and gas,<sup>97</sup> this thesis will pay particular attention to Implementing acts of Article 291 TFEU issued by the Commission.

One may be thinking that the delegation of law-making power by a legislative body to a non-legislative body is not a novel governance model. In fact, the theory of delegation has long been studied *within States* and *beyond States*: either applying agent-principle dilemma or fiduciary models. *Within States*, Sovereigns in history have long delegated law-making power to Legislators, which then delegated in more restricted terms to Executive bodies,<sup>98</sup> or most recently to Independent Regulatory Agencies<sup>99</sup> or even Private Bodies.<sup>100</sup> *Beyond States*,

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<sup>95</sup> Commission Regulations (EU) 2015/1222 establishing guideline on capacity allocation and congestion management; Commission Regulations (EU) 2016/1719 establishing guideline on forward capacity allocation; Commission Regulations (EU) 2016/631 establishing a network code on requirements for grid connection of generator; Commission Regulations (EU) 2016/1388 establishing a network code on demand connection; Commission Regulations (EU) 2016/1222 establishing a network code on requirements for grid connection of high-voltage direct current system and direct current-connected power park modules; Commission Regulations (EU) 2016/1447 establishing guideline on capacity allocation and congestion management.

<sup>96</sup> Until November 2016, there were still pending Guidelines or Network codes on the following regulatory issues: Balancing, Emergency and Restoration, Demand Connection, System Operation for electricity; and harmonized tariffs for gas.

<sup>97</sup> Considering the Energy Markets as electricity and gas sectors, the EU Legislator has never evoked Article 290, delegating to the Commission the law-making power to issue Delegated acts. Nevertheless, there are Delegated acts in other areas of Energy that fall out the field of research of this thesis: like Energy Labelling (e.g. Commission Delegation Regulation (EU) No 65/2014) or Energy Efficiency in Building (e.g. Commission Delegated Regulation (EU) No. 224/2012).

<sup>98</sup> The contending position on the Parliament or Congress's capacity to structure the allocation of law-making power within the executive branches has long been recognized by the doctrine as the "Rise and Rise of the Administrative State". See Lawson, Gary. "The Rise and Rise of the Administrative State." *Harvard Law Review* 107, no. 6 (1994). Calabresi, Steven G. "Some Normative Arguments for the Unitary Executive." *Arkansas Law Review* 48 (1995): 23–104. Shane, Peter M. "Legislative Delegation, the Unitary Presidency, and the Legitimacy of the Administrative State." *Harvard Journal of Law and Public Policy* 33, no. 1 (2010): 103–10.

<sup>99</sup> Majone, Giandomenico. "The Rise of the Regulatory State in Europe." *West European Politics, The State in Western Europe: Retreat or Redefinition?*, 17, no. 3 (1994): 77–101. Thatcher, Mark. "Regulation after Delegation: Independent Regulatory Agencies in Europe." *Journal of European Public Policy* 9, no. 6 (January 1, 2002): 954–72.

<sup>100</sup> The law-making powers exercised by private bodies that are not grounded in the consent or in the ownership of property. It is rather commissioned or allowed by a Sovereign State or even local governments. Lawrence,

Sovereigns have also delegated *law-making* power to Public and Private Supranational Institutions. Irrespective of the horizontal or vertical space dimension of delegations (within or beyond states), duties issued by delegated body are only ranked as binding forces, and therefore as *sources of law*, if the Sovereign says so. This is aligned with Hart's statement about legal systems in general: "the orders given by the subordinate will only rank as law if it is, in its own turn, given in pursuance of some order issued by the sovereign".<sup>101</sup> As has been shown in the previous chapter, the EU legal system is more complex than a legal system of a Sovereign State since the EU legislator itself issues orders on behalf of 28 Sovereign States.<sup>102</sup> The EU legal system is also more complex than classic International legal systems with its *sui generis* Constitutional aspect. Yet, the EU being a genuine legal system, as any other legal system, one could expect that the authoritative aspect of duties given by subordinates would be recognized by prior orders given in pursuance of some others issued by Sovereigns, which ultimately serve to validate orders issued either by the Legislator or by a subordinate.<sup>103</sup> Therefore, like the orders in the Treaty expressing the 28 Sovereigns' will to vertically delegate certain *law-making power* to the EU Legislator, there are also orders in the Treaty expressing the 28 Sovereigns' will to horizontally delegate *law-making power* from the EU Legislator to the EU Executive body – the Commission – and, exceptionally, to the Council.

As we have seen, Article 288 TFEU confers *conclusive identification*<sup>104</sup> Directives, Regulations, and Decisions as primary rules, as well assuring the non-coercive nature of Recommendations and Opinions. Like Article 288 TFEU, Article 291 TFEU also confers *conclusive identification* of Implementing Acts issued by the Council and Commission as primary rules. Therefore, the Treaty of Lisbon recognized rules written in Implementing acts

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David. "Private Exercise of Governmental Power." *61 Indiana Law Journal* 647 (1986) 61, no. 4 (October 1, 1986).

<sup>101</sup> "(...) the order given by the subordinate will only rank as law if it is, in its own turn, given in pursuance of some order issued by the sovereign. The subordinated must have some authority delegated by the sovereign to issue orders in his behalf". Hart (1961), p. 45.

<sup>102</sup> European legal and political scholars consider the governance system of the EU more complex than Sovereign States as long as its legitimacy is not grounded on a *social contract* between the people and Sovereign, but rather an agreement among Sovereign States. Although this description of EU legitimacy as an intermediary legitimacy in two levels had been commonly shared by most EU legal scholars since its constitution, the financial crisis of 2008 and the impact of ECB decisions on citizens' life have motivated some scholars to challenge it, which Fritz W. Scharpf refers to as the end of legitimacy intermediation. Scharpf, Fritz W. "Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis." Working Paper. MPIfG Discussion Paper, 2012.

<sup>103</sup> MacCormick, Neil. "Beyond the Sovereign State." *The Modern Law Review* 56, no. 1 (January 1, 1993): 1–18.

<sup>104</sup> Footnote 34.

issued by the European Commission as *source of law* as much as written rules in Legislative acts.

Nevertheless, as has been said at the beginning of the second subsection, conclusive identification of authoritative texts is the most simplistic version of a secondary rule. In complex legal systems, secondary rules may also refer to procedures on how primary rules should be enacted: *the secondary rules of change*. If so, while Legislative acts (Directives, Regulations, and Decisions) have their secondary rules of change written in the Treaty (e.g. legislative procedures of Article 89 and the principle of subsidiarity), the secondary rules of change of Implementing acts firstly laid down in EU Regulations that originally delegate law-making power to the Commission by restricting their regulatory competence. In the 2<sup>nd</sup> Energy Package, secondary rules of change are found in Articles 8 and 6 of the Electricity and Gas Regulations, respectively. Beside the Legislative act delegating authority from the European Parliament and Council to the Commission, secondary rules of change applicable for Implementing acts also refer to the procedure of Regulation No 182/2011<sup>105</sup> “concerning mechanisms for control by Member States of the Commission’s exercise of” law-making power for Implementing acts: the formal procedures are well known in EU jargon as *comitology procedures*. One example of the form of rules set in the Comitology procedure was the creation of comitology committees composed of representatives of the Member States.<sup>106</sup> In both types of comitology procedures – either *Advisory Procedure*<sup>107</sup> or *Examination Procedure*<sup>108</sup> – the Commission should be assisted by the Committee, which implies that Member States would still have an active participation in the procedure of drafting Implementing acts.

Given the secondary rules that serve as the criteria of legality to recognize Implementing acts as coercive orders, and so rules of primary type, this thesis can conclude that these non-Legislative acts (or Regulatory acts) are *sources of law* as much as the Legislative acts. Although Implementing acts have the primarily role of reducing or *shrinking* the vagueness of rules of Legislative acts in certain regulatory issue, it is as authoritative as Legislative acts are. Like Legislative acts could be judicially reviewed by the CJEU in actions

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<sup>105</sup> Regulation 182/2011.

<sup>106</sup> Regulation No 182/2011, Article 3(2).

<sup>107</sup> Regulation No 182/2011, Article 4

<sup>108</sup> Regulation No 182/2011, Article 5.

brought by Member States, European Parliament, Council or Commission,<sup>109</sup> Implementing acts could be challenged by the same Institutions and, additionally, by private parties in action for annulment directly addressed to CJEU.<sup>110</sup> Having said that, rules in Implementing acts that are source of European Private Law as much as the rules of Regulations, Directives and Decisions as long as they regulate transactions. Despite this claim potentially seeming obvious to lawyers with training in philosophy of law, it might be not so obvious for others who rely on (dis)information provided on the *EUR-Lex* website, which erroneously lists as “Sources of European Union Law” the Treaty, Directives, Regulations and Decisions and unreasonably excludes from *sources of EU law* the growing number of statutory laws issued as Implementing acts and Delegated Acts with direct effects and binding force.<sup>111</sup>

Having said that about Legislative and non-Legislative acts, this thesis has identified the most evident *secondary rules*, and in particular *secondary rules of changes*, in the EU “genuine” legal system. These secondary rules serve as original criteria of legality that recognizes EU rules of a primary type made by authorities with *law-making power*. Yet, recalling what has been said in the beginning of this subsection about the intertwined aspect of law and language, once the legal texts of EU Legislative and non-Legislative acts are recognized as duty-imposing rules, they only constitute the first layer of primary rules. Therefore, there is still *one* caveat which matters to avoid misunderstanding of this thesis’s claims concerning the change of “secondary rules of change”.

### 3.2.2. Shrinking Vagueness? Rigid Rules in Non-categorically Identified acts

Although this thesis has developed a *categorical identification* of the secondary rules of the EU legal system primarily based on conferring powers rules written in legal texts, it has to be kept in mind that the secondary rules are neither *hard articles* like hardcore clauses in National Constitutions; nor they are immune from changes as long as these changes are equally recognized by the rule of recognition of the EU legal system. A recent example of changes in the secondary rules of the EU legal system was the *law-making power* exercised by ECB when it turned non-binding austerity Recommendations into binding orders through

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<sup>109</sup> Article 263(1) TFEU

<sup>110</sup> Article 263(4) TFEU.

<sup>111</sup> EUR-Lex, *Sources of European Union Law*, available in: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A114534>

the implementation of the OMT (Outright Monetary Transaction) Program at the height of the post-2008 Eurozone's crisis.<sup>112</sup> The fact that the German Constitutional Court<sup>113</sup> followed the CJEU's judgment on the *OMT case*,<sup>114</sup> ruling in favor of the ECB, confirmed the changes in the criteria of legality that has been in place since 2012. Another case that is particularly intriguing is the recent CJEU judgment in the *KPN case*<sup>115</sup> in the telecommunications sector, whereby a Dutch court referred the question on whether national courts are permitted to make a decision that contravenes a non-binding Commission Recommendation. In contrast to the *OMT case*, the CJEU was more cautious in changing the secondary rules of the EU legal System and, instead, suggests that national courts *may* consider Recommendations.<sup>116</sup> Unlike

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<sup>112</sup> Until 2010 the "Broad Economic Policy Guidelines" were a set of austerity policy recommendations, therefore non-binding, which served as a reference for the "Troika's Compliance Reports" to monitor the policy of Member States. The first step given by the ECB to make Recommendations that imposed duties and obligations was though the OMT Programme, in which Member States were forced to comply with the recommendations only if they applied for rescue credit. But in December 2011, the adoption of the "Six Pack" of regulations and directives by the Parliament that apply to all EMU member States regardless of any immediate threats of the state insolvency. As Fritz Scharpf stated, "together with the 'Two Pack', the 'European Semester', the 'Fiscal Pact', and the recent agreement on centralized the banking supervision constituted a new governance regime for the Monetary Union that extends centralized competence far beyond their reach under the rules of the Maastricht Treaty. (...) In short, the governing power exercised by the ECB, the Commission, and the Council in the present Euro regime are not directly or indirectly supported by institutional mechanisms of *input-oriented* democratic accountability. Instead, they are publicly justified by *output-oriented* arguments." [Originally highlighted by the author]. Scharpf, Fritz W. "Political Legitimacy In A Non-Optimal Currency Area." In *Democratic Politics in a European Union Under Stress*, edited by Olaf Cramme and Sara Binzer Hobolt. Oxford University Press, 2015.

<sup>113</sup> Judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13

<sup>114</sup> C-62/14, Gauweiler and Others, 16 June 2015.

<sup>115</sup> C-28/15, Kininklijke KPN and Others, 15 September 2016.

<sup>116</sup> In the *KPN case*, the CJEU stated that, "even if recommendations are not intended to produce binding effects, the national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provision" (para. 41). Yet the Court also stated that the national courts may departure from the recommendation of the Commission "only where it considers that this is required on grounds of related to the facts of the individual case, in particular, the specific characteristic of the market of the Member States" (para. 43). One could read the *KPN case* in a way to understand that the judgment of CJEU is changing the secondary rules of EU legal system by recognizing non-binding Recommendations as binding. However, this analytical understanding of the *KPN case* would stretch the legal effects of the CJEU decision far beyond what was desirable by the Court. In the conclusions, the CJEU explicitly stated that the National Courts "may" depart from Commission Recommendations as the appropriate price regulation measure, instead of "shall" or "should" depart. These reinforced the fact that Recommendations have indeed no binding force. Notwithstanding my disagreement with the analytical understanding of the *KPN case* as a means to change the secondary rules of the EU legal system, I still think of *KPN* as a landmark case, *albeit* for other reasons. If one looks to the CJEU's judgment from a legal theory perspective, one can claim that, instead of changing the secondary rules of the EU legal system, the *KPN case* affects the methods of interpretation applied by national courts while adjudicating. If someone follow the concept of secondary rule of adjudication in which methods of interpretation matters, he could claim that the *KPN case* indeed changed the secondary rule of adjudication by compelling judges to incorporate into their legal reasoning the Commission recommendations as the best model on the grounds of individual cases. If so, national courts are not obliged to enforce recommendations, but give justifications as to why Recommendations are not the best regulatory choice according to the characteristic of the market of the Member States. We will return to the concept of secondary rule of adjudication below. As for the *KPN case*, see C-28/15, Kininklijke KPN and Others, 15 September 2016.

financial and telecommunication sectors, in the Energy Markets the CJEU has never been questioned about the legality of *law-making power* exercised by EU Executive or non-Executive bodies without prior delegation, nor has it been referred to about the coercion of non-binding Recommendations. Nevertheless, the absence of preliminary reference to the CJEU does *not* mean that secondary rules of change set in the Treaty have not been *in practice* challenged in the Energy Market, similar to what happened in financial sectors after the 2008 financial crisis. This is the question this thesis will face in chapter 6 while analyzing the primary rules regulating providing service contracts of TSOs approved by a very particular formal procedure for Network codes. Therefore, defining what the Treaty recognizes as *secondary rules* and *secondary rules of change* is fundamental to have a reference point that allows this thesis to observe whether the *original* delegation of law-making power expressed by the 28 Sovereigns in the TFEU has been changed by *practice* or not.

#### **4. EPL and Secondary Rule of Adjudication: Beyond Courts and Vertical Effect**

Primary rules in Treaty, Legislative, and non-Legislative acts are “general”. Rules are general for addressing duties to classes of persons (e.g. class of consumers) or legal entities (e.g. TSOs), instead of specific individuals as an *order* (e.g. TSO A or Andrea). Irrespective of the legal instrument (e.g. Treaty or Implementing acts) or the semantic texture (i.e. *more or less* vague), whole primary rules in EU legislation studied above are “general rules”. This thesis has showed that general rules could vary between the semantically rigid and the semantically vague, in which semantic vagueness leads to indeterminacy. The “open texture of law” then may leave open a range of possibilities for interpretation of EU Law.

In the prior section, this thesis described the “open texture of law”. It also demonstrated how Hart borrowed from pragmatics in the philosophy of language to shed light on the “logic of our language” and communication of legal norms. In this last section, this chapter advances Hart’s proposition on how primary rules are supplemented by “authoritative determinations”, which legal validity lays on secondary rules of adjudication, and how these “authoritative determinations” are primary rules as much as any legislation. It does so though stressing Hart’s broader concept of rule of adjudication which goes further than court decisions.

Like his predecessors, Hart acknowledged that the semantic vagueness of rules could open possibilities for interpretation on how individuals must conduct themselves in certain circumstances. However, different from his predecessors, Hart undermined the prior idea that rules are merely directives to courts, which ultimately provide legal content to vagueness through coercive orders. He did so through developing the Internal Point of View, which has been discussed prior.

Hart argues that individuals' behaviors regard and respond to a set of general norms in any system. When norms are vague, ambiguous or conflicting, individuals draw on a supplementary form of reference to shape their behavior. Borrowing the example of parenthood and power developed by Hart, if a mother asks her three children to remove their hats before entering the church and, right after, a grandmother reprehends the first kid for removing his hat with the left hand, the other two children could infer they should use the right hand to remove their hat, or actually not. If the children do remove their hats with the right hands, one could claim that children recognize two individuals holding power within the parenthood system: the mother's power to set the norms of conduct and also the grandmother's power to determine whether norms of conduct are broken or not. However, legal systems are highly complex. How do individuals recognize adjudicating authority in complex legal systems?

In legal systems, primary rules are supplemented by "authoritative determinations" answering "questions of whether a rule has been broken on a particular occasion" in legal systems. They could be represented by *yes-or-no* answers to questions raised through this chapter. Did Member State Y violate the *freedom of movement* when it imposed *information duties* on suppliers to disclose to customers their profit margin? Or Did TSO A violate *antitrust prohibitions* when it reserved capacity for undertaking X in exchange for a loan agreement? Answers to these questions would then "supplement the simple regime of primary rules" by constructing legal content of semantically vague rules, like a duty to inform clear and transparent prices for consumers. They are meaningful propositions of law depicting facts. However, the simple public answer to this question does not make a proposition of law into an "authoritative determination". For Hart, "authoritative determinations" supplement primary rules of law in a legal system insofar as "secondary rules empower individuals" to do

so. These “rules which confer power” is what makes an “authoritative determination” into a “rule of adjudication”. This is what Hart explicitly stated below.<sup>117</sup>

“The third supplement to the simple regime of primary rules, intended to remedy the inefficiency of its diffused social pressure, consists of secondary rules empowering individuals to make authoritative determinations of the question whether on a particular occasion, a primary rule has been broken. The minimal form of adjudication consists in such determinations, and we shall call the secondary rules which confer the power to make them ‘rule of adjudication’”.

If rules of adjudication are meaningful primary rules, as much as any Statutory acts, the second proposition is to determine who are the “legal officials” holding adjudicating power to construct the law. In the passage above, Hart argues that the “minimal form of adjudication” consists in “authoritative determinations” and “we shall call the secondary rules which confer the power to make them” sources of law. This is the point where Hart challenges the view that Courts’ decisions are the unique primary rules.

Since ancient legal systems, judges (*Iudicum*) have been legal officials that hold adjudicating authority to decide disputes. For Hart, Courts are empowered to make law by decisions because secondary rules empowered them to do so, but they are not the only legal officials in complex legal systems. Furthermore, writing in late 1950s early 1960s, he acknowledged that modern legal systems had “centralized official ‘sanctions’ of the systems” and conferred upon judges, what are called precedents.<sup>118</sup> But Hart recognized the centralization of adjudication power as analytically contingent. Hart advanced his claim in other passage of *The Concept of Law*, where he explicitly asserts that Court’s precedents are important as “ancillary provisions for failure of the systems”.

“If courts are empowered to make authoritative determinations of the fact that rule has been broken, these cannot avoid being taken as authoritative determinations of what rule are. So the rule which confers jurisdiction will also be a rule of recognition, identifying primary rules through the judgments of the courts and these judgments will become ‘source’ of law”.<sup>119</sup>

“It is of course very important, if we are to understand the law, to see how the courts administer it when they come to apply its sanctions. But this should not lead us to think that all there is to understand is what happen in

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<sup>117</sup> Hart (1961), p. 96-97

<sup>118</sup> Hart (1961), p. 96-97

<sup>119</sup> Hart (1961), p. 97.

courts. The principal functions of the law as a means of social control are not to be seen in private litigation or prosecution, which represent vital but still ancillary provisions for failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court”.<sup>120</sup>

Therefore, *precedents* for Hart are vital to judicially review the authoritative determination of other legal officials in case of failure of the system, but they are not the only supplementary source of primary rules in a complex legal system. Hart went even further by asserting that if one wants to understand how rules control, guide, and plan life, “this should not lead us to think that all there is understand is what happen in courts”. “It is to be seen in the diverse ways in which the law is used to guide life *out of court*”.

For Hart, the “minimum form of adjudication” still constitutes pronouncements of primary rules in legal systems. Therefore, they are reasons for actions for individuals. Individuals respond to them as they supplement the primary rules. To illustrate what minimum form of adjudication means, Hart used the examples of a policy man. If Italian officials impose fines on individuals for parking scooters at a prohibited parking area for vehicles, these fines represent an “authoritative determination” and, moreover, they inform individuals that scooters must be considered as vehicles. They are rules of adjudication and, therefore, primary rules, even if they could still be subject to judicial review.

By saying this, this thesis could come to the conclusion that primary rules validated by secondary rules of adjudication have two distinguishing features in any legal system. First, they have to be issued by legal officials with conferred powers to do so. Second, they have to be meaningful propositions of law answering questions about whether rules have been broken in particular cases. If so, Hart’s theory (again) explains a very important aspect of European Private Law. Supplementary sources of primary rules are not only preceded by precedents of the CJEU, but also by any other “authoritative determinations” that construct law by legal officials insofar as they have conferred powers to do so. If so, the supplementary source of primary rules goes beyond Courts and captures Out-of-Court decisions insofar as there are power-conferring rules.

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<sup>120</sup> Hart (1961), p. 40.

#### 4.1. *Supra-governmental Adjudicating Authorities: beyond CJEU*

Taking into account secondary rules of the EU legal system through the conferring of adjudicating powers to supranational officials, primary rules could refer to decisions issued by three “EU legal officials” in the Energy Market: the CJEU, the Commission (i.e. DG Comp), and most recently the ACER. CJEU’s infringement decision against Member State X for poorly implemented Electricity or Gas Directives in national jurisdiction,<sup>121</sup> as well as preliminary rulings interpreting whether consumer contracts of supplier A violates duties, are primary rules of the EU Legal system.<sup>122</sup> The Commission’s *formal decisions*<sup>123</sup> are also primary rules, when interpreting whether a clause in supply contracts of gas producer B breaches Article 101(1) TFEU. Decisions issued by the ACER on disputes between two NRAs are also primary rules. Both the Gas and Electricity Regulations of 2009, while regulating access to transmission systems, innovated by delegated powers to the ACER for solving disputes between NRAs in a very specific case. Both Regulations established that the ACER has authority to decide on exemptions for “new interconnectors” if the NRAs do not reach any agreement on the matter within 6 months and therefore upon a joint request to the ACER.<sup>124</sup> In these cases, the ACER’s decisions represents a rule of adjudication on whether exemptions for new interconnectors are in conformity with EU Law or not. If an exemption request includes capacity reservation contracts, as usually they do, the ACER will then rule contracts law.

The broader concept of primary rules extending towards rules of adjudication issued by authorities beyond Courts is vital to reveal an empirical observation of how rules of European Private Law govern contracts in Energy Markets. While the CJEU had few cases over history dealing with the private law dimension in Energy Market, legal scholars have devoted entire books to develop legal doctrines of EU contract law by systematizing the Commission’s decisions with regard to the enforcement of competition rules.<sup>125</sup> As Peter Cameron asserted

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<sup>121</sup> C-474/08, *Commission v. Belgium*

<sup>122</sup> C-92/11, *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen*

<sup>123</sup> Regulation 1/2003, Article 7.

<sup>124</sup> Regulation 714/2009, Article 17(5)(a)(b).

<sup>125</sup> See the series of edited books by Professor Christopher Jones and Emmanuel Cabau on EU Competition Law and Energy Markets, where there are entire chapters dedicated to build the doctrine of EU contract Law by systematizing Commission decisions in vertical and horizontal agreements. Jones, Christopher, and Emmanuel Cabau. *EU Competition Law and Energy Markets*. Second edition. Claeys & Casteels, 2007. Jones, Christopher, and Emmanuel Cabau. *The Internal Energy Market: The Third Liberalisation Package*. Third edition. Claeys & Casteels, 2010.

in his 2002 book on *Competition in Energy Markets*, the Commission's decisions between 1993 and 1996<sup>126</sup> already established 15 years as the maximum duration that long-term upstream supply contracts in the electricity Markets could be fixed, what he calls contractual "standard terms".<sup>127</sup> This evidences that EU law has advanced towards the *instrumentalization* of contracts to accomplish community ends even before the approval of EU Secondary Law on the sector regulation of Energy Markets. This is one aspect of European Private Law that will be better illustrated in the coming chapter 7. But this is not the end of the matter.

#### 4.2. Member State's Adjudicating Authorities: beyond National Courts

Discussion of the feature of the EU as an autonomous or non-autonomous legal system reaches an impasse regarding the roles of Courts and national authorities in the process of implementing EU Law. Though the CJEU acts as an "ancillary provision for failure of the EU Legal Systems", national Courts still hold discretion in referring to the Court a preliminary reference. Moreover, some national Courts still apply procedures to assess the primacy of EU Law.<sup>128</sup> If the CJEU, the Commission, and the ACER are supranational legal officials whose decisions supplement primary rules of the EU Legal System, the following proposition needs to be answered: what can this thesis say about national legal officials whose adjudicating authority within national jurisdictions EU law recognizes or even *creates*? No doubt, they are part of the construction of the legal discourse of European Private Law into their national legal system, though territorial jurisdiction diminishes the volume of their voices.

Since the negative integration, national courts have been by their nature the first guarantors of Community Law. When interpreting primary rules of European Private law, obviously they are constructing legal content from the semantic vagueness of EU rules within

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<sup>126</sup> *Electricidade de Portugal/Prego Project* [1993] OJ C265/3; *REN/Turbogas* [1996] OJ C118/7; *ISAB Energy* [1996] C138/3.

<sup>127</sup> For Cameron, "The duration of contracts figured prominently in three cases decided by the Commission between 1993 and 1996. However, this occurred in the context of restrictions arising from market foreclosure and led to the Commission to limit the contracts period". Later he complemented that the "principal similarities in the cases" was that "a power purchase agreement had been concluded between a new electricity generator and the incumbent monopoly", and "Commission approval in each case was conditional on a reduction of duration to 15 years. This period has therefore acquired the status of a 'standard' term, providing investors with sufficient security for a long-term commitment". Cameron, Peter D. *Competition in Energy Markets : Law and Regulation in the European Union*. Oxford University Press, 2002, p. 241.

<sup>128</sup> The provisions of the German Constitutional Court on the primacy of EU law are manifested in three types of review: ultra vires, fundamental rights review, and identity review.

their national jurisdiction. Besides national courts prior existence in Member States' legal systems, there are several other legal officials whose powers has derived from EU duty-imposing rules on Member States since the positive integration strategy. Those are NRAs, NCAs, and most recently ADRs.

In the Energy Markets, Member States have the obligation to delegate some adjudicating authorities to NRAs since the 2<sup>nd</sup> Gas and Electricity Directives. The 2<sup>nd</sup> Electricity Directive established that NRAs should have adjudicating authority to “act as dispute settlement body”<sup>129</sup> if any party have a complaint against TSOs or DSOs”, which decision should “have binding effects unless and overruled on appeal”.<sup>130</sup> Besides the adjudicating powers in complaints against TSOs and DSOs, the 3<sup>rd</sup> Electricity and Gas Directives largely extended the role of NRAs for enforcing EU law. Since its transposition, NRAs should have authority to “issue binding decisions on electricity undertakings”;<sup>131</sup> “to impose effective, proportionate and dissuasive penalties on undertakings” for non-compliance (or to propose that a competent court impose such penalty),<sup>132</sup> or even “approve all commercial agreements between the vertically integrated undertaking and the transmission system operator on the conditions that they comply with market conditions“. <sup>133</sup> Above all conferred powers to NRAs, one should also consider the Council Regulation 1/2003,<sup>134</sup> which imposed duties on Member States to create judicial or administrative bodies with authority to enforce EU competition rules: NCAs.<sup>135</sup> Most recently the ADR Directive bound Member States to provide alternative mechanisms to solve disputes involving consumers in general, which expanded the already existing Member State's duties to provide alternative mechanisms to solve disputes at sectorial level: between energy suppliers and energy

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<sup>129</sup> Directive 2003/54/EC, Article 23(5).

<sup>130</sup> Directive 2009/72/EC, Article 37(11).

<sup>131</sup> Directive 2009/72/EC, Article 37(4)(a)

<sup>132</sup> Directive 2009/72/EC, Article 37(4)(d). The 3<sup>rd</sup> Directives do not categorically obliged Member States to delegate authority to NRAs with regards imposition of penalties. It left open to Member States the alternative of imposing duties to NRAs take action against undertakings in national courts. In these cases, adjudicating authority would remain with Courts.

<sup>133</sup> Directive 2009/72/EC, Article 37(5)(e)

<sup>134</sup> Cseres, Katalin J. “Competition Law Enforcement Beyond The Nation-State: A Model for Transnational Enforcement Mechanisms?” In *The Transformation of Enforcement: European Economic Law in a Global Perspective*, edited by Hans-W. Micklitz and Andrea Wechsler, 319–41. Oxford and Portland, Oregon: Hart Publishing, 2016.

<sup>135</sup> Directive 2013/11/EU (ADR Directive).

consumers.<sup>136</sup> However, different to sectorial regulation, the ADR Directive highlights that Member States could delegate adjudicating authority to issue binding decisions.<sup>137</sup> If Member States indeed opt for power-conferring rules, one could claim that an empowered ADR body is equally capable of issuing an authoritative determination enforcing and supplementing EU law on what concerns *information duties* of energy suppliers or compensation damages for breach of contract.<sup>138</sup>

By analyzing the duties of NRAs, NCAs, and ADRs, there are two common obligations imposed by EU law on those national bodies representing alternative mechanism of enforcement and construct EU law in national jurisdiction. One is the duty imposed on these bodies to publicize their decisions to the general public, which makes their coercive order not only known to the addresser but also to all market players within their jurisdiction. The other is the obligation imposed on Member States to assure individuals' right to judicial review, confirming the ancillary functions of Courts.

If one applied the theoretical framework of this thesis, decisions of national Courts, NRAs, NCAs, and ADRs are decisions that supplement semantically vague rules of European Private Law within national jurisdiction. This assertion goes in the direction of confirming the proposition that the EU legal systems are *not* autonomous legal systems, but rather intertwine with Member State's legal systems that enforce and construct the legal content of EU Law within each of the 28 national legal systems. Despite their role of giving effectiveness to primary rules of European Private Law within such pluralism of European legal systems, these "authoritative determinations" are valid and recognized within their national jurisdictions. This justifies the methodological choice of this thesis in the coming chapters:

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<sup>136</sup> Since the 2<sup>nd</sup> Electricity and Gas Directives, Annex I, Member States have had the duty to provide Alternative Mechanisms for solving dispute between consumer and energy suppliers. Similar measures can be found in the Telecommunication Directives.

<sup>137</sup> Directive 2013/11/EU, Recital 37.

<sup>138</sup> The ERPL Project and Florence School of Regulation jointly organized a Workshop on 20 February 2015 on the role of Out-of-Court dispute resolution mechanisms in Energy Markets involving commercial and consumer contracts. On the side of the ADR for consumers, six speakers representing different ADRs in six different Member States (France, Belgium, Denmark, UK, Denmark, Italy, Czech Republic) described their governance, complaints procedures and, if any, authority to issue binding decision. Martin Salamon, Chief Economist and Danish Consumer Council, explained that not only the Danish Consumer Ombudsman has delegating powers to issue binding decisions, but also the Danish legal system has no Court precedents on consumer law matters in Energy markets because individuals do not appeal to Courts. Martin Salamon's statement reinforces what this thesis claims: the rule of adjudication goes beyond Courts. Martin Salamon, Workshop on 20 February 2015. As an explanation of the Nordic culture of adjudicating through Alternative Dispute Resolution mechanisms rather than Courts, See also Letto-Vanamo, Pia. "Judicial Dispute Resolutions and Its Many Alternatives: The Nordic

investigate primary rules of European Private Law made and enforced by supranational bodies and validated by secondary rules of the EU legal system.

Yet, there is *a* key feature of this thesis's claim that needs to be clarified about "authoritative determinations" of supra-governmental bodies. If this chapter aims to frame primary rules of European Private Law according to the combination of primary and secondary rules endorsed by legal positivism, it needs to deal with the nature of "settlements" as one type of "alternative dispute resolutions" that does not fit into the legal positivist's proposition of rule of adjudication. If settlements are agreements between two or more parties intended to resolve disputes or conflicts before Courts or governmental bodies impose binding decisions, they are merely agreements and do not represent authoritative determinations of what the law is. However, if authorities with adjudicating powers operate activities as mediators (ADRs) and/or counter-parties of the agreement (i.e. Commitment-decisions) and, moreover, these agreements are released to the general public, these settlements are not property "settlements" in the sense of agreements between two parties solving disputes within and between Law Firms.

EU law has been studied for its positive approach to create settlement mechanisms for dispute resolution at both national and supranational level.<sup>139</sup> The Commission has frequently short-closed investigations on competition concerns through a settlement mechanism called "Commitment-decision."<sup>140</sup> Furthermore, settlement mechanisms have attracted attention of consumer lawyers since the approval of the ADRs and ODRs. The ADR Directive imposes duties on Member States to create Alternative Dispute Resolution bodies to solve consumers disputes out-of-court, which could either have conferred powers to adjudicate the dispute by imposing solution on parties or not. When the dispute is solved through settlement between parties, then they are merely contracts. Settlements are by nature bargain mechanisms to short-close disputes before or after a formal request to an adjudicating authority for an "authoritative determination".

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Experience." In *Formalisation and Flexibilisation in Dispute Resolution*, edited by Joachim Zekoll, Moritz Bälz, and Iwo Amelung, 151–63. Leiden and Boston: Brill Nijhoff, 2013.

<sup>139</sup> Hodges, Christopher J. S., Iris Benöhr, and Naomi Creutzfeldt-Banda. *Consumer ADR in Europe*. Civil Justice Systems. Oxford ; Portland, Ore: Hart Pub, 2012. Hodges, Christopher, Naomi Creutzfeldt, Felix Steffek, and Eline Verhage. "ADR and Justice in Consumer Disputes in the EU." *The Foundations for Law, Justice and Society*, 2016. Wagner, Gerhard. "Private Law Enforcement through ADR: Wonder Drug or Snake Oil?" *Common Market Law Review* 51 (2014): 165–194. Cohen, Amy J. "ADR and Some Thoughts on the Social in Duncan Kennedy's Third Globalization of Legal Thought." *Comparative Law Review* 3, no. 1 (2012).

<sup>140</sup> Commission Regulation 1/2003.

If the concept of secondary rule of adjudication defines authoritative determination as a proposition of law answering questions on whether EU law was or was not violated, then settlement could not *a priori* suit the definition of authoritative determinations. Settlements are bargains that the defense pledges to short-close a dispute or investigation before declaration of wrongdoing. In spite of this, there are controversies. Indeed legal officials do not “decide” about violation of law, but Commitment-decisions are agreements in which the Commission is concomitantly party and authority with investigating and adjudicating powers. Therefore, the bargaining power of commitment-decisions is diverse from settlements in Courts where judges mediate conciliation. Furthermore, commitment-decisions, though settlements, are publicized. This means the commitment-decisions needs special attention, which will be dedicated in chapter 7.

## **5. From The Internal Point of View to the Harmonization?**

In this chapter, this thesis advanced Hart’s theory to explain why the debate over European Private Law is mired in perceptiveness. Legal scholars arguing whether European Private Law is Law or Meta-law, or has vertical or horizontal effect, have been mired in a debate that does not perceive Law as a social phenomenon. Substantive Law in Legal Systems goes beyond conclusive identification of Law in the Treaty. The Concept of Primary and Secondary rules are then powerful tools to understand legal systems as they are: a dynamic system of rules made and enforced by authorities with conferred powers, which are powers no longer conferred only to legislators and Courts. Furthermore, Substantive Law refers to normative system of rules providing commands for actions applied to legal officials and market actors. They could be either semantically vague as duties of non-discrimination, or rigid as prohibitions to reserve 50% of the capacity of pipelines to long-term contracts. Regardless of whether rules are approved in Directives with minimum or maximum harmonization regimes, or Regulation with general application, the semantic content of their measures must be the reference to a conclusion about harmonization. However, so far as Impact of Assessment of the Commission has not taken into consideration the semantic dimension of legal norms as reference to assess harmonization.

By framing European Private Law according to concepts of primary and secondary rules, this thesis aims to shed light on two approaches to Harmonization: the Top-Down approach based on Economic Analyses of Law, as well as Bottom-up approach based on the *presumption* of divergence.

Firstly, Economic and Legal scholars have developed economic analysis on the optimal Regulatory Framework. This analysis seeks to propose the best legal regimes to the accomplishment of EU purposes: Directives with minimum or with maximum harmonization, full harmonization through Regulations. This thesis then sheds light on the fact that “words” matter in these analyses more than the empty choice of regulatory regimes. It shows that a Regulation could not necessarily lead to “convergence” when its provisions contain vague rules. It also proves the same conclusion can be addressed to Directives. Rigid rules in Directives shrink the range of possible interpretations.

Secondly, besides Economic Analysis, some scholars point to divergent legal interpretations in national legal systems as an issue of bottom-up approaches to Harmonization. There are massive and persuasive comparative studies proving divergent interpretations to the same provision. To solve divergent implementations and legal interpretations, the EU has pushed bottom-up and voluntary Methods of Coordination to boost convergence in national legal systems. This thesis sheds light on the presumption of divergence. It contests the role of Open Methods of Coordination where rules are semantically rigid. It also contests comparative studies based on Court decisions as an appropriate methodology where semantically rigid rules applied to private transactions lead to fewer conflicts and fewer disputes in Courts.

The thesis returns to discuss approaches to Harmonization in its Conclusion.

– CASE I –

**Business-to-Business Contracts in Non-Competitive Markets:  
Long-term Capacity Reservation Contracts in Electricity Markets**

“Given the airline experience and the expected success of trucking and rail deregulation, economists and others have turned to deregulation as a possible cure for the alleged chronic inefficiencies of supply and pricing in the electricity power industry. Sound policy cannot be made on the basis of casual analogy, however”

Paul L. Joskow and Richard Schmalensee, *Markets for Power*, 1983

This thesis started its investigation with the aim of answering this question: whether (and if so, how) has the private law dimension of EU energy law regulated private relationships in energy sector since EU started pursuing positive integration? Has EU energy law *intruded* into national systems of private law and *substituted* legal provisions in civil codes and decrees-law governing property rights, contractual capacity, and obligations? By investigating these questions, this author has often faced a negative reaction from scholars, market actors, bureaucrats, and stakeholders, a reaction based on the following doubt: does EU energy law even have a private law dimension at all?

In chapter 2, this thesis deconstructed the classic concept of private law and also reconstructed the modern concept of private law with the intention of revealing the private dimension of EU law. It did so by showing how the negative integration project already spilled over national system of private law when it imposed obligations on Member States to change national private laws. This thesis then continued by showing how the European private meta-law evolved to European private law throughout the positive integration strategy. It demonstrated how secondary legislation has created duties and rights applied to individuals concerning the way they use their property and conduct transactions in the internal market. By doing so, this thesis underlined provisions of property law and contract law at the supranational system of law. Explaining the theoretical grounds of European private law and its evolutionary process was important to establish a common ground for introducing the following *cases*. Forthwith, this thesis investigates the private law dimension of EU law into the system of rules understood as EU Energy Law. Along this research, this author has witnessed more negative than positive reaction to the combinations of these two words, private law and energy law. This reaction is easily explained.

Until the late 1980s, national laws establishing energy policies were indisputably public laws. State-owned firms or private undertakings enjoying exclusive rights built and operated power plants generating electricity and transmission and distribution systems, and provided electricity to final customers (industries and citizens). Electricity was then seen as part of the industrial and social policies of sovereign States. National legal systems considered the power industry to be an arm of government and, therefore, their decisions were administrative acts and transactions were public contracts. Providing electricity at lower prices was one of the elements in the equation of production in decisions about where to establish generation capacity. States that were able to attract industries and manufactures because of lower electricity costs gained, in exchange, significant economic welfare gains domestically, lower unemployment, and higher consumption. This description of the electricity sector and industrial policy narrates the relationships of power industries and States until the 1980s. Matters changed significantly over the 1980s and into the 1990s.

While electricity industries were operating as public regimes until the 1980s, the production structure started to change after discourses about the inefficiency of States gained voice through economic theories about *rent seeking*, *libertarian* political discourses, and *liberal* economic theories. The endorsement of one or more of these ideas and discourses challenged the legal framework in utilities services, including the power industry. Worldwide,

States were pressured to divest and exit from productive activities that could potentially be operated by private undertakings. While economic activities operated by States passed through a process of privatizations and *deregulation*, the electricity power industry passed through a process of privatization and *(re)regulation*. As highlighted by Paul L. Joskow and Richard Schmalensee in their 1983 book *Markets for Power*, “policy cannot be made on the basis of casual analogy”.<sup>1</sup> In the 1980s and 1990s, state-owned companies become private undertakings, even those in which the State remained the majority shareholder; the ‘power industry’ became ‘electricity markets’; and ‘government planning’ transformed into ‘sector-oriented policy’. Sector-regulation has served thereafter as the principal means to correct deviations from expected market behavior and policies by private undertakings. This is the face of the Regulatory State in the electricity industry.

Nowadays, whenever States enact legislative acts or decree-laws imposing duties on electricity suppliers – like, for example, requirements to install smart meters for householder customers – those statutory acts are mandatory rules imposed on private contracts between householder customers and electricity suppliers. Therefore, legal provisions regulating private transactions are national private law. If the EU legislator, instead of national lawmakers, enacts the same provision, the legal norm is then part of a set of rules of European private law.

Since the early 1990s, when the EU started pursuing the positive integration strategy in energy markets, EU relied on a normative system of rules of private law to shape individuals’ behavior to accomplish EU values: integration, competition, security of supply, consumer empowerment and protection. Over time, in electricity markets, the private dimension of EU energy law has gained considerable importance and also extensive volume. Directives, Regulations, and implementing acts have regulated several aspects of electricity industry, including private contracts and private property that are no longer public contracts and public property.

EU law in electricity markets refers to an emerging body of valid and functional legal norms created to shape market actors behavior towards the ends of the EU. Since the early 1990s, EU energy law has pursued the creation of a competitive, secure, and sustainable

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<sup>1</sup> Which is different from vertical ownership. Joskow, Paul, and Richard Schmalensee. *Markets for Power. An Analysis of Electrical Utilities Deregulation*. Massachusetts: MIT Press, 1983.

internal market for electricity. While the ends of EU have not substantially changed throughout the years, the same cannot be said about the means. Since the late 1990s, EU energy law refers to a dynamic normative system of rules that are constantly reviewed, revoked and replaced by new packages. EU lawmakers impose duties on Member States, but also (and most importantly) rights and obligations addressed to market actors and their private contracts. Supply contracts of electricity between generators and buyers, trade intermediation contracts, services agreements between TSOs (Transmission System Operators), storage agreements, or supply contracts with customers and consumers are examples of private contracts nowadays governed by rules of EU law. Among these contracts, EU law has been sometimes more intrusive by imposing a vast set of rules, other times less intrusive establishing one mandatory rule. Yet it is evident the substantive dimension of European private law in regulated sectors.

To understand the evolution of EU law throughout three decades of positive integration in the energy market, this thesis highlights *four* regulatory strategies adopted by EU lawmakers since the first move towards positive integration. Doing so allows us to distinguish regulatory strategies falling into public regimes from those falling into private regimes. First, EU law prohibited Member States from granting exclusive rights. This rolled back legal monopolies. Secondly, EU secondary legislation imposed duties on Member States to promote public procurement under principles of non-discrimination. Concessions and authorizations to build power plants or transmission systems have been given to private undertakings based on duties of non-discrimination. Thirdly, through sector-regulation, EU lawmakers imposed unbundling obligations on owners of transmission and distribution systems, which are essential facilities. Since the 1<sup>st</sup> Energy Package, owners of transmission and distribution systems have faced restrictions of their property rights by EU law when there could be possible conflicts of interest between operating an essential facility and compete in upstream and downstream supply markets. The fourth strategy, which is connected to the third, refers to impose duties on TSOs to assure that system operators do not discriminate electricity undertakings accepting or refusing access to grids (or network systems).

This thesis claims that the first, third, and fourth strategies illustrate the private dimension of EU energy law. This finding justifies the title of this thesis. If one claims that the internal energy markets are the consequence of *integration through law*, this thesis aims to emphasize that this process has been done – to a great extent – through the (in)visible *private law* dimension of EU law; namely, *integration through private law*.

In the coming three chapters (case I and case II), this thesis advances its first case study. Instead of analyzing EU energy law only through textual interpretation of statutory acts, or only through doctrinal analyses of case-laws of the Court, this thesis combines these two methodologies by taking a close look at contracts. How do EU lawmakers and adjudicating authorities supplement primary rules of EU law and, in doing so, govern individuals' behavior in specific type of contracts? In the coming chapter, this thesis answers this question by looking at the one of the most important transactions in business-to-business relationships: capacity reservations contracts in transmission systems trading access to networks. To develop a concrete reference to advance the analysis, this thesis will then focus on Long-term Reservation Capacity Contracts.



**The (In)visible European Private Law and Sector-Regulation:**

**The ongoing saga of Regulating Transmission Contracts from Directive to Network Codes**

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## – CHAPTER 4 –

### **The (In)visible European Private Law and Sector-Regulation:**

#### **The ongoing saga of Regulating Transmission Contracts from Directive to Network Codes**

Transmission systems in electricity markets are the means for transporting of *the* good in this specific market: electricity. Like ships transporting seeds as goods in global commercial trade or airplanes transporting persons from one country to another, transmission systems transport electricity from generators to distributors systems, or from generators to final and large customers directly connected to transmission systems. However, when somebody wants to fly from one place to another, he or she could choose for a range of travel routes and, indeed, airlines companies with a single click at websites like Skyscanner or Expedia. In contrast, electricity undertakings have few alternatives to ensure that Megawatts purchased from the North Sea can be delivered precisely when needed to, say, the center of Graz, Austria. To allow electricity produced in the offshore wind power plants in the North Sea to reach customers in Graz, electric power travels thousands of kilometers from the generating site to an electrical substation. In so doing, the electricity passes through two or more transmission systems. Each transmission system could be owned and operated by different and independent private parties. Therefore, the performance of the supply contract of electricity between an electricity generator in the North Sea and an electricity retailer in Graz depends on several conditions. It depends on electricity undertakings having *access* to *capacity* in more than one transmission and distribution systems at the same time. It also

depends on coordination among operators of interconnected transmission systems to assure that electricity purchased in the North Sea, after being carried from the North Sea to the bottom of Germany, does not get *stuck* at the border between Germany and Austria because of a lack of capacity in one of the transmission lines. This is why agreements between transmission system operators and electricity undertakings are so important. The performance of the supply contract of electricity businesses-to-business depends on the formation and performance of the transmission service. This is one of the reasons that motivated the choice of studying the *transaction* between transmission system operators and electricity undertakings while those private parties are trading access to networks.<sup>2</sup>

In a private transaction, one party typically pay money in exchange for rights to a service or rights to possess a good. This is exactly what happens in the relationships between transmission system operator(s) and electricity undertakings (supplier and buyer). These relationships are contracts in which electricity undertakings pay in exchange for rights to access the grid and the transportation services. Transmission operators are like airline companies but, instead of transporting individuals, transmission contracts provide services for transporting electricity.

Since the beginning of liberalization processes in the 1980s, transmission contracts have become the cornerstone of electricity markets. Having contracts between transmission system operators and suppliers of electricity is a prerequisite for competitive markets. The more contracts between system operator and different suppliers are in place, the more competitive are upstream markets for generation and downstream markets for supply utilities. For this reason, even if a State divests its ownership shares in vertically-integrated firms, its involvement in the industry is still necessary in so far as it must regulate the private undertakings that own and/or operate transmission systems in order to preclude abuse of a dominant market position. Moreover, whereas on the one hand transmission operation conducted by States were once considered public regimes, on the other hand these contracts are no longer perceived as public regimes after liberalization, but rather private regimes. Nowadays, breaches of contract or default in performance by system operators create private remedies (i.e. compensation damages) enforceable in civil courts. To understand why and

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<sup>2</sup> Case II of this thesis discusses gas supply contracts in business-to-business relationships, rather than electricity supply contracts. It does so to ensure that this thesis covers both energy sectors; namely, the markets for electricity and gas. Despite being different sectors, the similarities of the EU legal framework regarding access to networks for natural gas and electricity allows this thesis to claim that most of the findings in this chapter can be applied to gas markets by analogy.

how these contracts shift from public regimes to private regimes, there is a need to first explain the patchwork of property and contractual rights interrelated between transmission system *owners*, transmission system *operators*, and transmission system *users* (e.g. electricity undertakings A and B), which could vary from one legal system to another.

Having access to capacity in transmission systems is the cornerstone of electricity *markets*. If an electricity undertaking (electricity undertaking A) holds the rights to reserve 100 per cent of the capacity of the transmission system connecting Munich and the borders of Austria, another electricity undertaking (electricity undertaking B), willing to purchase electricity from the wind power plants in the North Sea and send it to the center of Graz, would be precluded from using the transmission line because A has booked 100% of the transmission capacity. As such, the rights of electricity undertaking A to hold 100% of the capacity between Munich and the borders would preclude competition. Electricity undertaking B is thus unable to reach consumers in Graz.

To assure that electricity undertaking B does have access to *capacity* in transmission systems and, in doing so, have the ability compete with electricity undertaking A, legal systems worldwide have implemented different regulatory frameworks dealing with *three* private legal rights necessarily related to transmission system operations: (i) property rights of firms owning transmission system lines; (ii) contractual rights of transmission system users (e.g. electricity undertakings A and B) to access and use capacity in those transmission system lines, and; (iii) contractual rights hold by transmission system operators when owners of transmission system, instead of operating directly, entrust the activity to a third party, known as a transmission system operator (TSO).<sup>3</sup> Firstly, in any electricity grid (or network), there are firms holding property rights (or ownership) of transmission system lines. Owners in transmission systems are likely to be firms that have invested in the construction of infrastructure (i.e. building transmission lines). These firms expect to profit from the infrastructure investment. Revenues can come from using transmission *capacity* for their own upstream or downstream operations (e.g. vertical operations). Investments can also yield

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<sup>3</sup> When this thesis refers to transmission system operators as TSOs, it is pointing to operators that could either hold ownership of transmission systems or hold contractual rights to operate them. However, the definition of TSOs refers only to transmission system operators that do not (indeed, even cannot) compete with electricity undertakings A and B in the supply of electricity in downstream markets, nor compete with electricity generators such as wind power in North Sea. The definition of TSOs can be found in the EU Energy Law. This thesis more fully explains the definition of TSO in the subsection below (3.1).

returns if transmission capacity is negotiated with third parties willing to ship electricity, like electricity undertaking B's interest in sending electricity from the North Sea to the center of Graz. When transmission capacity is negotiated with third parties, which do not hold shares or property rights of transmission systems, the object of those transactions are to establish the *right to transmission capacity*. Rights to transmission capacity are then a second type of legal and private rights, which are based on contractual relationships. The right exists because two parties agreed to recognize them through manifestation of consent. Therefore, these are contractual rights held by electricity undertakings (promisees) to access transmission capacity offered by transmission operators (promisors). The latter, the promisor, is any firm operating transmission systems. Operators of transmission systems could be either owners of a transmission system or a third party, entrusted by the owner of the transmission system to transact in relation to it. The contractual relationship between transmission system *owners* and transmission system *operators* are then the third private relationship related to the economic activity of transporting electricity from power generator to final customers.

If one takes a step back and tries to understand the “transportation” of electricity from generators to final customers by having in mind the clear distinction of these three private rights and private relationships (property rights of transmission system *owners*, contractual rights between transmission system owners and transmission systems *operators*, and contractual rights between transmission system operators and transmission system *users*), she or he will understand how the regulatory framework of any legal system has interfered into the private relations of these market actors since liberalization. This is true because any legal system, either national or supranational, in a more or less intrusive way, regulates these *three* types of private rights and private relationships. It does so because in electricity industries, as any other network industry, regulators with conferring-powers intervene to avoid exploitative behavior of those who hold ownership of transmission systems, as well of those who operate these lines. This is the reason why networks are also called *essential facilities*. They are the elementary conditions for new competitors to access markets and therefore create competition on both sides of the electricity of supply chain: electricity generation on the upstream side, and the supply of electricity downstream.

Electricity undertakings, either generators in the upstream or suppliers in the downstream side, seeking access to capacity in a transmission system are parties in *Capacity Reservation Contracts*. These are agreements between electricity undertakings (e.g. generators or suppliers) and transmission operators, who could be either owners of

transmission systems or operators holding rights to transmission capacity. Depending on the national (or regional) legal system and regulatory framework, the legal arrangement between *owners* of transmission systems, *operators* of transmission systems, and users of transmissions could vary significantly in different regulatory models. Borrowing the expression used by Miguel Vázquez, Michelle Hallack, and Jean-Michel Glachant, it looks like network regulation “à la carte”.<sup>4</sup>

In Europe, the regulatory framework has largely changed over the last three decades and the EU has played a key role in pursuing these changes. Before the European Integration Project impacted the electricity industry, the electricity sector operated through state-owned firms and vertically-integrated production. Member States granted exclusive rights to those state- (or semi-state) owned firms, which back then operated as arms of government. Therefore, generation, transmission, distribution, and supply to final customers relied on a single firm, operating through public contracts and public regimes. After liberalization, which happened *hand-in-hand* with the positive Integration Project, the electricity sector has passed through a process of *privatization* in two different dimensions of the word *privatization*. First, States have divested from state-owned firms, thereby privatizing ownership of these companies. Second, both properties held by those firms and transactions negotiated by them are longer (and should not be) perceived as transactions under public regimes. Here we are speaking of privatization in its second sense; namely, of the property belonging to and the contracts concluded by these companies. In the newly privatized system, failure in performance is a breach of contract that could be subject to private enforcement in civil law courts.

In between liberalization and the Integration project, the EU legal system has played a crucial role in regulating those property rights and private transactions. EU legislators have put their visible hand on those private rights in an attempt to ensure that Member States, by regulating their domestic markets, can not preclude cross-border transactions of electricity.

Since the approval of the 1<sup>st</sup> Package, the European regulatory framework created obligations on transmission system *owners* and transmission *operators*. EU secondary legislation has governed their private relationships to avoid abuse of dominant positions by private parties operating natural monopolies. It governs individuals’ behavior to make sure

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<sup>4</sup> Vázquez Miguel, Michelle Hallack, and Jean-Michel Glachant. “Gas Network and Market: À La Carte?” *Robert Schuman Centre for Advanced Studies*, no. RSCAS 2013/73 (n.d.).

private actors do not preclude competition or cross-border trading. By so doing, EU lawmakers have not only imposed obligations on Member States but also on private parties. This is where the more robust private dimension of EU energy law can be found. These are the set of rules that this chapter will explore to answer the following questions: how has EU sector-regulation governed contracts between transmission system *operators* and transmission system *users* throughout the last three decades of positive market integration? Has the regulatory framework change over these years? If so, how has it changed in term of substantive law, as well as governance system of power-conferring rules?

To answer these questions, the coming sections focus on one particular type of transaction between TSOs and transmission system *users*.<sup>5</sup> Rather than looking at all varieties of transactions between system operators and users, which could be either long-term or spot relationships, trading in coupling market or not (i.e. bilaterally negotiated), this thesis gives a closer look at *Long-term Capacity Reservation Contracts* (LCRs). There are reasons that justify this choice. In the context of network industries, LCRs have long been a challenge for the completion of the internal market project. Moreover, LCRs have always provoked tensions between national systems of private law and European private law. If one looks to long-term contracts from the perspective of national civil codes, these are bilateral transactions where two parties exercises their freedom of contract by reserving transmission capacity. On the other hand, these are agreements in which the performance of the will of parties could preclude competition and potentially harm consumers. This brings us back to the example of the electricity undertaking A, who reserved 100 per cent of the transmission system capacity between Munich and the borders of Austria. Given the EU is the normative system of rules which has pushed competition and market integration in electricity markets, it has also been the legal system challenging the legality of those long-term agreements since the beginning of the Integration Project.

To explain how the EU has advanced towards the regulation of LCRs, this chapter will be divided in four sections. The first section (1) will explain why the regulation of transmission services in electricity sheds lights on the visible private law dimension of EU energy law. The second section (2) describes the reason why EU Law was not applicable to electricity power until the 1980s. It then shows how granting exclusive rights to single vertically-integrated firms protected the production model where transactions between system

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<sup>5</sup> See footnote 3.

operators and system users did not exist. The third section (3) explains positive integration and the emergence of European private law. It does so in two subsections. The first subsection shows how secondary legislation has regulated the property rights of transmission system owners and established TSOs as market actors. In doing so, EU law imposed the duty on all transmission system users, including system owners, to establish contractual relationships to access and reserve capacity in transmission systems (3.1.). The second subsection (3.2.) focuses on the proper contractual relationship between TSOs and transmission system users. This thesis thus shows how, package-by-package, EU energy law has created, revoked, and recreated a system of rules imposing duties on TSOs to create competitive and intergraded markets. Since the 1<sup>st</sup> Directive, EU secondary legislation has changed over packages and has moved, package-by-package, from duty-imposing rules of non-discrimination addressed to TSOs in the 1<sup>st</sup> Directive to a meticulous system of rules determining all contractual clauses of LCRs through a quasi-standard form contract in Regulations (ironically) called *Network Codes*.<sup>6</sup> This thesis explains the change from Directives to Regulations and Network Codes by explaining both changes in governance and substantive law. It explains how changes in conferred powers to make and adjudicate shifted from national legislators to NRAs, and later from NRAs to drafters of Network Codes. The fourth section (4) concludes pointing out how the set of rules regulating transmission systems illustrates the growth of self-standing European private law with regard to LCRs.

## 1. Why Long-term Capacity Reservation?

Why does this thesis choose to speak about contracts reserving capacity in transmission systems as the first case to shed lights on the private dimension of EU energy law? This thesis chooses to discuss the relationship between TSO and transmission system *users* because this specific contract has always been allocated by legal scholarship to a blurred area between public and private regimes. Even after three decades of the liberalization of energy sector throughout Europe, there are *still* legal scholars describing capacity reservations contracts as

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<sup>6</sup> The irony is related to the word “code”. While Civil Codes derived from the process of systematization of civil rights (and duties) between the 18<sup>th</sup> and 20<sup>th</sup> centuries, Network codes adopted the name “code” to refer to the systematization of duties (and rights) now at the supranational level and imposed to particular market actors in a distinct electricity market.

public contracts. This confirms the assertion of Kaarlo Tuori about the issue of discerning EU law as hybrid legal system, which could lead to conceptual confusion <sup>7</sup> about how supranational normative systems interact with national legal systems.

In fact, since liberalization, relationships between TSOs and transmission system users have shifted from public to private regimes in most of (if not all) Member States. Since European positive integration, EU secondary legislation has *never* referred to relationships between TSOs and system users as public contracts or public regimes. On the contrary, the EU legislator has always advanced regulatory frameworks boosting the independence of TSOs from political interference by national parliaments and executive bodies, as well as from electricity undertakings operating in competitive markets. EU sector-regulation has indeed regulated national public acts establishing mechanisms of control for monitoring the TSOs: the certification process of TSOs. However, this thesis is not referring to the legal relationship of administrative law's nature, where Member States authorize or monitor TSOs. The focus of this investigation is rather on the contractual relationship between TSOs and other market actors (e.g. electricity generators and suppliers). Even if one claims that contracts between TSOs and system users have to be considered Public Service Obligations (PSO), such a proposition does not mean transmission services are governed through *public* regimes. As concluded by Rozeta Karota in her PhD on the concept of PSO in energy, the concept of PSO was confused between the 1<sup>st</sup> and the 2<sup>nd</sup> Directive, which was later clarified by the Commission. <sup>8</sup> Since the 2<sup>nd</sup> Directive, the EU legislator refers to PSOs (and later as well SGEI) as a relationship between suppliers of utility services, which could be operated by public or private undertakings. PSOs are then economic activities for which market actors must be governed by law to accomplish EU policies like security of supply, sustainability,

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<sup>7</sup> Tuori (2012).

<sup>8</sup> “The European Commission included this expression in a number of policy documents, but it did not clarify its meaning. In its 2001 communication, and the Report to the Leaken Council, the European Commission Relied on the terms “Public Service” and “Universal service”, but it did not provide a definition of PSO. The first definition of PSO by the European Commission was provided in the 2003 Green Paper and later in the 2004 White Paper. (...) However, in the interpretative note provided by the Commission in 2004 after the adaption of the second Electricity Directive, the Commission stated that PSOs are ‘[o]bligations which the undertaking... if they were considering its own commercial interests, would not assume to the same conditions’. In addition, the European Commission pointed out that when the Member States imposes a PSO the following conditions should be satisfied: firstly, the obligations imposed should be related to the supply of the SGEI in question; secondly, the measure should contribute directly to satisfying this general economic interest; and thirdly, the measure should be imposed in such a way it did not affect the intra community trade.” Karova, Rozeta. “Understanding the Public Service Obligation in the Electricity Sector: Lesson for the Contracting Parties of the Energy Community Treaty.” *European Energy Journal* 2, no. 1 (January 2012), p. 54-55. See also Karova, Rozeta. *Liberalization of Electricity Markets and the Public Service Obligation in the Energy Community*. Alphen aan den Rijn: Kluwer Law International, 2012.

energy efficiency, or climate change. Given what this thesis has discussed in the chapter 2, duty-imposing rules on contractual relationships does not turn transactions into public regimes, nor public contracts. Even though the EU secondary legislation imposed duties of non-discrimination on TSOs since the 1<sup>st</sup> Directive, which were later transcribed in EU Regulation from the 2<sup>nd</sup> package on, this obligation does not compromise the private nature of legal relationships. Non-discrimination duty is to the EU legal system what *duty of act in good faith* is to a national system of private law. As such, reservation capacity contracts are interesting for this thesis precisely because of the conceptual confusion that arises when these contracts are determined to be public contracts. This misunderstanding leads to *two* consequences: one related to law in book, the other to law in practice. While the description of these transmission services as public contracts leaves European private lawyers far from discussing the normative system of European private law in regulated markets, in particular network industries, it also hampered the legal consciousness about how private enforcement of EU law through private remedies could improve the overall effectiveness of the legal systems, in particular when duties are enacted in Regulations. The conception confusion in describing transmission services as public regimes or public contracts can be better understand if one looks at the power industry before the liberalization beginning in the late 1970s.

Over more than half-century, the power sector was primarily organized within States. Undertakings were vertically integrated monopolies, in majority also state-owned, operating within the geographic limits of the national boundaries and, therefore, *national* laws. States were in control of the governance structure of the entire energy supply chain. The primary components of electricity supply – generation, transmission, distribution, and supply – were integrated within individual electric utilities charging *national* public regulated prices.<sup>9</sup> Economists upheld that markets played a minor role in electricity sectors, or even no role at all. In parallel, neither public nor private international lawyers performed functions in designing the legal framework since there was no cross-border trade of electricity. *National* laws were the sole means regulating electricity utilities.

This governance model of vertical integrated monopoly lasted for decades; the dissemination of the economic values of a free market launched a new political economic

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<sup>9</sup> Friedman (1964), p. 373

movement. The diffusion of the New Institutional Economics,<sup>10</sup> together with the growing ideological and political disaffection with the performance of state enterprises, underpinned a wave of reforms that introduced market values into public service obligations. Given the conditions for the critical juncture,<sup>11</sup> the first initiatives to liberalize the power industry begun in the UK<sup>12</sup> and the US<sup>13</sup> during the 1980s as an attempt to introduce a comprehensive sector reform program through privatization of state ownership and the opening to potentially competitive activities.

While pioneering nation-states were the first to pursue the electricity liberalization, national legal systems continued being the means to achieve the ends of liberalization. Still within the limit of national boundaries, economists and political scientists engaged in twofold debates. The first was led by the pioneering work of Joskow and Schmalensee in 1983.<sup>14</sup> Whilst the Chicago school of economics advocated that the liberalization of market must occur through total deregulation,<sup>15</sup> institutional economists at MIT highlighted the risks of vanishing public regulation in network industries, anticipating the market failures that were years later confirmed by the California electricity crises and the collapse of Enron.<sup>16</sup> If public regulation is needed to shift regimes toward market-based competition,<sup>17</sup> then the second and

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<sup>10</sup> The breaking through works of the three godfathers of the revolution in economics: Williamson, *Markets and Hierarchies*, 1975; North, *Institutions, Institutional Change and Economic Performance*, 1990; Coase, *The Firm, the Market and the Law*, Chicago University Press, 1998; and. See also P. Joskow, *Introduction to New Institutional Economics*, in: Eric Brousseau and Jean-Michel Glachant, *New Institutional Economics*, Cambridge University Press, 2008.

<sup>11</sup> Having in mind the interdisciplinary approach of this book, we are using the term critical junctures or conjunctures by taking into consideration convergence and divergences of the semantics used by economists and political scientists. See Douglas C. North, *Understanding the Process of Institutional Changes*, Princeton University Press, 2005, and Paul Pierson and Theda Skocpol, *Historical Institutionalism in the Contemporary Political Science*, In I. Katznelson and HV Milner, *Political Science: State of the Discipline*. New York: W.W. Norton, 2002.

<sup>12</sup> Energy Act 1983.

<sup>13</sup> Public Utility Regulatory Policy 1979 followed then by Energy Policy Act 1992

<sup>14</sup> P. Joskow & R Schmalensee, *Markets for Power: An Analysis of Electricity Utility Deregulation*, MIT Press, 1983.

<sup>15</sup> George Stigler, *The Theory of Economic Regulation*, Bell Journal of Economics and Management Science, 2:1, 1971.

<sup>16</sup> Although the Enron had been a giant gas undertaking, in US, the lesson learnt about the risk of the total deregulation of networks were extended to whole network industries including electricity. Bethany McLean and Peter Elkind, *The Smartest Guys in the room: the amazing rise and scandalous fall of Enron*, New York: Portfolio, 2006.

<sup>17</sup> Following the works of P. Joskow & R Schmalensee, M. Armstrong, S. Cowan, J. Vickers, *Regulatory Reform: Economic Analyses and British Experience*. London: MIT Press, 1994; M.A. Crew and P.R. Kleindorfer, *The economics of Public Utility*. London: MacMillan, 1986.

tangential debate kicked off the question on how to regulate power utilities to boost a well-functioning competitive market.

Within the frame of federal systems of governments like the US, Germany or Brazil, whatever policy goals demands *ex ante* regulation, national rule-makers face the challenge of how to better allocate regulatory capacities by finding the right degree of *centralization versus decentralization*; the delegation of authority from central to local governments, *vis-à-vis* the delegation from parliaments to regulatory agencies.<sup>18</sup> Into the box of federal systems, Constitutions provide the foundations for full harmonization of laws over national territories, agencies to set and monitor compliance, and courts to coherently adjudicate disputes. Large discretionary power is conferred to politics to decide how to better allocate regulatory capacity within sovereign territory. Furthermore, in times when economic impact analyses justify political decisions of governments, the distribution of competence has mainly been settled as a matter of economic reasoning in solving *the principal-agent* dilemma in terms of externalities and transaction cost. Law plays a minor role in decision-making about how to allocate regulatory capacity within sovereignty, in contrast to economics and politics.<sup>19</sup>

When the liberalization of electricity markets is solely a *national* policy, rule-makers rely on *national* legal systems. However, when the policies of liberalization rise to the *transnational* level, the task of allocating regulatory capacity gains a second layer of normative order, and often a second layer of legal systems, that lack the kind of normative system that would replicate federalism. Differently from the situation at the ground level of nations, at the higher ground level of transnational legal systems, the ‘air is rare’.<sup>20</sup> Here we enter the realm of the EU and EU law.

To enter the realm of EU law, this thesis analyzes the integration project by first explaining the negative integration strategy through answering the two following questions. Why did the rules of the Treaty not force Member States to open electricity markets before the 1990s, and why was competition law in the Treaty not imposed on electricity undertakings? Moreover, it will briefly introduce why the sole enforcement of the Treaty

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<sup>18</sup> M. Taggart, *From Parliamentary Power to Privatization: The Chequered History of Delegated Legislation in the Twenty Century*, University of Toronto Law Journal, vol. 55, pp. 575-627.

<sup>19</sup> M Dorf and C Sabel, *A Constitution of Democratic Experimentalism*, Columbia Law Review 267, 1998.

<sup>20</sup> Tim Büthe and Walter Mattly, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press, 2011.

upon the private law of Member States wouldn't have been enough to create a competitive and internal market in a network industry such as electricity.

## 2. Negative Integration through Private Law: the Need for Sector-Regulation

Already in 1957, the purposes of creating common and competitive markets could have long been read *in* and *between* the lines of the founding Treaties of the European Community.<sup>21</sup> The European Commission of Steel and Coal (ECSC) earlier contained specific regimes relating to anti-competitive agreements, abuse of dominant position and also merger controls.<sup>22</sup> The original Treaty of Rome enlarged these commitments beyond the steel and coal commodities towards all goods and services already in 1957. Notwithstanding the provisions of the Treaty, market integration had little impact on sectors perceived as public utilities until the late 1980s.

In contrast to today's EU legal doctrine on the indistinct application of the Treaty's rules in energy markets, before the 1980s the CJEU's precedents indeed provided reasons for action to Member States to create or keep monopolies and exclusive rights to the provision of services of general economic interest (SGEI) (e.g. electricity, gas, postal service, telecommunication, and broadcasting). This was thanks to the CJEU's interpretation of Articles 37(1) and 90 of the ECC Treaty in the early 1960s. At this time, Member States depended on foreign natural gas, and so in the natural gas sector exclusive rights were usually applied from importation of natural gas into territorial jurisdiction of Member States until the distribution to final customers in the internal market. In the electricity industry, by contrast, exclusive rights restricted the entire electricity supply chain into domestic markets and national policies. Therefore, the electricity industries were enclosed into domestic markets, more than natural gas. If national industries were vertically integrated covering operation of generation, transmission, distribution and supply, transmission contracts did not exist as electricity supply chains were *within-firms* and *without contracts*.

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<sup>21</sup> Anca D Chirita, *A Legal Historical Review of the EU Competition Rules*, International & Comparative Law Quarterly, 63 ICLQ 2 (2014), p. 284-286.

<sup>22</sup> ECSC Treaty (Treaty of Paris), Paris, 18 April 1951, Art.4.

Although the ECC Treaty provisions regarding exclusive rights and monopolies remained unchanged in the EC Treaty, several disputes were referred to the Court *via* both preliminary references and infringement procedures between 1988 and 1994. In this period, States (including some Member States) were engaging in market reforms of SGEIs worldwide. States' initiatives in privatizing public entities operating exclusive rights and opening these markets for competition by States challenged the prior "non-commercial character" or "public interest of non-economic nature" of these sectors. Moreover, this period coincided with the Commission's initiative of building single and well-functioning markets through regulation: positive integration, as pioneered in the Single European Act.

Between 1988 and 1995, the CJEU's judgments not only reviewed EU legal doctrine with respect to the conformity of exclusive rights to what concerns PSO' operations, but also set the precedent that *indirectly* rolled back exclusive rights to build transmission systems. The Court *started* to reassess its own interpretation of the Treaty in the late 1980s. It did so firstly by deciding several cases in preliminary reference and infringement procedures concerning exclusive rights to operate PSOs and their limitation between 1988 and 1991. There were cases questioning exclusive rights granted to telecoms in France<sup>23</sup> and Belgium,<sup>24</sup> broadcasting in Greece,<sup>25</sup> port operators in Italy,<sup>26</sup> and postal services in Belgium.<sup>27</sup> Among those *cases*, two were particularly remarkable for this thesis because they expanded parties' autonomy in upstream supply of electricity. The *Almelo case*<sup>28</sup> referred to the Court questioned the conformity of agreements restricting the importation of electricity. At that time, the Court was not questioned about exclusive rights for building and operating transmission systems, but it was so with regard to exclusive rights on the importation of electricity by municipal suppliers.

The *Almelo case* is particularly interesting for transmission service because it sheds light on the limitations of the application of the Treaty to solve the lack of cross-border trade of electricity between Member States. Even after the CJEU imposed on Member States the duty of removing legal barriers for trade, like in the *Almelo case*, municipal suppliers would

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<sup>23</sup> C-202/88, Commission v. France

<sup>24</sup> C-18/88. RTT

<sup>25</sup> C-270/89, ERT

<sup>26</sup> C-179/90, Genova

<sup>27</sup> C-320/91, Corbeau

<sup>28</sup> C-393/91, Almelo case, 27 April 1994.

still have to face the challenge of “transporting” electricity from neighboring Member States to cities in the Netherlands. If transmission system operators refused to transmit the electricity purchased by municipal suppliers to generator in different Member States, the effectiveness of the CJEU’s judgment would depend on another legal battle against the transmission system operator. Back in time, if the system operators were already private undertakings, then the enforcement of the four freedoms provision upon individuals was impossible.

By looking at the few years in which the negative integration impacted upon electricity market, one could conclude that the cross-border trade of electricity and creation of competition would have had different path without positive integration. If positive integration had not advanced a set of rules applied directly to market actors as to what concerns property rights of transmission systems, the construction of the internal market would have walked with a slower cadency. The process, as we shall see in more details in the next section, continued with the enactment of EU secondary law.

### **3. Positive Integrations through Private Law: EU Property and Contract Law**

While pioneering States were drafting their national reforms towards a more market-based model of domestic public services, the European Community launched the Single European Act in 1986. Led by the Commission’s charismatic president, Jacques Delors, Member States agreed to a major revision of the Treaty of Rome. The original Treaty, which had set the foundations of the negative integration, was reviewed. Political restraints were relaxed, which opened the possibility for the massive approval of EU secondary legislations: the integration through positive integration.<sup>29</sup> Thereafter, sector-regulation Directives started to be drafted for the electricity markets. Back then, integration through law in electricity markets meant that 12 vertically integrated and not-interconnected national electricity markets,<sup>30</sup> which would eventually turn into 28, would have to merge into a single and

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<sup>29</sup> See Kaarlo Tuori, *European Constitutionalism*, Cambridge University Press, 2015, p. 53-58.

<sup>30</sup> It is worth of attention the work of Terence Daintith and Leigh Hancher in 1980s as part of series of works within the framework of research at the European University Institute, whose introduction is remarkable for beginning with a strong statement. “Not many people, we would guess, could be found to say that the energy sector offered a good example of positive and effective European integration. The general consensus, in which senior community officials participate no less than outside observers, is that the Community performance in this

competitive market. Yet, the Treaty was not so clear about the variety of institutional arrangements available to accomplish this goal. Unlike central governments in federal systems, which pursue national policies by holding large competence to either centralize or decentralize regulatory capacity, EU lawmakers wear tight suits.<sup>31</sup>

Neither EU fits into a federation model of political organization, nor does the EU Treaty replicate equally the status of national constitutional law. Looking first at regulatory decision-making, the principles of subsidiarity underlies the thresholds of regulatory capacities held by the EU in areas not of its exclusive competence, such as the electricity market. Taking solely the text in the Treaty, subsidiarity determines that the EU can act only and in so far EU policies cannot be sufficiently achieved by Member States.<sup>32</sup> This means that the degree of specification of EU binding norms established as part of EU secondary law is strictly related to the interpretation of the subsidiarity principle.

In 1986, the European Single Market was built with the ambitious plan of merging 12 (later 28) vertically-integrated and geographically-segregated national electricity markets,<sup>33</sup> into an integrated and competitive market. European networks were not originally designed with cross-border trade in mind.

Cross-border trade required primarily investment in building sufficient interconnection capacity. Once two or more grids are connected, the management of the electricity flow from one to another, if not coordinated, has a high potential of destabilizing network operations. In spite of the regulatory challenges of building a cross-border market almost from scratch, the Delors Commission – with immeasurable optimism – speculated the internal market for electricity would be implemented in 1992.<sup>34</sup> But what was supposed to be a six year project turned out to be only the first chapter of a long and still on-going journey of 30 years.

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field has been inadequate”. Terence Daintith and Leigh Hancher, *Energy Strategy in Europe: The Legal Framework*, 1986, p. 1.

<sup>31</sup> Neil MacCormick, *Democracy, Subsidiarity, and Citizenship in the European Commonwealth, Law and Philosophy*, 16(4) (1997): 331.

<sup>32</sup> Article 5(3) TFEU

<sup>33</sup> Leigh Hancher, *op. cit.*

<sup>34</sup> Commission White Paper

There are two reasons why the construction of a competitive and integrated European electricity markets <sup>35</sup> required a positive integration strategy, each will be explained in the following subsections. First, the EU project aimed to open up national monopolies operated by giant energy incumbents that, irrespective of public or private ownership, held great power to resist and protect their markets from new entrants. Second, lawyers and institutional economists have faced the challenges of overcoming resistance by regulating electricity markets in a scarce transnational legal framework. At the same time as EU primary law clearly set its policy goals of building an integrated and competitive market, which later expand to other, and sometimes contradictory policies (such as climate change), there was not as much clarity about the variety of institutional arrangements available to accomplish these goals. <sup>36</sup>

Since the 1<sup>st</sup> Package and 1<sup>st</sup> Directive, EU lawmakers had already pursued the independence of system operators, non-discriminatory access to networks, and of course *de facto* creation of a common market. But taking into account the principle of subsidiarity and proportionality, Member States remained competent to regulate the operation of TSOs that directly and indirectly affected the use of interconnectors. <sup>37</sup> The semantic rigidity of the provision of EU energy law was considerably low in the 1<sup>st</sup> Package with regard to cross-border operations. Member States held broad discretion to regulate balance mechanisms and tariff structures, which are functions that hamper trade across territorial borders. Therefore, to facilitate the completion of the internal market, there was a need for collaboration between States and also TSOs to implement practices enhancing cross-border performance.

New modes of rule-making became crucial to boost the coordination of cross-border operations. National public authorities begun to dialogue with neighboring states to share information and define best practices jointly. Moreover, private undertakings in charge of transmission systems also started to play a more central role by developing the second layer of cross-border collaboration. Public regulation issued by national authorities has since then co-existed with the plurality of self-regulations and later hybrid regulation at transnational level that, though scarcely employed before, became prominent after the approval of the 1<sup>st</sup>

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<sup>35</sup> Jean-Michel Glachant, *The Three Ages of Europe's Single Electricity Market*, in *Tough Decisions and a Daunting Agenda*. Friends of Europe Discussion Paper, 2013.

<sup>36</sup> Nicolas Aroney, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, *Law and Philosophy* (2007) 26: 161-228.

<sup>37</sup> Directive 1996/92/EC, Article 8(2).

Energy Package. To understand the production and emergence of these transnational public and self-regulatory regimes, which have uncontestedly shaped the European energy market, and how they have interacted from the middle 1990s onwards, we shall first look at how private and public rule-makers have been involved into the production of norms, as well the characteristics of the norms emerging from these interactions along the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> energy packages.

### *3.1. Regulating Property to Create Contracts: The Unbundling of Transmission Systems – Through EU Private Law*

The Commission attached a long general explanatory memorandum accounting for the sector-related policies to the first proposal for the 1<sup>st</sup> Electricity Directive. Although the Commission put forward the 1<sup>st</sup> Electricity Directive in 1992, the European Parliament and Council approved it far later, in 1996, with some changes to the original text. Nevertheless, the three policy goals remained unchanged in general terms: a non-discriminatory license system,<sup>38</sup> non-discriminatory access to networks,<sup>39</sup> and management unbundling.<sup>40</sup> This subsection is about unbundling, which started as duty-imposing rules regulating management of transmission system operators in the 1<sup>st</sup> Directive, which since then has passed through changes package-by-package. Unbundling in the 2<sup>nd</sup> package evolved to legal unbundling, which in the 3<sup>rd</sup> package became quasi-ownership unbundling.

Speaking about unbundling matters for understanding reservation capacity contracts. Reservation capacity contracts are agreements that are *partially* a consequence of legal unbundling obligations. If the electricity industry was mostly vertically-integrated firms before positive integration, vertically-integrated firms operated through within-firm activities. There were no *transactions* (i.e. contracts) between upstream electricity generation and downstream electricity supply. The 1<sup>st</sup> Electricity Directive made a significant contribution to the creation of the electricity market by reassuring the incompatibility of legal monopolies and exclusive rights. However, legal scholars and economists usually agreed with the assertion that the 1<sup>st</sup> package was not effective in reshaping market *status quo ante* towards

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<sup>38</sup> Directive 96/92/EC, Article6(2).

<sup>39</sup> Directive 96/92/EC, Article7(5).

<sup>40</sup> Directive 96/92/EC, Article7(6).

the internal market. Article 7(6) of the Directive 96/92/EC was one of the reasons that justified the scepticism of legal scholars and economists. Instead of forcing the de-verticalization, the measure established management unbundling obligations. Under management unbundling obligations, vertically-integrated firms continued operating transmission systems. Mandatory management rules could mitigate conflicts of interests, but certainly not eliminate them. Above the management unbundling, scholars also claim that the 1<sup>st</sup> package was ineffective for having been rendered obsolete by events, given that negotiations took so long to complete.<sup>41</sup> Peter Cameron reinforced that most of the obligations established by the Directive had already been implemented by Member States. Yet even if reforms had already been anticipated by national legal systems *de facto*, this should not obscure the advances of having elevated the regulatory framework to the EU level. Already 1996 the EU legislator enacted directives transposing duty-imposing rules of the Treaty to Directives – a non-discriminatory license system and non-discriminatory access to networks, and management unbundling – by addressing obligations to electricity undertakings regardless of its public or private nature. Seen from the perspective of the EU legal system, this produced very little headway *per se* but was later expanded with EU Regulations over the 2<sup>nd</sup> and 3<sup>rd</sup> packages.

After nearly two years, the Council called on the Commission to speed up liberalization to fully achieve the internal market. In answering this solicitation, the European Parliament first approved the 2<sup>nd</sup> Electricity Directive concerning common rules for the internal market in June 2003.<sup>42</sup> The 2<sup>nd</sup> Electricity Directive then approved the legal unbundling. Though legal unbundling was far from the ideal governance model, as long as dominant firms could still capture the TSOs, legal unbundling was relevant for other reasons. It forced legal de-verticalization. Thereafter, all transmission system users, including previously vertically-integrated firms, had to be parties in transmission agreements with TSOs.

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<sup>41</sup> For Peter Cameron, the first energy packages were ineffective for having been rendered obsolete by events. Considering the negotiation took long seven years from its proposal to approval, the provisions of the Directive were out of date in order to follow the changes in European integration led by the Treaty of Maastricht and later by the Treaty of Amsterdam. Peter D. Cameron, *Competition in Energy Market: Law and Regulation in European Union* (2007). New York City: Oxford University Press, p. 40.

<sup>42</sup> P., Bernard, M. Navarette Moreno, and Vanhay A. “An Overview of the Evolution of the European Unbundling Process in Electricity Sector.” *European Energy Journal* 3, no. 4 (October 2013): 24–45.

### 3.1.1. Management Unbundling

Since the early years of liberalization, there has been a widely-accepted proposition that a non-discriminatory access to networks depends on having independent TSOs and DSOs operating under a regulatory governance system whereby the network access decision could not be interfered with by those operating in competitive markets. These are economic assumptions long accepted for network industries, which motivated the reaction against the total deregulation in the electricity sector.<sup>43</sup> If undertakings vertically operating could participate in the management of networks, which are natural monopolies, they would tend to restrict access to pipelines for new competitors and, therefore, foreclose the upstream and downstream sides of electricity markets for their own interests.<sup>44</sup> Since the 1<sup>st</sup> Package, the EU has approved regulatory provisions with the aim of avoiding anticompetitive behaviour regulating market actors. The 1<sup>st</sup> Directive, the EU established the *management unbundling* of vertically-integrated firms, which required them to separate the decisional processes about transmission and distribution operations from any other ordinary economic activity. This rule affected the corporate governance of vertically-integrated firms. This limitation of the freedom to manage the company is clearly an intrusion in property (and/or contract) law – at least if one accepts the insight that the modern corporation is characterized by a separation between ownership and control, with the latter (ideally) designed to minimize agency problems.<sup>45</sup> By separating the decision power within the same legal entity, the EU lawmaker expected to solve the issue of conflicts of interest. The department carrying the operations of natural monopolies would not suffer interference from departments operating in competitive operations. As we might expect, the means was not appropriate to assure access to networks

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<sup>43</sup> See the contribution co-written by Paul Joskow and Jean Tirole, economists who represented the school of economist thinking against the implementations of the liberation values of Chicago School of Economics in the electricity markets for being network industries: Paul Joskow in US and Jena Tirole in Europe. Joskow, Paul, and Jean Tirole. “Reliability and Competitive Electricity Markets.” *RAND Journal of Economics* 38, no. 1 (n.d.): 60–84.

<sup>44</sup> COM/91/548 Final, SYN 384, 21 February 1992.

<sup>45</sup> Seminal, to this regard, A. Berle and G. Means, *The Modern Corporation and Private Property*, (New York; Chicago; Washington: Commerce Clearing House Publishing, 1932); M. Jensen and W. Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’, 3 *Journal of Financial Economics* 305-360 (1976).

on non-discriminatory basis.<sup>46</sup> As an alternative, the 2<sup>nd</sup> Electricity Directive went one step further and approved the *legal unbundling*.

### 3.1.2. Legal Unbundling

The 2<sup>nd</sup> Electricity Directive moved a step further when the EU approved *legal unbundling*.<sup>47</sup> Instead of keeping the operations of natural monopolies and the competitive operations within the same legal entity, vertically-integrated firms were forced to reallocate transmission and/or distribution operations to an independent legal entity. Thereafter, the role and legal character of TSOs was defined as independent and, most importantly, a separate legal entity with legal personality dissociated from vertical and often dominant firms. It did so by imposing the prohibition on TSOs of carrying any upstream (generation) or downstream (supply) economic activity in electricity markets and, at the same time, operating transmission systems. Within the enacted regulatory framework, an undertaking owning transmission systems, power plants, and electricity retailing operations had to either create a new legal entity to take over the operations of the grid, or divest activities in competitive markets. Thereon, the operation of the transmission system became incompatible with competitive activities based on the presumption of discriminatory behaviour. This thesis claims that legal unbundling in the 2<sup>nd</sup> Directive represents a regulation of property law. If management unbundling was already mandatory rules intruding into the corporate governance of firms, legal unbundling advanced a set of rules towards another sphere of private law: property rights. Since the 2<sup>nd</sup> Directive, EU law has regulated property rights held by owners of transmission systems. Regulating the use of property or private rights has a different meaning than what energy lawyer recognizes as *ownership unbundling*. Legal unbundling already regulates property rights when it restrains the freedom of a distinct qualified owner to operate transmission systems under their ownership. It restricts *rights in rem* of owners who, concomitantly, operate economic activities upstream or downstream within the electricity

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<sup>46</sup> Philip Lowe, Ingirda Pucinskaite, William Webster and Patrick Lindeberg, *Effective Unbundling of Energy Transmission Networks, lessons form the Energy Sector Inquiry* (2007), Competition Policy Newsletter, Summer 1, Spring 2007, p. 24.

<sup>47</sup> Directive 2003/54/EC, Articles 10(1).

supply chain. In doing so, legal unbundling is to the EU legal system what the *inalienability of property rights* is to national systems of private law.<sup>48</sup>

After describing how EU energy law evolved from unbundling management to legal unbundling, this thesis still needs to explain how the later affected LCRs, the subject of study in this case I. Legal unbundling forced the de-verticalization of integrated firms, which turned obligatory the existence of TSOs as stated in the Article 8 Directive 2003/54/EC. In doing so, the 2<sup>nd</sup> Directive turned the contracts between TSO and transmission system users into obligatory transactions. One hundred per cent of the capacity of transmission system had to be accessible through contracts, regardless of whether the transmission capacity user was owned the transmission or not. If LCRs are agreements between TSOs and transmission system operators, legal unbundling turned the latter agreements into the key transaction in electricity markets. Moreover, the 2<sup>nd</sup> Directive was more emphatic about the independence of TSOs.<sup>49</sup> It established a longer list of mandatory rules regarding corporate governance of TSOs.<sup>50</sup> It did so to ensure that neither shareholders or transmission system owners interfered in decisions of TSOs about whom (which users) to give access to the transmission system. Therefore both mandatory rules on legal unbundling and independence are a means to accomplish non-discriminatory access to transmission systems. These are regulatory frameworks created to make sure that transmission users would not be discriminated against while requesting access to the network. LCRs are one type of contract between TSO and system user and non-discriminatory duties are obligations imposed on its contractual parties.

Legal unbundling prohibited the legal personality of TSOs from carrying on activities upstream or downstream in electricity markets, but it did not prohibit that shareholders of TSOs would do so. Economists have always pointed out the inefficiency of legal unbundling, proposing then more intrusive regulatory frameworks at the EU level. Given the endorsement of the EU legislator, the 3<sup>rd</sup> package moved a step further establishing what the 3<sup>rd</sup> Directive calls *ownership unbundling*. This thesis calls the regulatory framework implemented by the 3<sup>rd</sup> Directive as quasi-ownership unbundling. It does so to reinforce that, in fact, the Commission's intentions to approve *de facto* ownership unbundling (also called total ownership unbundling) were further down along the priority list in negotiations in EU

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<sup>48</sup> See Rose-Ackerman, Susan. "Inalienability and The Theory of Property Rights," Faculty Scholarship Series, 1985.

<sup>49</sup> Directive 2003/54/EC, Articles 10(1).

<sup>50</sup> Directive 2003/54/EC, Articles 10(2)(a)(b)(c)(d).

Parliament and Council. By saying this, this thesis then explains how the private dimension of EU energy law went one step further in 2009.

### 3.1.3. *Quasi-Ownership Unbundling*

The 3<sup>rd</sup> Electricity package came out in 2009 and it put forward the most profound changes in the governance of the EU considering, on top of the measures in the 3<sup>rd</sup> Directive itself,<sup>51</sup> all the parallel Regulation encompassing the creation of the ACER and the Mandatory Network. Given the changes in EU governance have impacted more contractual relationships between transmission users and TSOs, these changes will be subject to investigation in the coming subsection. Yet, the 3<sup>rd</sup> Directive innovated when it imposed the obligations of the quasi-ownership unbundling model, a step further than the prior legal unbundling.

Among the changes that were introduced in the 3<sup>rd</sup> Electricity Directive, the ownership unbundling rules are particular interesting. Whereas the 1<sup>st</sup> and 2<sup>nd</sup> Directives established respectively *management unbundling* and *legal unbundling*, the 3<sup>rd</sup> Directive took another step further by enforcing *ownership unbundling*.<sup>52</sup> Recalling the 2<sup>nd</sup> Electricity Directive, legal unbundling required vertically-integrated firms to leave activities of transmission system operation to different legal entities, splitting the legal personality of firms operating in competitive markets from those operating in non-competitive markets. Within those terms, vertically-integrated firms were allowed to keep shares in firms operating natural monopolies insofar they did not interfere with their management. Decision about to who provide or refuse access should be based on non-discrimination duties.

To safeguard the independence of firms operating natural monopolies even more, the 3<sup>rd</sup> Electricity Directive excludes the option of TSOs and DSOs being subsidiaries of firms operating in competitive markets. Thereafter, vertically-integrated firms had to divest their shares from TSOs. No longer could firms supplying electricity be shareholders of TSOs. Nevertheless, though the divestment in operators, vertically-integrated firms could continue owning the tangible property of network grids insofar as the operations were assigned to a

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<sup>51</sup> Directive 2009/73/EC.

<sup>52</sup> Directive 2009/73/EC, Article 9.

third party through, for example, lease agreements. In doing so, EU legislator established two possible corporate governance models: Independent System Operators (ISO) or Independent Transmission Operator (ITO).<sup>53</sup> To ensure independence of TSOs, the 3<sup>rd</sup> Electricity Directive has established a system of certification relied on external trustee to assess and monitor the independence of TSOs.<sup>54</sup> Quasi-ownership unbundling is indeed a rule that regulates the corporate governance model of vertically-integrated firms by prohibiting the intangible *status* of shareholders in network operators. Yet the fact that vertically-integrated firms could still hold property rights of transmission systems is one of the most criticized aspects of the 3<sup>rd</sup> Package.<sup>55</sup>

The unbundling of transmission systems has been one of the sector-oriented policies implemented package-by-package. Thanks to the subsidiarity principles of the EU legal system, the legal strategy of enacting more intrusive regulatory strategies package-by-package has been a common path adopted by EU lawmakers. Despite the fact that unbundling ownership had always been considered an alternative among various modes of regulatory framework since the 1<sup>st</sup> Directive, back then there were political restraints along negotiations precluding the adoption of more intrusive mandatory rules into the private relationships of market actors. The strategy taken by the EU has then been the approval of more ‘soft’ regulation (e.g. management unbundling), politically agreed by Member States. Where this proves to be inefficient to accomplish EU sectorial-policies, the inefficient results are used as legal and political arguments by the Commission in subsequent proposals for a new regulatory framework represented by a new package. In doing so, both the electricity and gas sectors have passed through three packages since 1996 and 1998, respectively. Even

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<sup>53</sup> The third gas package reinforces the unbundling requirements requiring the use of three possible models: (i) the total ownership unbundling, (ii) the independent system operator (ISO), and the independent system operator (ITO). According to Angus Johnston and Guy Block: “from the preparatory works of the third gas package directive, it is clear that the preferred option of the Commission was, and remains, the ownership unbundling. The second option was the ISO: here the ownership of the network could still be held by vertically integrated entity, but the transmission system network itself must be managed by an independent system operator, which must be entirely separate from the vertical integrated company and which is to perform all network operator functions. Third, and developed only during the negotiation which led up to the final adoption of the third package, was the ITO: under this arrangement, separation of the transmission activities must be achieved through the establishment of the ITO, which must be responsible for the maintenance, development and operation of networks, even though these networks remain the property of the vertically integrated companies. See Angus Johnston and Guy Block (2012), p. 39.

<sup>54</sup> Directive 2009/73/EC, Article 10.

<sup>55</sup> See Barrett, Eva. “A Case of: Who Will Tell the Emperor He Has No Clothes?—market Liberalization, Regulatory Capture and the Need for Further Improved Electricity Market Unbundling through a Fourth Energy Package.” *Journal of World Energy Law and Business*, December 17, 2015, 1–16.

considering that the 3<sup>rd</sup> and last package was approved in 2009 and 2010, the EU is now in moving to the 4<sup>th</sup> package in 2017: the Energy Union.

In this subsection, this thesis explained how Directives, through imposing legal unbundling obligations, turned capacity contracts into the most important transactions in the electricity markets, as important as electricity supply contracts. In the coming subsection, this thesis moves to analyse how these *emergent* contracts between transmission system operators and EU energy law has regulated transmission system users. It does so by though giving a close look at the normative system since the 1<sup>st</sup> package. The regulation of these contracts being the main object of this investigation, this thesis will describe mandatory rules according to the language used by EU lawmakers to govern individuals' behaviour while engaged in transactions. The objective is to describes how EU lawmakers have changed substantive law (i.e. duty-imposing rules of non-discrimination) and new governance structures (i.e. the multilevel system of law-making and law-enforcement) over three decades of positive market integration. The next subsection concludes by reinforcing this thesis' claim. It shows how the EU legislator advances a governance system of law-making at the EU level and, through it, has set out a mass production of Implementing acts, what energy lawyers call Network Codes. From Directives to Regulations and Network Codes, the private dimension of EU energy law has advanced the normative system of rules establishing rigid mandatory rules applied to LCRs.

### *3.2. Regulating Contracts to Complete the Internal Market: Form Non-discrimination Duties to Third Party Access to Unbundling Capacity*

Transmission system *operators* are like rivers in feudal society. If only one Lord's friend accessed rivers, there was high risk of this Lord's friend feeling tempted to increase a good's price and its profit and, in doing so, harm people within the manor. Transmission systems are to modern and postmodern society what *rivers* were to feudal society. The more suppliers can access transmission capacity, the is the lower risk of exploitative commercial practices by suppliers charging excessive electricity prices for people. If more supply contracts between generators and wholesale customers, or between wholesale suppliers and final customers, have access to capacity in the transmission system, there will be more competition and, where there is competition, marginal costs will tend to be lower. Final

customers and consumers could then share benefits from lower marginal cost. Final customers and consumers in the electricity market are we, the people.

By following this economic assumption, the EU has since early 1990s pursued a positive Integration Project with the aim of building a competitive and single market. The completion of the internal market can be considered complete if, say, a wind-power generating plant located in North Sea can effectively sell its electricity to a large industry in the south of Italy. To the completion of the internal market, the EU has advanced a normative system of rules to grant access to the transmission system all over the Europe.

In the context of electricity markets, duty-imposing rules of non-discrimination has been the cornerstone of the electricity market since the positive integration project. This is particularly true if one looks at contracts between TSOs and transmission users. Since the 1<sup>st</sup> Directive,<sup>56</sup> EU lawmakers have explicitly established that TSOs should provide non-discriminatory access to system users, especially those system users who were not TSOs' subsidiaries or shareholders. TSOs could not discriminate against electricity undertakings while making choice to provide access or not to electric grids, including negotiations of LCRs. Stepping back in time to the late 1990s, the implementation of the 1<sup>st</sup> Directive faced a problem in its implementation. TSOs refused access without providing clear legal reasoning that could justify those refusals. The poor progress made in both competition and cross-border trade was then underlined by the Commission as a political, economic, and legal justification to approve a new regulatory framework: the 2<sup>nd</sup> Package.

In 2003, the EU legislator approved the 2<sup>nd</sup> package. It revoked the 1<sup>st</sup> Directive and approved the 2<sup>nd</sup> Directive<sup>57</sup> and a new Regulation<sup>58</sup> on access to network in cross-border exchange. Rather than approve more intrusive EU substantive law concerning mandatory rules imposed on contractual relationships between TSOs and transmission users, the EU legislator approved new governance modes of making and enforcing EU energy law at the EU and national levels. At the national level, the 2<sup>nd</sup> Electricity Directive imposed on Member States the obligation to create and confer powers to NRAs. NRAs became the national legal official in charge of regulating, monitoring, and enforcing EU law in to national jurisdiction. This includes the obligation in which NRAs have to establish “terms and conditions” to

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<sup>56</sup> Directive 96/92/EC.

<sup>57</sup> Directive 2003/54/EC.

<sup>58</sup> Regulation 1228/2003.

contracts between TSOs and system users, including LCRs. While at the national level Member States created NRAs, the EU legislator delegated powers to create more detailed duties on TSOs to the Commission. Less than five years after the approval of the 2<sup>nd</sup> package, the Commission released the Energy Inquiry in 2007 denouncing the “contractual congestion” in transmission systems as the main reason for market foreclosure. Contractual congestion occurs when the TSOs agree with system users to reserve capacity for the long-term; namely, LCRs. The Commission then pointed to LCRs as an economic, political, and legal justification to draft a new package: the 3<sup>rd</sup> Package.

Between 2009 and 2010, the EU legislator approved the set of legislative acts that today is referred to as the 3<sup>rd</sup> Package. It replaced the 2<sup>st</sup> Directive with the 3<sup>rd</sup> Directive;<sup>59</sup> replaced the Regulation on access to network in cross-border exchange;<sup>60</sup> and also approved a Regulation creating a European Agency (ACER).<sup>61</sup> The 3<sup>rd</sup> Package radically changed the governance system of making of EU law through implementing an institutional arrangement between the Commission, ACER, and TSOs’ associations, where the former merely approves EU law and the latter two draft them. The change in EU governance set out an institutional arrangement with conferred power and knowledge to put in practice a *mass production* of Network Codes regulating all the operations of TSOs at the EU level. Since then, six Network Codes have been approved and twelve are “in development”. Each network code represents a set of distinct binding rules approved through Implementing acts. On 26 September 2016, the Commission approved the Network Code on forward capacity allocation,<sup>62</sup> establishing “harmonized” rules for LCRs. These contracts must now follow a “standard-form contract” established at EU level.

Between the 1<sup>st</sup> and 3<sup>rd</sup> Package, there was a saga: three decades, three packages, and an encyclopedia of rules. In 2015, the EU opened a new chapter entitled Energy Union, which is “in development”. In the coming three sections below, the EU saga will be described with a close look at substance.

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<sup>59</sup> Directive 2009/54/EC.

<sup>60</sup> Regulation 714/2009.

<sup>61</sup> Regulation 994/2010.

<sup>62</sup> Commission Regulation (EU) 2016/1719.

### 3.2.1. *Duty of Non-discrimination and Contractual Congestion: the VEMW case*

Whereas the birth of the 1<sup>st</sup> Package reinforced the approximation between EU principles and energy markets, the absence of technical rules at supranational level in the Directives raised real challenges in the implementation of market integration. These barriers were even more evident in what concerns the regulation of TSOs, then transmission system operators, and system users. In 1996, the 1<sup>st</sup> Directive devoted a single provision to the issue, which established mandatory rules to contracts between system operators and system users when the later requested access:<sup>63</sup>

Article 7(5). The system operator shall not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.

With regards the contractual relationship between *system operators* and *system users*, the 1<sup>st</sup> Directive innovated by replicating in its provision the duty of non-discrimination and, moreover, addressed it to private undertakings. If the principle of non-discrimination has for a longer period been known by EU legal scholars as obligations applied to Member States, the Directive 96/92/EC introduced those obligations to private relationships. Yet the duty of non-discrimination was introduced into the Directive as a single and vague mandatory rule applied to these specific transactions. In the prior chapter, this thesis defined vague rules based on Article 7(5). It attempted to demonstrate how market actors, while negotiating access to transmission systems or Member States while implementing the Electricity Directive, could interpret vague rules (e.g. non-discrimination) differently. Could a transmission operator refuse access to the transmission system between Munich and the borders of Germany if an operator had previously signed a LCR with electricity undertakings booking 100 per cent of the transmission system capacity? If yes, and if the LCR booked 50 per cent, is it in conformity with the Directives' rules? To answer these questions, one would have had to take into account market conditions, alternative transmission systems as alternative trajectories, or even national legal culture.

The mandatory rule of non-discrimination is indeed a vague rule and, when enacted in a supranational normative system, it can provoke different market behavior or interpretation

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<sup>63</sup> Directive 96/92/EC, Article 7(5).

within and between national legal systems. One could then expect that vague rules of non-discrimination could lead to divergence. In the EU energy market, the vague rules in the 1<sup>st</sup> package applied to LCRs provoked two reactions: the draft of voluntary guidelines in Forums boosting *Open Methods of Coordination* (OMC) between Member States, as well as Court Disputes.

As a solution to mitigate possible divergences along the implementations of the Electricity Directive, the Commission decided to set up the Florence Forum as attempts to create a periodical meeting dedicated to discussing barriers to the internal market and how to break them.<sup>64</sup> The objective was then to establish a platform where Member States could coordinate the implementation of Directives and avoid divergence. The Florence Forum, which is still taking place, has then served as discussion platform to voluntary networks among national regulators and private undertakings at European and regional level.<sup>65</sup> Furthermore, the Forum's meetings became also concrete platforms to start up new formal initiatives regarding cross-border cooperation. This was the way members welcomed the joint effort of the NRAs to create the Council of European Energy Regulators (CEER).<sup>66</sup> To avoid divergences, participants suggest the development of voluntary guidelines by those regulatory

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<sup>64</sup> The Florence and Madrid Forums were established in 1998 and 1999, respectively. The Electricity and Regulatory Forum (thereafter the Florence Forum) and the Gas Regulatory Forum (thereafter the Madrid Forum) were set up to jointly discuss the issues regarding the creation of the internal market with a large group of stakeholders. The list of participants includes NRAs, Member States, the Commission, TSOs, traders, consumers, network users, and power exchanges. Besides the diversity of legal entities connected by vertical and horizontal relationships, the Forums have long been seen as a voluntary network that releases recommendations that fall into what we conceive as non-binding self-regulation, such as the 1<sup>st</sup> and 2<sup>nd</sup> Guidelines for Good Practice.

<sup>65</sup> Burkard Eberlein (2005). Eberlein, Burkard. "Regulation by Cooperation: The 'Third Way' in Making Rules For the Internal Energy Market." In *Legal Aspects of EU Energy Regulation: Implementing the New Directive on Electricity and Gas Across Europe*, edited by Peter D. Cameron, 59–88. Oxford and New York: Oxford University Press, 2005. Eberlein, Burkard. "Experimentalist Governance in the European Energy Sector." In *Experimentalist Governance in the European Union*, edited by Charles F. Sabel and Jonathan Zeitlin. Oxford: Oxford University Press, 2010.

<sup>66</sup> Ten NRAs voluntarily signed the memorandum of understanding for the establishment of the CEER in 2000 as a voluntary non-profit association, being then the first genuine regulatory network in European energy markets. While it started with 10 members, CEER has expanded and embodies all the NRAs from the 28-EU Member States and additionally the NRAs of Norway and Iceland as members of the European Economic Area (EEA). The CEER has been an active actor in the energy sector considering the activities it has been tasked with over the years. It responds to the Commission when consultation is held to revise EU Regulation and Directives and monitors compliance with EU public regulation and other forms of self-regulation. Most importantly, CEER issues recommendations, principles and guidelines identifying market best practices that, though not binding, are one of the new modes of non-binding self-regulation that shape markets through a genuine regulatory network. As a cooperative initiative of NRAs, the CEER became the first regulatory network in the European energy markets.

decision bodies.<sup>67</sup> At the 5<sup>th</sup> meeting of the Florence Forum in March 2000, members stressed the importance of making progress in harmonizing the implementation of Member States as regards access to networks. This was when forum parties agreed in creating cooperative platforms between TSOs, which became the ETSO.<sup>68</sup>

In between the appeals of stakeholders in members of the Madrid Forum, the CJEU was receiving one of the first preliminary references as regards EU energy law. In 2003, the landmark *VEMW case*<sup>69</sup> reached the Court requesting the interpretation of Article 7(5) of Directive 96/92/EC questioning the conformity of the LCRs agreeing on the preferential access to the systems for cross-border transmission of electricity. In the case, electricity undertakings challenged the decision of the Dutch authority DTE (Director of the Service for Implement and Control of Energy Supply) authorizing the agreement between the transmission operator TenneT and one of the transmission system users, NEA (*Nederlands Elektriciteit Administratiekantoor*). Back then, TenneT and NEA were parties in the LCR reserving 50 per cent of the capacity of the cross-border system. In June 2005, the CJEU considered the act of DTE in violation with the duty of non-discrimination in Article 7(5) Directive 92/96/EC. In doing so, the Court considered the LCRs between the Dutch's system operator and the Dutch system user, the latter who used to hold exclusive rights before liberalization, as an agreement in breach of the EU regulatory framework.

The *VEMW case* is interesting from two perspectives: one related to the facts of the case, the other related to the legal reasoning advanced by the Court. First, the LCR between DTE and NEA was a pre-existing contract, the contract's formation having preceded the day when the 1<sup>st</sup> Directive entered into force. Yet the Court rejected the claim about the inapplicability of EU law. It did so through reinforcing that Dutch authorities had not requested derogation with regards pre-existing agreements and, as such, EU law was

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<sup>67</sup> Understanding Forum through the reflexive theory. Brousseau, Eric, and Jean-Michel Glachant. "The Institutional Economics of Reflexive Governance in the Area of Utility Regulation." *EUI Working Papers RSCAS 2010/09* (2010).

<sup>68</sup> The Florence and Madrid Forums also served as platforms to launch the second layer of horizontal regulatory networks. In the electricity market, a new association was established in 1999 by the four existing regional associations of TSOs – UCTE, Nordel, ATSOI and UKTSOA – which has been called ETSO (European Transmission System Operators). In parallel, TSOs in the gas sector set the first institutional network for collaboration among them right after the approval of the 1<sup>st</sup> Gas directive. The GTE (Gas Transmission Europe) was established in 2001 for gas TSOs as a non-formal association, which was later converted into GIE (Gas Infrastructure in Europe), as a legally independent and non-profit association organized into three subdivisions: GTE (Gas Transmission Europe), GSE (Gas Storage Europe) and GLE (Gas LNG Europe).

<sup>69</sup> C-17/03, *VEMW*, judgment on 7 June 2005.

immediately enforceable to contractual parties even if those obligations preexisted the EU Directive. Besides dismissing the inapplicability defense, the Court considered illegal the act of reserving 50 per cent of the transmission capacity, which fulfilled the vague rules of non-discrimination by creating thereon the cap of 50 per cent of transmission capacity for other LCRs in the electricity markets. In the early 2000s, transmission system operators could not reserve on a preferential basis more than 50 per cent.

Despite the relevance of the *VEMW case* in the early 2000s, the dispute raised in the CJEU concerned the EU secondary legislation approved in the 1<sup>st</sup> package. Back in time, EU sector-regulation was enacted in a Directive, which had solely vertical direct effect. For this reason, the legal act of Dutch authority was subjected to the preliminary reference, rather than the private contract. The non-conformity of the administrative decision was what spilled over to the LCR agreement between TenneT and NEA. Yet since the 2<sup>nd</sup> package, mandatory rules of non-discrimination have been enacted in Regulations with general application. From 2003 on, plaintiffs could sue the transmission operator directly.

### 3.2.2. *Third Party Access and yet Contractual Congestion*

The 1<sup>st</sup> Electricity Directive represented the first move towards the regulation of LCRs. The *VEMW case* confirmed that duties of non-discrimination, even if enacted in Directives, were applicable to private relationships and private contracts in electricity markets. Yet the vagueness of the provision was one of the reasons why Member States were still poorly interconnected in 2002. It created space for the Commission to propose the 2<sup>nd</sup> package, approved in June 2003.

The 2<sup>nd</sup> package advanced towards more intrusive transnational regulation. With regards the 2<sup>nd</sup> Directive, the intrusion was not about substantive law, but rather power-conferring rules in Member States. First, with regard to regulatory decision-making at national level, the directive imposed obligation on Member States to delegate authority to independent NRAs. Regulatory agencies, which were initially an institutional arrangement implemented by Member States on voluntary basis, became binding.<sup>70</sup> Interestingly, the 2<sup>nd</sup> Directive replaced the provision regarding the duty of non-discrimination by the concept of Third Party Access

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<sup>70</sup> Directive 2003/54/EC, Article 23.

(TPA) in Article 20.<sup>71</sup> TPA is a *positive duty* of what the 1<sup>st</sup> Directive established as negative duty: the duty of non-discrimination. By doing so, the 2<sup>nd</sup> Directive imposed the duty on TSOs to explain the reasons for refusing access to any system user. In doing so, the 2<sup>nd</sup> Directive did not change duties and rights applied to agreements between transmission system operator and system users, but it has empowered system users to act against TSOs and abuse of their position as operators of essential facilities. At the same time the 2<sup>nd</sup> Directive established the positive duties of providing access (i.e. TPA rights), it conferred powers to NRAs to adjudicate disputes between TSOs and system users. By turning NRAs into business-to-business ADRs,<sup>72</sup> the EU enhanced the effectiveness of the EU legal system through private enforcement out-of-court.

Regarding EU substantive law, the EU secondary legislation expanded its provisions to shrink the degree of indeterminacy of the supranational rules to what concerns capacity allocation and congestion management. Capacity allocation and congestion management (CACM) is the legal framework that governs the behavior of TSOs while operating transmission systems. It is crucial to the establishment of the capacity available in the transmission system in case of transmission users' requests. Alongside the 2<sup>nd</sup> Energy Directives, the CACM rules were approved within the EU Regulation 1228/2003 on conditions for cross-border exchange in electricity.<sup>73</sup> Different than Directives, EU Regulations determined rules that are immediately enforceable across the EU. It dispensed transposition into national legal systems as Directives. Therefore, debate over *direct v. horizontal effect* is not applicable to Regulations. In the electricity market, Regulations determining mandatory rules to private undertakings involved in cross-border operation have been enacted since 2003. If the *VEMW case* raised concerns about the enforcement of EU law on existing LCRs, the Regulation 1228/2003 fulfilled the legal issue by regulating with precise terms:

Annex. Existing long-term contracts shall have no pre-emption rights when they come up for renewal.

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<sup>71</sup> Directive 2003/54/EC, Article 20(1).

<sup>72</sup> Directive 2003/54/EC.

<sup>73</sup> Regulation 1228/2003.

The novelty of the 2<sup>nd</sup> Package was not only restricted to the use of Regulations with general application. To give flexibility to existing rules and enhance adaptability of law, the EU legislator innovated by approving the Commission guidelines as annex.<sup>74</sup> Commission Guidelines, despite the name “guidelines”, are in fact binding EU law. Unlike Directives and Regulations approved by the European Parliament and Council, guidelines are amended directly by the Commission through the comitology process.<sup>75</sup>

In the procedure for comitology, the Commission presents a draft of the guidelines to a committee of representatives of Member States, whose positive vote is required by qualified majority. Once approved, guidelines become binding norms.<sup>76</sup> The Commission Guidelines are the epitome of hybrid regulation. Commission Guidelines are Implementing Acts addressed to TSOs, which are private undertakings operating essential facilities. Some scholars argue that the lawmaker in this context is diverse from what is conceived as legislator in democratic constitutions.<sup>77</sup> To draft and approve Commission Guidelines, the Commission and the committees could consult an advisory body composed of all the NRAs while drafting Guidelines called the European Regulators Group for Electricity and Gas (EREG). In spite of the similarities to CEER in terms of member composition, EREG is a quite different legal entity. Whereas CEER was a voluntary cooperation between NRAs, EREG are not voluntary, but a mandatory regulatory network of NRAs.

From 2003 to 2009, when the EU approved the 3<sup>rd</sup> package, the Commission released one Commission Guideline in 2006 amending the Annex of Regulation 1228/2003.<sup>78</sup> In the Implementing Acts, the Commission approved what has been one of the most intrusive mandatory rules into LCRs: the mandatory rules of *use-it-or-lose-it* or *use-it-or-sell-it*.

Annex. 2.5. The access rights for long- and medium-term allocations shall be firm transmission capacity rights. They shall be subject to the use-it-or-lose-it or use-it-or-sell-it principles at the time of nomination.

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<sup>74</sup> Annex I to Regulation 1228/2003.

<sup>75</sup> In fact the Commission Decision of 9 November 2006 amending the Annex to Regulation (EC) 1228/2003 on conditions for access to the network for cross-border exchanges in electricity.

<sup>76</sup> Regulation 1228/2003, Article 9; and Regulation 1775/2005, Article 10.

<sup>77</sup> Scharpf (2012).

<sup>78</sup> Decision 2006/770/EC

Mandatory rules of *use-it-or-lose-it* or *use-it-or-sell-it* are mandatory rules that have been imposed on LCRs since the Commission enacted them. LCRs are called Long-term Capacity *Reservation* because the object of these bilateral agreements is *rights* to certain capacity in a certain transmission systems. When parties have the right to a certain reserved capacity, agreements were performed in way that the *physical* capacity in the transmission systems are alienated to a specific system user. The alienation of reserve capacity has then been the cause to contractual congestion in transmission systems. Even when parties holding rights to capacity transmission did not use the contracted capacity, this physical capacity was not reallocated to third parties. It was not allocated because of legal uncertainties concerning the consequence. Was the reallocation of a contracted physical capacity breach of contract or not? The approval of the mandatory rules of *use-it-or-lose-it* or *use-it-or-sell-it* reduced (if not eliminated) the risks of transmission system operators being sued for damages for breach of contract, depending on how national systems of private law operate. The Commission Guidelines of 2006 then became the first rigid ruled applied to LCRs with a considerable impact on integration and harmonization of private law.

### 3.2.3. *Unbundling Capacity, Network Codes and Standard-form (Long-term) Contracts*

The 2<sup>nd</sup> Package already launched new modes of law-making at the EU level, but the EU has advanced further along the spectrum of regulatory capacity thanks first to the legitimacy pledged by the Treaty of Lisbon and later the approval of the 3<sup>rd</sup> Energy Package.

The Treaty on the Functioning of the European Union (TFEU) caused a major reorganization of primary EU law with a significant impact on EU energy law. As novelty, Part 3 on Union policies and internal actions includes a Title (XXI) on Energy. According to Article 194 TFEU, Union policy should aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy external policy and internal market and, for so doing, the regulation of cross-border operations has been addressed under the competence of the Union whereby the TFEU explicitly states *EU policy should promote interconnection of energy markets*.<sup>79</sup> By including a specific provision in the TFEU about sharing the competence over cross-border operations, a new critical juncture opened up the transnational

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<sup>79</sup> TFEU, Article 194(1)(d).

regime to other new modes of regulatory decision-making and hybrid regulation, which were brought into existence by the 3<sup>rd</sup> Energy Package.<sup>80</sup>

In the same year the Treaty of Lisbon was approved, the Commission proposed the 3<sup>rd</sup> Package, which was by far the most ambitious draft of EU energy law concerning the rearrangement of regulatory decision-making at EU level. It comprises the review of the prior two Directives on common rules for the internal market in energy and natural gas, the two Regulations on access and cross-border transmission system and also the inclusion of a 3<sup>rd</sup> new Regulation. The 3<sup>rd</sup> Package introduced two novelties into the existing rule-making models: the Agency for Cooperation of Energy Regulators (ACER) and the European Network of Transmission Operators for Electricity (ENTSO-e). Both ACER and ENTSO-e lack conferred powers to approve EU legislative or Implementing Acts, but they both have shared competence to draft Implementing Acts before being called Guidelines. These Implementing Acts drafted by ACER and ENTSO-e and approved by the Commission through comitology are called Network Codes.

The 3<sup>rd</sup> Package has been a big revolution with a lot of new rules and innovation and the major reason was the birth of the ACER for the internal market in energy.<sup>81</sup> Approved by Regulation 713/2009 and effectively established in 2011, the ACER was created to replace the ERGEG relating to the function of monitoring and coordinating the relationship among NRAs and also between NRAs and the European Commission. Whereas ERGEG worked as a mandatory network of NRAs created by the Commission to perform advisory functions, ACER is a genuine European Institution that was created by the European Parliament and the Council. One NRA vote has been the governance that drives ACER decision-making,<sup>82</sup> in particular with regard to its regulatory authority for drafting *Framework Guidelines*. Despite the confusion in using (again) the term “guidelines”, Framework Guidelines are norms that *a priori* do not bind market players. These are what ACER calls the Target Model.

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<sup>80</sup> Pielow, Johann-Christian, and Brita Janina Lewendel. “Beyond ‘Lisbon’: EU Competences in the Field of Energy Policy.” In *EU Energy Law and Policy Issues*, edited by Bram Delvaux, Michael Hunt, and Kim Talus, 3rd ed., 261–230. ELRF Collection. Cambridge, Antwerp, Portland: Insertia, 2012.

<sup>81</sup> Walter Boltz (2010) Boltz, Walter. “The New Regulatory Agency: A Practical Guide to Its Functioning and Priorities.” In *EU Energy Law and Policy Yearbook 2010: The Priorities of the New Commission*, edited by Jean-Michel Glachant, Nicole Ahner, and Adrien De Hauteclouque, V:133–46. EU Energy Law. Leuven: Claeys & Casteels Publishing, 2010.

<sup>82</sup> Regulation 713/2009, Article 15(1)(a).

ACER's Framework Guidelines by *themselves* are not binding to electricity undertakings. However, framework guidelines bind ENTSO-e while drafting Network codes. Network codes as drafted by ENTSO-e solely are not binding, but Network codes become binding after completed the comitology process bringing by the Commission.<sup>83</sup> Given ENTSO-e are mandatory networks of TSOs,<sup>84</sup> the institutional arrangement of lawmaking after the 3<sup>rd</sup> package gives to TSOs a sort of (*in*)*direct* conferred power to approve EU Implementing Acts that would govern their own operations; namely, Network Codes. What makes Network Codes happen is the delegated authority of the Commission, but what makes the drafting of Network Codes more efficient is the knowledge barrier filled by ACER and ENTSO-e.

A closer look at this hybrid form of Network Codes shows the stiffening of the legal framework applicable to private parties in the EU electricity market which this thesis holds characterizes self-standing European private law.

Since the approval of the 3<sup>rd</sup> package and following establishment of ACER and ENTSO-e, there has already been approved six Network Codes, with twelve more “in development”. Each network code represents a set of distinct binding rules approved through Implementing acts. On 26 September 2016, the Commission approved the Network Code on forward capacity allocation.<sup>85</sup> Forward capacity allocation is nothing more than LCRs. It is a set of rules regulating forward (long-term) allocation capacity (capacity reservation) by establishing “harmonized” rules<sup>86</sup> for LCRs. If one steps back and reads the Commission Regulation 2016/1719 through its *titles, chapters, sections, and Articles*, she will realize that this Network Code on forward capacity allocation looks mostly like a standard-form contract for LCRs. Transmission rights of LCRs won't be bilateral negotiated between transmission system and network user as it has always been. Soon long-term capacity rights will be traded through auctions offered which both the decision of *offer* capacity allocation in long-term and the *acceptance* of trading does not rely in the consent of the TSO. LCRs will have to follow

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<sup>83</sup> Musialski, Cécilia, and Cécile Marchi. “Network Codes and (Formal and Material) Boundaries to EU Action in the Electricity and Gas Sectors.” *European Energy Journal* 3, no. 2 (April 2013): 39–63. See also Lavrijssen, Saskia, and Irina Bordei. “ACER: Demystifying the European Energy Supervisor from a Consumer Perspective.” *Oil, Gas & Energy Law Intelligence* 10, no. 5 (October 2012).

<sup>84</sup> Florence Melchior and Steven de Moel (2011). Moel, Steven de, and Florence Melchior. “Cooperation between TSOs: Background, Organisation and Netcodes.” In *European Energy Law Report VIII*, edited by Marta M. Roggerkamp and Ulf Hammer, 21–42. Energy & Law. Cambridge, Antwerp, Portland: Insertia, 2011.

<sup>85</sup> Commission Regulation (EU) 2016/1719.

<sup>86</sup> Commission Regulation 2016/1719, Recital 5.

terms and conditions established in the Section 4 of the Commission Regulation 2016/1719. Among the provision of the secondary legislation, all LCRs between TSOs and system users have thereon to consider the following obligations as irrevocable mandatory rules: the restriction of *contractual capacity* established to system user in Article 37, pricing in Article 40, conditions for transferring transmission rights in Article 44, compensations caps in Article 54, and above all a long list of terms and conditions that must be “harmonized” through cross-binding zones in the internal market in Article 52.

When this thesis started four years ago, there were no Network Codes. While writing this thesis, the phenomenon of Network Codes became evident (for not saying aberrant). No doubt, the integration through a self-standing European Private Law is indeed taking place.

#### **4. Is the Emperor Naked? Legal Scholars and the Visible European Private Law**

Section 3 illustrated clearly the gradual Europeanization of private law through the positive integration strategy – in which EU institutions *instrumentalize* private law to their own ends. Neo-functionalist political scientists studying institutional dynamics<sup>87</sup> have long explained the phenomenon in the political arena: “as European actors discovered the limits or (...) [vagueness] of EU rules, they pressed for new modified rules”.<sup>88</sup> In parallel, some lawyers used to explain the phenomenon of Europeanization of private law by observing the narrowest dimension of law: the increase in quantity of EU Legislative and non-Legislative Acts, and also, the replacement of Directives by Regulation. Describing the Europeanization of Private in Energy market though these qualitative methods is a factual preposition hard to dismiss. More and more integration in Energy Markets has been done through what Christian

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<sup>87</sup> Having Ernest B. Haas as the preeminent leader of the neo-functionalist school. Ernest B. Haas, *The Obsolescence of Regional Integration Theory*, Berkley: Institute for International Studies, 1975.

<sup>88</sup> Again taking a leaf out of the political scientist’s playbook: “The logic of institutionalization has long been at work in the EU, and its crucial to understanding integration as a dynamic process. As European actors discovered the limits or ambiguities in EU rules, they pressed for new modified rules. The new rules created legal rights and opened new arenas for politics, and thereby established the context for subsequent interactions, disputes and rules of changes”. Wayne Sandholtz and Alec Stone Sweet, *Neo-functionalism and Supranational Governance*, in Erick Jones, Anead Menon, and Stephen Weatherill (ed.), *The Oxford Handbook of the European Union*, p. 24.

Twigg-Flesner put with a keen sense of humor: “Good-bye Harmonization by Directives, Hello Cross-Borders only Regulation”.<sup>89</sup>

The fact that has been a phenomenon of Europeanization of Private Law is more than ever visible. If legal scholars are for the legal community the echoing of the voices for the construction of legal discourse, proposition dismissing the private law dimension of EU law could and should be contested as the naked Emperor that wears no clothes.

Yet describing the phenomenon of the Europeanization of private law as a process that occurs through the replacement of Directives with minimum harmonization by full harmonization or Regulations is correct, but simplistic. This account portrays only one dimension of the Europeanization of private law. As explained in previous chapters, to have a fuller picture of the phenomenon of the Europeanization of Private Law in Energy Markets, one needs to bear in mind that all legal statutes in the EU, the Treaty, Legislative and non-Legislative Acts, uses language as means to communicate rules of law and, by so doing, the use more or less rigid language results directly either in restricting or expanding Member States’ discretion for making law. Therefore, to see the Europeanization of Private Law properly, one has also to distinguish EU primary rules according to their semantic rigidity: more or less rigid rules, more or less vague rules. The more Directives with vague rules have been replaced by new Directives and new Regulations with more rigid rules, the less discretion remains in the hands of Member States to implement EU legislative acts by filling the vagueness according their own national law-making choices. Furthermore, the more new Regulations are approved with rigid rules, the lesser the enforcement authorities could construct legal content by interpreting vague rules. The increase of Directives and Regulations with rigid rules, as has been said, shrunk the role of enforcement authorities towards what legal philosophers explain as the most simplistic function of adjudication: the *application of law* with no or minimum space for interpretation.

The analysis in this chapter thus confirms both that EU energy law has an important private law dimension and also that a central feature of this private law dimension is that the evolution of the positive integration goes hand-in-hand with the stiffening of the language of EU law, thereby leading towards the phenomenon identified in this thesis as self-standing EU private law.

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<sup>89</sup> Christian Twigg-Flesner, Good-Bye Harmonization by Directives, Hello Cross-Border only Regulation? – A way forward for EU Consumer Contract Law.



**Business-to-Business Contracts in Competitive Markets:  
Upstream (and Downstream) Long-term Supply Contracts in Gas Markets**

In Case Study I, this thesis developed the investigation into how primary rules of European private law have directly and indirectly imposed duties and obligations on individuals involved in *Long-Term Capacity Reservation Contracts (LCRs)*: business-to-business contracts between electricity undertakings and TSOs operating transmission in electricity markets. In the context of network industries, the opening of the market for competition depends on assuring access to networks as long as they are *natural monopolies*. Precisely in the context of EU energy markets, EU lawmakers approved a regulatory regime in which transmission systems have to be operated by independent TSOs, which in turn establish contractual relationships with all transmission system users for providing access to the grid. Case Study I of this thesis showed how primary rules of European private law have ruled contracts between TSOs and electricity undertakings to accomplish the policy mandate of the Union: namely, creation of a functioning internal energy market. It also proved the assertions of this thesis: the dynamic replacement of vague rules of European Private law in Directives having indirect effect by rigid rules in Regulation and Implementing acts with general application. EU rules enshrining duties and rights with more precise commands on what to do or to abstain from between parties in LCRs suggest the intrusion of rules of European private law into national legal systems.

However, on the grounds of the analysis of Case Study I, one could still claim that the gradual intrusion of European private law into every single aspect of *transmission service* contracts (e.g. price, right to access, or obligation to reselling capacity) could be foreseen. As long as transmission systems are natural monopolies, the establishments of mandatory rights to access the networks are required to ensure access to the markets. Therefore, regulating LCRs has been the *sine qua non* condition for creating a single and competitive market. If so, there is still a open question. If one could expect the creation by European private law of duties and obligations on contractual parties operating natural monopolies, could one claim that the same path is expectable when transactions occur in *competitive markets*? If so, how are these rules recognized (criteria of validity)? And how do they govern market transactions (normativity of law)? As is the case with LCRs, do rules of European private law provide semantically rigid commands to contractual parties determining what parties ought to do or to abstain from? Could this process suggest *intrusion* of rules of EU Private Law into national systems of private law (legal pluralism)? Answering these questions is the objective of Case Study II and of the two coming chapters, 5 and 6.

Case Study II of this thesis investigates whether primary rules of EU Energy Law have ruled *Gas Supply Contracts* in business-to-business relationships to create a single and competitive market and if so, how. In contrast to Case Study I, *Gas Supply Contracts* in business-to-business relationships have been transactions in competitive markets since the early stages of market liberalization.

In Gas Markets worldwide, a Gas Supply Contract is generally defined as a contract for supply of natural gas; this includes transactions whereby the natural gas is the *physically settled* good and excludes financial instruments, such as non-physically settled gas derivatives.<sup>90</sup> There are *three* types of transactions that could be generally defined as *gas supply contracts*. From upstream to downstream, there are supply agreements between gas producers and customers (commonly wholesale customers);<sup>91</sup> supply agreements between gas resellers and customers (i.e. retailers and large end users, such as gas-fired power plants and

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<sup>90</sup> This general definition of Gas Supply Agreements is finding in the 3<sup>rd</sup> Gas Directive 2009/73/EC, Article 2(34). When the 3<sup>rd</sup> Gas Directive was approved in 2009, EU Lawmakers defined Gas Supply Contracts as agreements for the supply of natural gas, excluding gas derivatives that are financial instruments. Later, the REMIT and MIFID II was more precise in distinguishing physically and non-physically settled gas derivatives, of which the latter are financial instruments falling under the scope of MIFID II and the former are Supply Gas Contracts under the scope of REMIT and EU Energy Law, which are the “C6 energy derivatives contracts” mentioned in Section C6 Annex I relating to coal and oil. See MIFID II, Article 95.

<sup>91</sup> Directive 2009/73/EC, Article 2(29).

industries); and gas supply agreements between suppliers and consumers. While the third type of Gas Supply Agreements include consumers, the two other types of transactions are Gas Supply Contracts between businesses. These contracts are the object of investigation in this Case II. Among them, Gas Supply Contracts in which natural gas producers are suppliers are Upstream Supply Contracts, while agreements in which suppliers are resellers of natural gas are Downstream Supply Agreements. The performance of both Upstream and Downstream Gas Supply contracts depends on access to pipelines. If so, similar to any other sale of goods depending on transportation services for delivery, transmission and distribution services by TSOs and DSOs are a means to assure the flow of natural gas to delivery points and, therefore, complete performance. Transportation and Supply Contracts can thus be distinguished as different transactions, although one or more contractual parties in Gas Supply Agreements are also parties in transportation contracts with TSOs or DSOs. Furthermore, gas (like electricity) is a network industry. In particular, transmission and distribution systems are essential facilities and transactions regarding transportation services take place in naturally non-competitive markets.

Gas Market, EU Law has pursued the creation of a functional internal Particularly in the EU market for natural gas through a positive integration strategy since the 1990s. To accomplish the Union's sectorial policies of *creating* and *guaranteeing* a competitive, secure, and – above all – integrated market for natural gas, EU Law advanced the regulatory framework for Liberalization already in the 1990s. This framework can be summarized in three steps or regulatory choices. *First*, it prohibited exclusive rights leading to roll back legal monopolies.<sup>92</sup> *Second*, it imposed on network operators unbundling obligations of non-competition neither in upstream nor downstream markets for supply of gas. These obligations removed the within-firm mode of production by contractual transactions. *Third*, given the decentralization of supply chains into transactions, EU lawmakers have approved a set of mandatory rules governing and instrumentalizing contractual transactions through two modes of institutional design. Either they imposed duties on Member States to regulate terms and conditions of contracts (e.g. tariffs in transmission systems); or EU Law was addressed directly to contractual parties (e.g. TPA rights and information duties). The third regulatory strategy is what matters for this thesis and most particular for the understanding how rules of European private law have provided reasons for actions to contractual parties.

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<sup>92</sup> 1<sup>st</sup> Utilities Directive 93/38.

Over the last three decades of Liberalization of the EU energy market, gas supply chain in Europe became essentially grounded on sequential contractual relationships: Gas Supply Contracts between Gas Producers and Importers, Importers and wholesale costumers, retailers and consumers; Transmission and Distribution Service Contracts between TSOs or DSOs and gas undertakings; Leasing Contracts between TSOs and pipelines' owners, Storage Contracts, LNG Terminal Operation Contracts, Insurance contracts, and most recently is moving towards agreements involving Energy Data Management.

Given the market structure, the completion of the EU internal market for Energy has consisted in setting mandatory rules for contracts, which makes the intersection of EU Energy law and European private law indisputable. Along the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Gas Package and forward, rules of EU energy law regulated the market through creating rights and duties addressed to contractual parties in certain types of transactions as a means to accomplish the Union's purposes. In Consumer supply agreements, EU Energy law imposes duties on suppliers to give notice before any intention to modify contractual condition,<sup>93</sup> or it enshrines rights to reasonable prices<sup>94</sup> and assures compensation for performance failures.<sup>95</sup> Those rules commonly associated to duties carried by undertakings operating Public Services Obligations to end-users and Consumer policies. In Transmission Service Contracts, EU Energy Law imposes duties of non-discrimination on TSOs in providing access for gas undertakings, as well as prohibited price negotiation for accessing networks. Those rules are commonly associated to Third Party Access Rights and Competition Policies, which is the cornerstone of EU Regulatory Framework for creating completion in network industries.

While the assertion that EU Energy Law governed individuals' behavior involved in Consumer Contracts and Transmission Service Agreements is indisputable, the same cannot be said about Gas Supply Contracts in business-to-business relationships. EU Energy Law refers to Gas Supply Contracts in business-to-business relationships, but the term commonly referred to targets or indicators to measure competition at different level of supply chains. Package-by-Package, EU lawmakers have established timelines determining which customers (or promisees) of Gas Supply Agreements should choose suppliers between competing

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<sup>93</sup> Directive 2009/73/EC, Annex 1, 1(b).

<sup>94</sup> Right for Reasonable Prices are commonly associated to Public Service Obligations. Directive 2009/73/EC, Article 3.

<sup>95</sup> Directive 2009/73/EC, Annex 1, 1(a).

undertakings: known as *eligible customers*.<sup>96</sup> The 1<sup>st</sup> Gas Directive started by listing as *eligible customers* large customers, such as gas fired power plants, while the 2<sup>nd</sup> and 3<sup>rd</sup> moved towards large industries and ended with household customers.

Having in mind these *two* different regulatory strategies towards contracts in Gas markets, scholars are inclined to dismiss the assertion that EU Sector-Regulation plays any role in governing Gas Supply Contracts between businesses in competitive markets, in contrast to Transmission Service and Consumers Contracts. Taking the microeconomic Constitution approach to interpret the system of rules of EU Law,<sup>97</sup> those scholars argue that the EU's mandate is to pursue *market freedoms*. If natural gas transactions take places in competitive markets, the EU would have lacked competence to regulate contracts through Sector-Regulation. Thus, Gas Supply Contracts would be ruled only by *ex post* enforcement of Competition Law to correct market failures case by case.<sup>98</sup>

In contrast to this view, Case Study II argues that the private law dimension of EU Energy Law goes beyond the microeconomic approach to European Constitutionalism. EU Energy Law has ruled Gas Supply Contracts in business-to-business relationships through both Sector-Regulation and Competition, even when transactions take place in uncontestably competitive markets. Given the Trilogy of Gas Packages, the 1<sup>st</sup> Gas Directive determined that large industries consuming 25 million cubic meters of gas annually should be *eligible costumers* on July 1998 thereon. Eligibility was later gradually expanded to customers with lower levels of consumption until it reached householders. Instead of policy goals, those provisions are primary rules granting rights for contractual parties in gas supply contracts.<sup>99</sup> Moreover, although those provisions are still committed to microeconomic Constitutionalism – that is, the European private Law as a means to *enable freedom of contract*<sup>100</sup> (or *freedom-to-contract*),<sup>101</sup> – the Security of Supply in 2008 justified an additional set of rules. It justifies

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<sup>96</sup> The 1<sup>st</sup> and 2<sup>nd</sup> Gas Directives established the gradual target of turning into *eligible customers* certain buyers in gas supply contracts, which started from large industries and ended with householders. Eligible customers are then buyers in gas supply contracts that can choose gas suppliers in markets.

<sup>97</sup> Tuori (2015).

<sup>98</sup> The microeconomic approach to market regulation refers to the heated in late 1990s Chicago School.

<sup>99</sup> Directive, Article 18(2).

<sup>100</sup> Micklitz, Hans-W. “On the Intellectual History of Freedom of Contracts and Regulation.” *Penn State Journal of Law & International Affairs* 4, no. 1 (December 2015).

<sup>101</sup> See the distinction between freedom of contract and freedom to contract. EU Law provisions on the eligible customers falls into what they define as rules of private law aiming to assure freedom to contract. Hanoch Dagan, *Autonomy, Pluralism, and Contractual Theory*, Law and Contemporary Problems, No. 2, 2013.

rules restraining freedom to assure Security of Supply. Besides those and other rules in Sector-Regulation, the active role of the Commission in enforcing competition law also lead to the supplementation of primary rules with a distinct set of rules listing prohibited clauses in Supply Agreements.

If this thesis finds a positive answer to the proposition whether European private law ruled supply agreements, it then needs to answer the further proposition: how these rules are recognized (criteria of validity), govern market transactions (normativity of law), and interact with national systems of private law (legal pluralism)?

To answer the proposition on *how*, Case Study II proposes to focus on a *single type of supply contract* and apply the theoretical framework of this thesis to it. Among all types of gas supply contract business-to-business (e.g. long-term, spot, prompt), Case Study II focuses on *Long-Term Upstream Supply Contracts (LUCs)*. The investigation of rights and duties on LUCs' parties enables this thesis to contrast them with rules regulating *Long-Term Downstream Supply Contracts (LDCs)* and observe divergences and similarities. Both LUCs and LDCs are supply contracts transacting between large gas undertakings. Whereas the former are sales agreements in which suppliers are gas producers, in the latter gas suppliers are reselling gas.

This thesis argues that European private law has indeed ruled both LUCs and LDCs since the early 1990s, which proves the intersection between European private law and EU Energy Law also in business-to-business transactions in competitive markets. Primary rules addressing parties of LUCs and LDCs have been created through two types of conferring-powers rules: those conferring-power to legislate on *Sector Regulation* (i.e. secondary rules of changes), and those conferring-power to adjudicate *Competition Rules* (i.e. secondary rules of adjudication). Case Study II is then developed along the two coming chapter 5 and 6, whereby the first is devoted to *EU Sectorial Regulation* and the latter to *EU Competition*.

Chapter 5 is dedicated to defining LUCs and LDCs and to describing how EU Sector-Regulation reacted to contractual practices after the EU began to pursue positive market integration. Since CJEU decisions perceiving utilities services as commodities, which then rolled back exclusive rights in energy markets, EU Lawmakers have issued legislative acts enshrining rights and duties of contractual parties with the purpose of constructing a competitive and secure internal market for natural gas. Rules of EU Energy Law are directly

addressed to contractual parties through Directives under the justification of accomplishing competitive and integrated markets. Following the Security of Supply crisis of 2008, EU Lawmakers reassessed the regulatory framework and advanced the approval of more mandatory rules imposing duties to supply in time of crisis and information duties. Given those rules of EU Law are functional to reach the Union's objectives, they range between semantically *vague* and *rigid* rules. Taking the *internal point of view*,<sup>102</sup> rules that are semantically close reduce the scope for divergent interpretations between market actors and legal actors in Member States, leading to Harmonization of Private Law. These findings strengthen this thesis's claim in favor of the *self-standing* nature of European Private Law when convoluted discourses of EU Law reproduce precise commands on what to do or abstain from doing.

Chapter 6 shifts the focus of this thesis to the analysis of primary rules of European private law supplemented by the active roles of the European Commission in the enforcement of competition law. Given that Gas Supply Contracts are transactions in competitive markets and that rules of EU Competition Law have been applied to Energy since the early the 1990s, one could expect the Commission would have adjudicated competition law and, by doing so, supplemented primary rules with authoritative determinations of what the law is, case by case. In other words, which clauses and contractual practices would be perceived as a violation of competition law. This has indeed happened. The *adjudicating authority* of the *Commission* has played a particular role in *announcing* a list of prohibited clauses to LUCs and LDC (e.g. profit sharing clauses for LUC or time-clause restrictions for LDCs). However, *all* the speech acts of the Commission are *commitment-decisions*. Commitment-decisions are the result of hybrid EU procedure law. The hybridity lies in its ambivalent nature, which cannot be perceived as an authoritative determination of what law is, nor merely a settlement. Stressing the endorsement in Legal Scholarship and more recently by legal officials of commitment-decisions as a source of law, this thesis claims that commitment-decisions in Energy Markets create reasons for actions, albeit this raises concerns about the effects on EU rules of adjudication.

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<sup>102</sup> Hart (1961).



**European Private Law and Sector-Regulation:**

**Enabling Freedom to Open Market but Restricting Freedom after Security Crisis**

**1. What are Long-Term Upstream and Downstream Supply Contracts?**

- 1.1. Business-to-Business vs Business-to-Consumers
- 1.2. Bilateral Negotiated, OTC Markets, and Exchanges

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Contracts

**5. Slow and Steady European Private Law: moving the Sector-Regulation towards business-to-business supply contracts**



**European Private Law and Sector-Regulation:**

**Enabling Freedom to Open Market but Restricting Freedom after Security Crisis**

European private law have extensively governed terms and conditions of transmission contracts. EU Regulations created a distinct set of rules imposing *duties of non-discrimination, prohibition of negotiated prices*, and most recently *obligations of use standard-form contracts on TSOs* and gas undertakings, parties in *LCRs*. Regulating transactions involving access to networks is the *sine qua non* condition to create a competitive internal market. However, has EU Private Law also governed contracts when there are competing suppliers? If so, how? How are these rules recognized (criteria of validity), how do they govern market transactions (normativity of law), and how do they interact with overlapping national private law systems of Member States (legal pluralism)?

Scholars with a microeconomic approach to market regulation commonly argue that business-to-business relationships in competitive markets are ruled solely through *ex post* Competition, rather than *ex ante* Sector-Regulation. Gas Supply Contracts are neither transactions negotiating access to networks, nor are the parties weaker Consumers, which could justify *ex ante* Regulation as a means to accomplish the EU mandates in Competition and Consumer Policies. In contrast to the microeconomic approach to analyze law and markets, this thesis proves that EU Lawmakers have indeed enacted legislative acts ruling Gas Supply Contracts, even when transactions take place in competitive markets.

In this chapter, the thesis observes how the enactment of Sector-Regulation rules in EU Energy Law has advanced a set of distinct mandatory rules towards contractual parties in LUCs and LDCs throughout three decades of European positive integration strategy in the gas market. The investigation begins by describing common contractual practices shared in LUCs before EU advanced towards the regulation of the gas market. The analysis enables this thesis to develop a comprehensive understanding of how EU Sector-Regulation intruded into the private sphere of contractual parties that previously were negotiated freely by the parties. EU Energy Law is then observed from *two angles*: the choice of legal regime (i.e. Directives with indirect effect or Regulations with general application); and whether language used by EU lawmakers plays any role in providing precise and objective reasons for action addressed to undertakings involved in Supply Contracts. The aim is to test the claim that the private dimension of EU Energy Law includes semantically rigid rules, which suggests intrusion of European Private Law into national legal systems of private law.

The investigation concludes by confirming that analyses about Harmonization of European Private Law require an investigation that goes beyond the choice of legal regimes (i.e. Directives with indirect effect or Regulation with general application) and goes towards the semantic dimension of norms and how this dimension plays a role in legal argumentation. Understanding how European Private Law interacts with national legal systems requires taking into account the open texture of language in legal rules. Since the 1<sup>st</sup> Package, Lawmakers have approved semantically vague and rigid rules granting rights and imposing duties for contractual parties including LUCs and LDCs. While the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Package regulate Gas Supply Contracts through rules in Directives with indirect effect, the Security of Supply crisis in 2008 provided political justification to the approval of a Regulation with general application. When measures in Directives or Regulations are under scrutiny regarding Harmonization of European Private Law governing transactions, the choice of legal regime is irrelevant to build conclusions regarding the interaction of European private law and national private law. To prove this point, chapter 5 will investigate the private law dimension of EU energy law applied to Gas Supply Contracts before and after the Security of Supply Crisis.

Since the 1<sup>st</sup> Package, Gas Directives have imposed *duties of non-precluding competition* to parties involved in Long-term Contracts in general,<sup>103</sup> and at the same time set out rules in which final customers consuming more than 25 mcm of gas annually have had the

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<sup>103</sup> 2<sup>nd</sup> Gas Directive.

right to choose gas suppliers from July 1998 thereon.<sup>104</sup> While the former refers to vague commands that neither determines the meaning of *long-term* (e.g. one or ten years long), nor defines the type of transactions (i.e. gas supply or transmission service), the rigidity of the latter is undisputable. Final customers fulfilling the consumption criteria of 25 mcm of gas annually would *ex ante* recognize their rights to freely choose gas suppliers between two or more competitors. If one takes the *internal point of view* as developed by H.L.A. Hart, semantically rigid rules suggest Harmonization as long as addressees and factual conditions for rights are determined by the EU Parliament and Council. If Lawmakers had drafted the Gas Directive differently, e.g. by defining eligible customers as large industries and leaving the legal content to be transposed and interpreted by Member States, one could expect a different outcome. The German Legislator could transpose Directives defining large consumption as more than 10 mcm annually, while the Italian Parliament could have decided to replicate the provisions of EU Law in a Decree-law without further specification. If an undertaking consuming more than 10 mcm annually in Italy had found difficulties in purchasing gas from different suppliers from July the 1998, it would have had fewer incentives to bring an action against the Italian Government for non-compliance or against network operators for not granting the transportation of natural gas purchased in Germany to Italy. Besides rights to competitive markets, chapter 5 analyses provisions on derogations rights granted to parties in LUCs with ToP Clauses. Despite the indirect effect of Directives, the semantic aspect of rules is fundamental to understand how European private law intrudes into national legal systems of private law imposing duties and granting rights.

Besides the 3<sup>rd</sup> Gas Directive, the Security of Supply Crisis of 2008 led to the approval of the 2010 Regulation with general application, which expanded rules addressed to LUCs and LDCs. Instead of granting rights to contractual parties through Directives, the Security of Supply Regulation created duties to assure the non-interruption of supply of natural gas to certain “protected customers” in case of Security of Supply Crisis. The regulation defines “protected customers” as household customers and, where the Member States concerned so decided, small and middle enterprises. The *duty of non-interruption* of gas supply in case of emergence deserves particular attention for two reasons. On the one hand, the semantic rigidity of EU Regulation determining the conditions in which suppliers cannot interrupt gas supply for “protected customers” suggests intrusion of the European private law into the national systems of private law. It removes the possibility for national judges to excuse

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<sup>104</sup> 1<sup>st</sup> Gas Directive.

suppliers for the failure of Performance due to *force majeure* in case of Security of Supply crisis. On the other hand, EU Lawmakers explicitly leave to Member States the regulatory choice of whether to consider small and middle enterprises as “protected customers”. However, different from Directives with minimum Harmonization in which Member States would transpose EU Legislation holding discretion to increase the level of protection to individuals, in Regulation, Member States can exercise discretion solely by *opting-in or opting-out* (that is, by including or excusing small and middle enterprises). A careful investigation of the open texture of EU Energy Law upholds this thesis’ conclusion regarding the interaction between the overlapping legal systems of European private law and of the 28 national systems of private law. At the same time, EU Lawmakers have approved semantically rigid rules shrinking the room for divergent implementation and interpretation regarding the legal content of norms in Regulation. With this approach, the discretion of Member States to express their regulatory choice is limited to a system of *opting-in and opting-out* alternatives.

To understand how primary rules of EU law advanced rules regulating LUCs and LDCs, it looks to contracts. Chapter 5 is divided in *four* sections. The first section starts by identifying precisely the type of contract under scrutiny – LUCs and LDCs – according to contractual parties, location in the supply chain, and type of negotiation (1). The second section stresses the reason for having a closer look at LUCs, as these are supply contracts with internal and external dimension and the cornerstone of purchasing gas *before and after* the European Positive Integration Strategy. It describes how LUCs emerged in European Gas Markets and consolidated common clauses and features before the European Integration Strategy reached Gas Markets (2). Once the preexisting common features and practices of LUCs are revealed, this thesis steps into the Europeanization of Private Law by dividing the timeline of market integration between Negative and Positive Integration Strategy. The third section answers the question on how CJEU’s speeches on the unconformity of exclusive rights and import and export monopolies indirectly affected Security of Supply Contracts between business-to-business (3). The fourth section moves from the Treaty’s measures to the EU Secondary Law, where the provisions of European Private Law flourished over the two decades of positive integration: 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Packages (4.2). It continues analyzing the changes of EU Regulation but after the security of supply crisis between 2008 and 2009 (4.1).

## 1. What are Long-Term Upstream and Downstream Supply Contracts?

While Case Study I investigated how primary rules of European private law ruled *Long-Term Capacity Reservation Contracts (LCRs)*, the second case study primarily moves the spotlight on to *Long-term Upstream Supply Contracts (LUCs)* in the gas sector. It also compares these with *Long-term Downstream Supply Contracts (LDCs)* when divergences of EU primary rules are discernable.<sup>105</sup> To delimit the object of investigation, this manuscript needs to first distinguish the object of research (LUCs and LDCs) from various other types of Supply Contracts in gas markets: sales contracts in which gas is the object of the contract. It does so by distinguishing *Gas Supply Contracts* according to the location of their performance along the supply chain (*upstream* and *downstream*); its parties (*promisor* and *promisee*); its nature (*business-to-business* or *business-to-consumer contracts*); type of negotiation (*by bilateral agreement* and *via organized market place*), as well their *duration* (long-term, spot, or prompt). It also needs to justify the methodological choice of having LUCs as one of the two cases of this thesis.

### 1.1. *Business-to-Business vs Business-to-Consumers*

Terminologies like *upstream* and *downstream* indicate the localization of agreements along supply chains.<sup>106</sup> In the gas sector, there are Gas Supply Contracts (or sales commercial contracts) in *three* different stages of the supply chain. First, Gas supply agreement could refer to *upstream* sales contracts negotiated between gas producer operating E&P (Exploring & Producing) of O&G (Oil and Gas) natural reserves (as promisor) and buyers (as promisee), who used to be gas importers with exclusive rights in a national market and, since the EU positive integration's strategy in the Energy market, could be any market actor. Gas Supply Agreements could also refer to *downstream* sales contracts negotiated between gas sellers *not* involved in E&P operation of O&G (as promisor) and buyers (promisee), who could be any

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<sup>105</sup> A Long-term Upstream Supply Contract has been commonly referred to with the acronym LTC. However, the acronym LTC is not precise enough for distinguishing Long-term supply contracts in the upstream and downstream sides of the gas supply chain. Considering this thesis's claim that duties and rights have changed according to the location of the contract along the supply chain, it's more appropriate to use the acronyms LUC and LDC to properly emphasize their differences.

<sup>106</sup> Piet Jan Slot, *The impact of liberalization on long-term energy contracts*, J. Network Industry, 2000, p. 289.

market actor except consumers. There is also a third Gas Supply Contract on the downstream side, which refers to *consumer contracts* between gas retailers (as promisor) and consumers (as promisee).

Case Study II of this thesis focuses primarily on *Upstream Supply Contracts* between gas producers operating E&P of O&G in Member States or Third-Countries and buyers in the internal market. Moreover, it does so by comparing them with *Downstream Supply Contracts* in which both gas resellers and buyers operate in the internal market.

### *1.2. Bilateral Negotiated, OTC Markets, and Exchanges*

Besides the location, there is also a need to distinguish commercial contracts according to types of negotiation. *Upstream and Downstream Gas Supply Contracts* are generally distinguished between bilaterally-negotiated *contracts* and contracts traded in an *organized market place* (OMP),<sup>107</sup> which could be either *Exchanges* or *Over-the-Counter* (OTC) Markets.<sup>108</sup> In bilaterally-negotiated contracts, gas producers negotiate directly with buyers outside OMP.<sup>109</sup> They are non-standard contracts according to the Commission Implementing Regulation 138/2014<sup>110</sup> (Implementing REMIT).<sup>111</sup> By contrast, Supply Contracts could be negotiated in OMP (Exchanges) or OTC markets. OTC Markets have evolved in a standardized way. Terms and Conditions of supply contracts are privately standardized. Trades are conducted in “clips” or multiples of 25,000 tonnes per day on NBP and, sometimes, also defined in time period.<sup>112</sup> In contrast, contracts in OTC Markets are still bilateral contracts between sellers and buyers, though intermediated by brokers. In parallel to the OTC Markets, there are OMPs negotiated in Exchange Markets as trading platforms. Supply contracts are distinguished according to the length of time for performance: spot contract (within day WD, day-ahead DA), prompt (balance of week BOW, weekend WE and

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<sup>107</sup> For the definition of OMP, Commission Implementing Regulation 1348/2014, Article 2(4).

<sup>108</sup> Patrick Heather, *The Evolution of European Traded Gas Hubs*, The Oxford Study for Energy Studies, December 2015. Heather, Patrick. “The Evolution of European Traded Gas Hubs.” *The Oxford Institute for Energy Studies* OIES Paper NG 104 (December 2015).

<sup>109</sup> Commission Implementing Regulation 1348/214, Article 2(4)

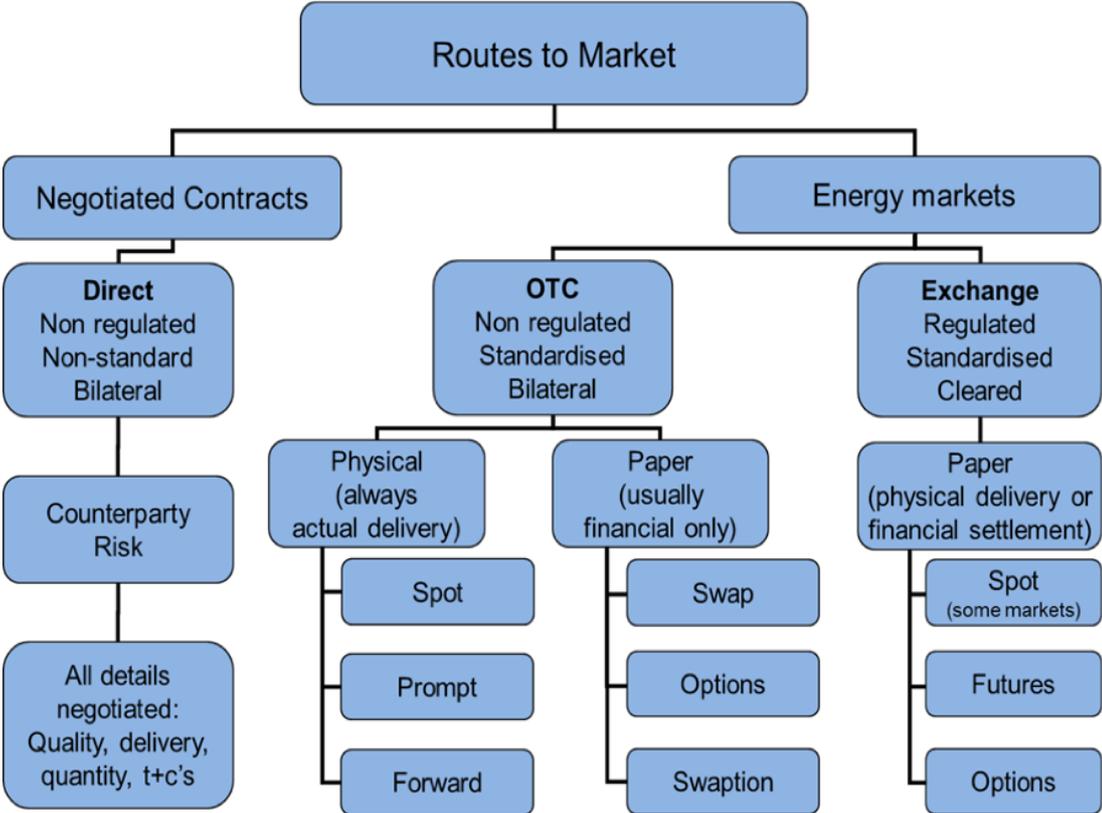
<sup>110</sup> Commission Implementing Regulation 1348/214, Article 2(3)

<sup>111</sup> Regulation 1227/2011, Article 8(2)(6).

<sup>112</sup> Heather (2015), p 8.

balance of month BM) and future contracts (monthly, quarterly, and seasonal products). The European Exchanges are: ICE, ICE-Index, EEX, Powernext, Austrian Central European Gas Hub (CEGH), and GME. Although the market had long standardized supply contracts negotiated in OMPs, EU law has moved towards ruling those contracts on both OTC Market and Exchanges through Financial Service and Energy Wholesale Regulatory acts especially with regard to *information duties*.

To illustrate the difference between negotiated bilateral contracts and contracts negotiated via organized market, this thesis borrows from Patrick Heather’ work on *the Evolution Traded Gas Hubs*.<sup>113</sup>



Heather (2015)

LUCs are long-term commercial sales contracts of natural gas between O&G Producers as seller (promisor) and large firms as buyers (promisee). O&G Production could be either

<sup>113</sup> Heather (2015), p 8.

operating in Member States (e.g. Groningen gas field in Netherlands) or not (e.g. Norway or Russia), but buyers have to be necessarily located within Member States' jurisdiction. As shown in the left side of Patrick Heather's figure, LUCs are neither traded in exchange nor in OTC Markets. This means that terms and conditions are *not* standardized by Exchanges or traders' associations, but rather are negotiated by parties. Like LUCs, LDCs are bilaterally negotiated agreements, but promisors are reselling gas rather than producing it. Nevertheless, this manuscript makes reference to *LDCs* to stress how primary rules of European private law have ruled these very similar contracts in different ways: in a nutshell, by restraining the autonomy of parties more in one type of contract than others.

Once the object of research is identified, there is a need to explain the reasons why this thesis selected LUCs as a Case Study among other types of contracts. This choice is explained by reference to Patrick Heather's figure introduced above.

## **2. Why Long-term Upstream Supply Contracts? Pre-existing and Persisting Cross-border Contracts**

For Patrick Heather,<sup>114</sup> bilaterally-negotiated gas supply contracts, like LUCs, are “non-regulated” contracts. For him, “non-regulated” contracts are agreements in which *promisor* and *promisee* negotiate all terms and conditions: quality, delivery, quantity and other terms. However, asserting that bilaterally-negotiated contracts are “non-regulated” agreements does not mean there is no law ruling these contracts. Law rules whole transactions regardless of whether they are bilaterally-negotiated contracts between legal entities or traded in organized markets. When supply contracts occur within territorial jurisdiction, national private laws apply to the transactions. When gas supply contracts occur in cross-border operations, contractual parties determine their choice of law and jurisdiction. By doing so, they are choosing the law that must set the body of rules binding individuals. When parties fail to perform, law is what enshrines rights for compensation. Therefore, propositions that contracts could exist without law in complex societies are like the statement that energy can be created without mass in transformation ( $E=mc^2$ ). It is a false statement.

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<sup>114</sup> Heather (2015), p 8.

If law rules all contracts, the question that puzzles lawyers is which rules creates reasons for actions for the legal entities involved in LUCs: duties and rights imposed on promisor and promisee while negotiating and performing this type of transaction. Here is where LUCs turn into a very interesting case study. Since the 1960s, LUCs have been agreements that share common features: they are mainly *cross-border commercial transactions* with an external dimension, which have been the cornerstone of purchasing natural gas from gas producers in all Member States. Despite the increase of liquidity of gas purchased in organized markets, LUCs continue as a bedrock contractual mechanism for the physical supply of gas in most EU Member States. Therefore, differently from other transactions in gas markets (i.e. LCRs, LDCs, and consumer contracts), LUCs are commercial contracts that have always been ruled by overlapping legal systems before and after the European Positive Integration's strategy: national laws, International Law, and only latterly EU law.

The preexisting character of LUCs allows this thesis to trace the common clauses inserted in these transactions before the EU integration strategy and investigate how primary rules of EU law have created or modified mandatory duties and rights for parties involved in commercial contracts. It does so by looking at whether primary rules of European private law have directly created rights and duties addressed to parties of LUCs, or whether primary rules have indirectly ruled LUCs by determining the violation of national laws or IGAs that do so.

### *2.1. Pre-existing and Persistent Cross-border Private Contracts*

In the previous case study, this thesis analyzed *Long-Term Reservation Capacity Contracts* (LCRs) in the electricity sector. Likewise, LCRs in gas markets are also agreements between TSOs and gas undertakings that mainly emerged in the mid- the 1990s as a response to unbundling duties imposed by EU Law. They grant rights to access natural monopolies and therefore restrict the autonomy of contractual parties to grant access. Besides LCRs, the second transaction in gas markets that attracts attention is the supply of gas to end-users as consumers or industries. Although these sales agreements are indisputably private contracts nowadays, they were commonly classified as public contracts ruled by administrative law

before the 1990s.<sup>115</sup> Given that transactions of LCRs did not exist and gas supply contracts with end-users were considered public contracts, this thesis argues that LUCs are a very particular type of transaction in the gas market, which deserves a close investigation for those who intend to understand the Europeanization of Private Law over time. There are *four* features of LUCs that justify this claim, which are related to their *timing, space, legal nature,* and the *market location* of transactions.

*Firstly*, related to timing, LUCs have been used as a negotiation mode to purchase gas from O&G producers since the 1960s, when transmission infrastructure had to be developed from scratch. Even after the positive integration strategy, as well as the emergence of OTC Markets and Exchanges, LUCs have been far from becoming a residual instrument in the gas markets. In 2014, the Commission Document on the Implementation of Security of Supply Regulation released three sets of data that ground this claim. First, the share of long-term contracted gas in annual consumption varies from 10% to as high as 150% in Member States, depending on the degree of interconnection.<sup>116</sup> For them, approximately 300 LUCs were performed in the EU and there are only few exceptional cases in which LUCs are not renewed.<sup>117</sup> In September 2016, ACER and CEER released a joint report on EU Gas Markets acknowledging that LUCs are still the “bedrock of contractual mechanism for physical supply in most EU Member States”.<sup>118</sup>

*Secondly*, concerning the transaction space, LUCs are mostly cross-border supply contracts between suppliers exploring O&G natural reserves (within Member States or Third Countries) and buyers lacking natural reserve. Apart from Netherlands, UK and Denmark, those that have held sufficient gas resources to satisfy domestic consumption at different

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<sup>115</sup> In *Law in Changing Society* of 1964, Wolfgang Friedman describes how French Law distinguished transportation services provided by State Owned Company to a private undertaking as private contracts and public service provisions between electricity provider and consumers as administrative contracts. In this regards, even when both gas suppliers and buyers in LUCs were state owned companies, their sales commercial agreement were still classified as private contract. Wolfgang Friedman (1964), p. 371-373.

<sup>116</sup> “The share of long-term contracted gas in the annual consumption varies from as low as 10% to as high as 150%. The high share of gas contracted on long-term is a usual feature of isolated markets with low level of diversified source and/or those who have LNG as a significant supply source. There are however also well-connected markets with access to various gas sources, where the share of long-term contracted gas is dominant is the annual supply volumes”. Commission Document on the Implementation of Regulation (EU) 994/2010 and its contribution to solidarity and preparedness for gas disruption in the EU, SWD(2014) 325 final, p. 18.

<sup>117</sup> SWD(2014) 325 final. See De Hauteclocque, Adrien, Ilaria Conti, and Jean-Michel Glachant. *From a Reactive to a Proactive EU Regulatory Framework for Long-Term Gas Import Contracts*. Florence School of Regulation 02, 2015. <http://cadmus.eui.eu/handle/1814/37422>.

<sup>118</sup> ACER/CEER, Annual Report on the Results of Monitoring the Internal Natural Gas Market in 2005, p. 7.

times and for different duration,<sup>119</sup> European Member States have long been known as dependent on import of gas to meet domestic demand. In the 1980s, the domestic production of gas in Italy and Germany accounted for only 8.6% and 5% of final consumption, respectively<sup>120</sup> and these circumstances remain hitherto the same.<sup>121</sup>

Considering that the majority of Member States have long had a negative Balance of Trade (BoT) in gas, the EU and Member States have relied on purchases of gas from O&G producers in Third Countries. It has been a path since gas overwhelmingly replaced coal in cookers, heaters and power-plant electricity generation in the 1980s. The lack of natural advantage in the majority of Member States forced buyers (or importers) to establish cross-border commercial contracts with large gas producers in Third Countries. Those have been mostly State Owned Firms operating in Russia, Norway, Algeria, and most recently Qatar.<sup>122</sup> Their natural gas reserves are geographically located within a distance that has enabled gas transmission through a network system of pipelines, which was the only feasible way of transporting gas in the early ages of market consolidation and continues to be the most important transportation method.<sup>123</sup>

*Thirdly*, with regard to legal nature, LUCs have always been private contracts ruled by principles of private law, rather than public contracts ruled by administrative law. When supplies of natural gas in the downstream side to end-users were conducted by legal entities with exclusive rights granted by national law (e.g. state owned firm or executive bodies),

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<sup>119</sup> Natural gas has played an important role in Netherlands since the discoverer of the Groningen gas fields in 1959, the largest non-associated gas field in Europe, whose volume of total production still allows the Netherlands the status of net-exporter. On the other hand, the production of gas in the UK portion of North Sea in the Southern Gas Basin and in the Continental Shelf has progressively decreased along the years and most recently shifted the UK to the status of net-importer. IEA, *Oil and Gas Security: Emergence Response of IEA Countries – Netherlands*, (2012), p. 17-18; *Oil and Gas Security: Emergence Response of IEA Countries – United Kingdom* (2010), p. 15.

<sup>120</sup> Terence Daintith and Leigh Hancher, *Energy Strategy in Europe: the legal framework* (1986), Berlin and New York: Walter de Gruyter, p. 60-64.

<sup>121</sup> See Eurostat, *Natural Gas indicators*, Data from February 2016. Accessed on: 13 December 2016.

<sup>122</sup> In 2015, indigenous EU production represented about 35% (157 bcm) of total EU gas consumption of 450 bcm. About 290 bcm were imported through pipelines from Russia (27%), Norway (21%), Algeria (8%), and Qatar (8%). Consequently, with total EU production expected to decrease by 2030 to about 110 bcm and EU demand expected to lie in a range between 380 and 450 bcm, EU imports from Third Countries will likely persist over the years. See, ENTSOG, Ten Years Network Development Pan 2015, <https://user-30078157.cld.bz/ENTSOG-TYNDP-2015#>.

<sup>123</sup> Although the import of gas occurs through pipelines and LNG terminals, the LNG industry in the EU represented an irrelevant market until the early 1990s and has gained substantial market share only in the early twenty-first century. Yichen Du and Sergey Paltsev, *International Trade in Natural Gas: Golden Age of LNG?* (2014), MIT Joint Program on the Science and Policy of Global Change, Report No. 271. See also ENTSO-g, op. cit.

rules of civil law were not applicable to regulate these transactions.<sup>124</sup> By contrast, LUCs have always been transactions ruled by principles and rules of private law even when both buyers and suppliers were stated owned enterprises operating through Import-Export exclusive rights.

*Fourthly*, LUCs had been traded in markets with import and export exclusive rights (i.e. legal monopolies) on both sides of the transaction: suppliers and buyers. However, this has changed since the positive integration strategy and competition between producers and buyers increased on the upstream side of the gas market. Since the EU law ruled out Import-Export monopolies in the 1990s and imposed duties of building cross-border interconnections on Member States, the degree of competition in upstream gas markets has increased on both sides of transactions, excepting Nordic and Baltic Countries. On the gas suppliers' side, the market share of the largest production and import gas companies has decreased. On the buyers' side, there has also been an increase in the number of legal entities "bringing natural gas into the country" (e.g. Belgium and Italy increased from a single importer to 21 and 78, respectively).<sup>125</sup> This has reinforced differences between the contractual governance of LUCs and LCRs. While the former are transactions in competitive markets in which suppliers usually share a dominant position, the latter are transactions in natural monopolies. This justifies some differences on how European private law has ruled these contracts, as will be stressed further in this chapter and in the concluding chapter.

## 2.2. *Pre-subjection to Plural Legal Systems*

If one tries to understand contract law from *the internal point of view*, meaning from the perspective of two or more contractual parties transacting and taking decisions according to rules of *one or more* legal systems, one would reach the conclusion that LUCs are transactions ruled by *overlapping and intersecting* legal systems since the 1960s. There are primary rules recognized by secondary rules of *three* different legal systems: national private law, International Law, and only latterly EU law.

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<sup>124</sup> Wolfgang Friedman (1964).

<sup>125</sup> See Eurostat, *Natural Gas indicators*, Data from February 2016. Accessed on: 13 December 2016.

Firstly, different from the prior case study on LCRs, LUCs have always been cross-border transactions given that most Member States have long had a negative BoT for gas. Therefore, both States where suppliers produce gas and buyers importing it have claimed jurisdiction to rule LUCs.

Secondly, above all national laws there have been rules of International Public and Private Law. Whereas rules of International Private Law regulate merely formal procedures on the choice of applicable law and jurisdiction, Intergovernmental Agreements go deeper into terms and conditions of the transactions. The first LUCs in the 1970s were commercial agreements mirroring terms and conditions concomitantly negotiated by States in International Governmental Agreements (hereinafter IGAs).<sup>126</sup> Hence, IGAs and LUCs have long been twin agreements, in which breaches in performance could provide twofold enforcement reactions: countermeasures between States, and compensation between private parties. Even after half a century, IGAs continue to be the legal instruments that set the primary rules of some LUCs, determining rights and duties imposed on parties of those commercial agreements.<sup>127</sup> At this point, it is important to emphasize that IGAs are *not* Bilateral Trade Agreements (BITs). BITs are agreements between Member States establishing term and conditions of private investments (e.g. guaranteeing compensation in case of changes in State Laws affecting the regulatory framework of investments), but not terms and conditions on the sale of natural gas (e.g. penalties for delays or the non-delivery of gas) or other commercial transactions like providing service of transportation or deposit (i.e. storage).

There are two reasons why IGAs have determining terms and conditions of LUCs. Firstly, on the supplier side, the majority of non-Member States with O&G natural reserves opted for legal regimes based on public ownership of minerals. O&G production are conducted either by state owned companies or private firms through public authorization or

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<sup>126</sup> Azaria, Danae. *Treaties on Transit of Energy Via Pipelines and Countermeasures*. Oxford University Press, 2015.

<sup>127</sup> In the Impact Assessment of the Commission accompanying the document proposal for repealing Decision No. 994/2012/EU, it is argued that IGAs continue as relevant instruments to set terms of conditions of gas supplies. "IGAs continue to be relevant in the physical delivery of commodities to the EU. Significant infrastructure projects of the past (and future) continue to rely on public supports in the form of IGA's that will need to be agreed/renewed in the coming years. In the case of gas supplies, the share of piped gas in the total extra-EU imports has reached 90% in 2014, which represents roughly 257 bcm out of a total of 286 bcm. The majority of the gas pipelines connecting the EU to its trading partners were commissioned in the period from the late 1970s to the late of 1990s and were based on contractual agreements between the project promoters and often underpinned by one or several agreements between producing, transiting and receiving countries". SWD(2016) 27 final, p. 11.

concession with varieties of restrictions on sales and exportation to foreign countries.<sup>128</sup> Secondly, most of the operations funding E&P stages or transmission infrastructure are still the beneficiaries of public funding.<sup>129</sup> These two features of the upstream side of the gas supply chain mean that LUCs are subject to highly-politicized negotiations, despite the efforts of EU in financing infrastructure projects over the last ten years.<sup>130</sup>

The third overlapping legal system is the EU legal system, whose primary rules first appeared when the EU pursued the positive integration strategy in the early the 1990s. There are *three* courses of action EU lawmakers and EU legal officials could take to rule LUCs indirectly and directly with European private law.

Indirectly, European private law appears when addressees of duties and obligations are Member States using their legal instruments to rule LUCs. In the *first* course of action, primary rules of EU law could regulate LUCs by declaring the *inapplicability* of national private laws. In the *second* course of action, EU law could also indirectly regulate LUCs by attesting the *inconformity* of rules of IGAs. Both these primary rules of European private law appear if the CJEU is referred to in infringement procedures or preliminary references. Besides doing so indirectly via ruling contracts, the Positive Integration Strategy added the *third* course of action. European private law could *directly* rule contracts while enshrining duties and obligations directly applied to legal entities involved in LUCs, or through imposing duties on Member States to do so. In the *third* course of action, EU law could also rule LUCs by enacting EU Secondary Laws determining mandatory terms and conditions binding on the parties of LUCs. Moreover, it could also directly rule LUCs by supplementing EU secondary law and competition rules in the Treaty by adjudicating authorities.

Since this thesis is committed to study how EU law has ruled contracts in Energy markets, national private laws and IGAs are *not* the main focal point of this thesis. They are relevant for this thesis only when EU legal officials establish the incompatibility with EU law of rules in national laws or IGAs that impose duties and obligation on legal entities of LUCs (i.e. the indirect course of action). Moreover, this thesis is not interested in discussing how market players have developed OTC Markets and Exchanges, nor how these markets have provoked voluntary changes from LUCs to organized markets.

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<sup>128</sup> Lucila De Almeida, *As duas Faces da Petrobras*, Master's thesis defended at FGV São Paulo.

<sup>129</sup> See footnote 20, SWD(2016) 27 final, p. 11.

Nevertheless, considering LUCs have indeed been the backbone of purchase of natural gas in Europe since the 1970s, it is relevant to examine *common LUCs' clauses and features* before the Europeanization of Private Law. On these grounds, this thesis answers the following proposition: how has EU law reacted to common features or clauses of LUCs? This part of the investigation matters in understanding whether EU Private Law has ruled LUCs by invalidating existing clauses (e.g. destination clauses), assuring their compatibility with EU law (e.g. take-or-pay clause), or creating new duties and obligations (e.g. information duties) and if so, how.

In the coming section, this thesis relies on the interdisciplinary literature<sup>131</sup> and the monitoring documents released by ACER and Commission to narrate the origins of LUCs and identify their *common clauses*: long-term duration, parties with exclusive rights on import and export, entry and delivery points, ToP clauses, destination restriction clauses, and oil-price indexation. Although common clauses of LUCs have been vastly reported by scholarship and policy documents, there is little research distinguishing whether some of these clauses derived from duties imposed by IGAs prior negotiated between Member States and Third Countries or national laws, or they have been inserted by parties as customary commercial practices.<sup>132</sup> Yet, since this thesis is concerned with how EU law has ruled contracts, instead of how IGAs or national laws rule them, the lack of data on IGAs terms and conditions does not undermine the methodology of this thesis as long as infringement procedures against IGAs or Member States' laws have to comply with the principle of publicity of EU law.

### *2.3. Common Clauses and Features before Market Integration*

Different from sales traded in OTC Markets and Exchange, LUCs are *not* standard-form contracts. They are commercial contracts with terms and conditions negotiated between

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<sup>130</sup> See footnote 20, SWD(2016) 27 final, p. 11.

<sup>131</sup> Konoplyanik, A. "Russian Gas to Europe: From Long-Term Contracts, On-Border Trade and Destination Clauses To...?" *Journal of Energy & Natural Resources Law* 23, no. 3 (2005): 282–307. Block, Guy. "Arbitration and Changes in Energy Prices: A Review of ICC Awards with Respect to Force Majeure, Indexation, Adaptation, Hardship and Take-or-Pay Clauses." *ICC International Court of Arbitration Bulletin* 20 (2010): 51–109. Hobér, Kaj. "Recent Trends in Energy Disputes." In *Research Handbook on International Energy Law*, edited by Kim Talus, 225–40. Edward Elgar Publishing, 2014.

<sup>132</sup> Both IGAs are confidential international agreements. The Commission has increased its knowledge about IGAs since 2012. This was possible after the SoS Regulation and Decision imposed duties on Member States and private parties in LUCs to disclose some contractual clauses to the Commission (see section 4.2 below).

parties, according to duties and obligations imposed by a complex multi-level legal system. Nevertheless, LUCs are commercial agreements that have been the cornerstone of the purchase of natural gas in Europe since the 1970s, in which few suppliers were located either within the Community or in Third Countries connected by pipelines.

Considering the restricted number of gas producers and suppliers to Europe, LUCs have been commercial contracts sharing *common clauses*. Some of the clauses have been the object of interdisciplinary studies, EU Policy Documents, Commission investigations and Arbitral Awards, which allowed this thesis to identify and reconstruct the main clauses and features of LUCs starting from a set of terms and conditions conventionally called *Groningen Contractual Model*. Besides compiling scholarship and official documents, this thesis also bases its investigation on the *Gas Model Contract* endorsed by the Association of International Petroleum Negotiators (AIPN).<sup>133</sup> Although members are not bound to use or endorse the contractual model, the document reflects a certain degree of agreement between natural gas producers.

To understand the origins of commercial practices and the features of LUCs in Continental Europe, Aad Correljé, Coby van der Linde and Theo Westerwoudt argue that there is a need to trace terms and conditions of LUCs trading natural gas from the Dutch Groningen gas field to Continental Europe.<sup>134</sup> LUCs were originally the type of negotiation used to export gas from the large reserve of natural gas discovered in 1959 in the Groningen Gas Field. As the Dutch Government opted to grant exclusive right to export gas to NAM/Gas Export, it concentrated the sales of gas in one single seller, which then traded with buyers located in Germany, Belgium, France, and Italy since the 1960s. Contractual Practices and features found in agreements between NAM/Gas Export and gas undertakings like E.ON, Distrigas, Gaz de France, and ENI became later reference points for further O&G producers importing to Continental Europe.<sup>135</sup>

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<sup>133</sup> AIPN, Gas Model 2006.

<sup>134</sup> Aad Correljé, Coby van der Linde and Theo Westerwoudt, *Natural and Gas in Netherlands: From Cooperation to Competition?* (2003) Amsterdam-Zuidoost: Oranje-Nassau Groep.

<sup>135</sup> To illustrate the spillover of this contractual governance into the EU, let's consider the main suppliers of natural gas to continental Europe: State Owned Firms in Russia, Nigeria and Norway. Gazprom employed the Dutch model to export to Germany, Austria, France and Italy in the early 1970s, which was replicated in the early 1980s under the SGE IV project. Over the same time, Algerians replicated similar terms to export to Italy via pipelines, as well as to France, Belgium, Greece and Spain through LNG (Liquefied Natural Gas), which was again used in the early 1990s to export to Spain and Portugal via the Maghreb pipeline. In the same area, prior to the construction of the Nigeria Liquefied Natural Gas Project in 1989, the Nigeria gas producer and project

By saying this, this thesis describes some of these clauses starting from the most obvious one: the long-term duration of upstream transactions.

### 2.3.1. Long-term Duration: from 8 to 25 years long relationship

LUCs have always been very long-term contracts and they continue to be renewed with very long-term duration. The average length of LUCs in 1985 was about 15 and 25 years.<sup>136</sup> With the renovation of some LUCs, the average length has shrunk to about 8-15 years, in particular from 1998 on.<sup>137</sup> According to the Commission, in 2014 “approximately 300 long-term contracts exist in the EU. Regarding duration of these agreements, a balanced distribution is visible: 31% of them run for 1-10 years; 33% run for 10-20 years and 36% in force for more than 20 years”.<sup>138</sup>

In the early years of gas markets, the emergence of LUCs on the upstream side was grounded mostly in economic reasons: the recovery of up-front investment costs for building pipelines and financing E&P operations in O&G industry.<sup>139</sup> Besides the network infrastructure, the increasing demand for O&G worldwide required more investment in E&P operations. LUCs would then assure the return of high up-front cost investments running by either side of the contract.<sup>140</sup>

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sponsors entered into a similar agreement with ENEL of Italy, Enagas, and Gas de France. In the aftermath, Statoil started to export gas from the large Troll gas field to Germany, Netherlands, Belgium, France, Austria and Spain in the 1990s by adopting the LUCs imbued in the Groningen model. This is certainly not an exhaustive list of LUCs in the EU through history, but a mere illustration of the extent to which the EU's larger suppliers of gas adopted the Groningen model. Energy Charter Secretariat. *Putting a Price on Energy: International Pricing Mechanisms for Oil and Gas* (2007), p. 143. Correljé, Coby van der Linde and Theo Westerwoudt, p. 67.

<sup>136</sup> For a quantitative analysis, see Anne Neumann and Christian von Hirschhausen, *Less Long-Term Gas to Europe? A Quantitative Analysis of Europe Long-Term Gas Supply Contracts* (2004), *Zeitschrift für Energiewirtschaft*, Vol. 28, No. 3, p. 177; and Jonathan Stern, *Security of European Natural Gas Supplies* (2002) London: the Royal Institute of International Affairs, p. 9.

<sup>137</sup> For a quantitative analysis, see Anne Neumann and Christian von Hirschhausen (2004), p. 180. See also Heather (2015).

<sup>138</sup> SWD(2014) 325 final, p. 18.

<sup>139</sup> Karsten Neuhoff and Christian von Hirschhausen, *Long-Term vs. Short-term contract: a European Perspective on Natural Gas* (2005), *op. cit.*, p. 3-5.

<sup>140</sup> See Kim Talus, *Long Term Gas Agreement and Security of Supply? Between law and Policies?* 32 (4) *European Law Review* (2007), p.536.

Within this context, LUCs were instruments to tie durable and transaction-investment operations as described by Williamson in his theory of relational contracts.<sup>141</sup> From the O&G producer's side, long-term agreements were the imperative model to ensure the recovery of extremely high up-front costs not only derived from drilling, exploring and producing gas, but also the investment in infrastructure of pipelines to transport gas from reserves to the boundaries of its own territory, named exit points. From the buyer's side (or importer) – which before the liberalization was composed mostly by national and local companies covering simultaneously distribution and supply operations – there were also investments in infrastructure systems to develop the national pipeline network from entry points at their boundaries to the end-user. Furthermore, either producers or imports, together with third parties or not, were usually engaged in joint investments in cross-border transmission pipelines. Often these transnational network operations pass through the territory of Member and non-Member States or under off-shore courses to reach the location of end-users, which required complex investments and contractual arrangements between LUC's parties, parties in transit countries, and States.

Although the economic argument on functionality of long-term duration of LUCs is persuasive when it is associated with high up-front investments, this justification becomes less persuasive to explain the renovation of LUCs over the years. Thus, the persistence of LUCs contracts is usually justified by its second functionality: *security of supply*. Since most Member States have always had a negative balance of trade,<sup>142</sup> LUCs guarantee supply for consumption reducing the risks of a supply crisis. This is how EU law had perceived LUCs until the 2008 supply crisis. This topic will be better developed in the coming subsections.

### 2.3.2 Parties: between Import and Export Monopolies

Before EU liberalization, LUCs were transactions made between suppliers (or exporters) and buyers (or importers) with Import-Export exclusive rights guaranteed by the national laws of the legal systems in which both legal entities were established. The private

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<sup>141</sup> Williamson (1979). See also Anna Creti 2003. Benjamin Klein, Robert G Crawford and Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process* (1978) *Journal of Law and Economics*, Vol. 1, No 2, p. 297-326; and Oliver E. Williamson, *Credible Commitments: Using Hostage to Support Exchanges* (1983) *The American Economic Review*, Vol. 73, No. 4, p. 519-540.

<sup>142</sup> See Eurostat, *Natural Gas indicators*, Data from February 2016. Accessed on: 13 December 2016. [http://ec.europa.eu/eurostat/statistics-explained/index.php/Natural\\_gas\\_market\\_indicators](http://ec.europa.eu/eurostat/statistics-explained/index.php/Natural_gas_market_indicators).

dimension of those national laws is revealed by considering exclusive rights as imposing duties on parties of LUCs, thereby restricting their autonomy about whom to trade with.

For suppliers and buyers within the common market, EU Member States maintained Import-Export exclusive rights over the EU negative integration strategy's restricting to one or few entities the right of being party in LUCs until the positive integration strategy. This thesis discusses the CJEU's decisions in the coming sections. By contrast, for suppliers operating in third countries, EU law does not provide reasons for actions. It has no power to declare whether national laws of Third Countries violate EU law or not.<sup>143</sup> Third countries are thus sovereign to determine their foreign policy, including export and import of energy. Furthermore, commonly States with large natural O&G reserves have long restricted their gas exports through different legal arrangements.<sup>144</sup> Some gas producers outside the Union have continued to operate E&P under exclusive export rights, others under national legal regimes authorizing or providing concessions with restrictions concerning the trade of gas (e.g. restricting volume of gas, single seller mechanism).<sup>145</sup>

### *2.3.3. Take-or-pay Clause*

The Groningen model of gas supply transactions pioneered the transplant to Continental Europe of the take-or-pay clause already used in the US. Since then, take-or-pay clauses have been reproduced in the absolute majority of LUCs importing gas to EU. This is the reason why the literature and legislative acts used to refer to LUCs contracts with take-or-pay clauses as “take-or-pay” (ToP) supply contracts. ToP supply contracts are then a specific type of LUCs, necessarily including ToP clauses.

Prior to 1960 in the US, gas producers overlooked the fluctuations in gas demand between seasons – high in winter, lower in summer – thereby creating financial hardships. Winter times forced gas purchasers, who used to be pipeline owners, to acquire an overabundance of production capacity from producers. To serve their interests, these buyers insisted on preempting and reserving exclusive rights to the gas production capacity of the

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<sup>143</sup> Daintith (1987).

<sup>144</sup> Espa, Ilaria. *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines*. Cambridge: Cambridge University Press, 2015.

<sup>145</sup> See Lucila de Almeida (2011).

seller, albeit with the former under no obligation to buy if supply surpassed demand. As a result, when buyers acquired a lower volume of gas during summer, producers were unable to sell the remnant volume to third parties because of the exclusive dedication clause, which provoked a loss of gas sales revenue. ToP clauses were then drafted to safeguard the interests of producers. They require the buyer to purchase a minimum volume of gas for each period based on daily rate of production. Regardless of whether the buyer takes the minimum quantity of gas or less, the contractual obligation requires full payment for the minimum quantity.<sup>146</sup> A typical ToP clause resembles the text below:<sup>147</sup>

Article 1.1: Annual take-or-pay:

(1) in respect of each Contracts Year the Buyer will either take and pay for or, if not taken, pay for a minimum quantity of natural gas (the 'Minimum Quantity') and such quantity shall be the Adjust ACQ for that Contract Year calculated as provided in ARTICLE 1.1(2) below; (2) If in any contract year the Buyer takes and pays for less than the Minimum Quantity for that contract year the buyer shall pay for the shortfall (expressed in the mega joules) at a price equal to the Prevailing Contract Price.<sup>148</sup>

Although ToP clauses were first introduced into LUCs to protect the producer from the opportunistic behavior of buyers, the condition indeed has benefited both parties as far as gas demand increased at the global level. On the producers' side, ToP conditions shielded them by assuring certain minimum revenues regardless of their off-take. The importer, on the other hand, boosted its security of supply. From the time of the formation of Dutch model to the current LUCs in performance, Russia (then the Soviet Union) has implemented ToP clauses in all long-term agreements since the 1970s. According to a recent study on the European

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<sup>146</sup> In the English Court of Appeal case of 1992, *Conoco Limited v. Foxboro Great Britain Limited*, the English court concluded that the obligation of the buyer of the service to pay for the shortfall from the minimum quantity in take-or-pay clauses did not arise from a breach of contract but from a separate obligation to make good the shortfall. Distinguishing the legal nature of minimum quantity obligation, whether it is regarded as being a payment made in respect of a breach of contract or a payment made under a separate obligation, is important to the application of the law of penalties, the law under which agreed damages are considered by the court to be excessive are not recoverable. See Michael Brothwood, *The E.U. Gas Directive and Take or Pay Contracts*. *Oil & Gas Law and Taxation Review*, no. 138 (1998): 320–21.

<sup>147</sup> Michael Brothwood and Denton Wilde Sapte. *Take-or-Pay Contracts*. In *Gas Trading Manual: A Comprehensive Guide to the Gas Markets*, edited by David Long, Geoff Moore, and Gay Wenban-Smith. Elsevier, 2001.

<sup>148</sup> We can also find another illustration about how the take-and-leave clause has been drafted in J. Michel Medina, *Take-or-pay Oklahoma Style* (1989), *The Oklahoma Bar Journal*, Vol. 60, N. 12, p. 705. "Buyer agrees to purchase and receive from seller or to pay for it if available but not taken, a quantity of gas equal to the Sum of the Daily Contract Quantities herein specified (...). The Daily contract quantity shall be daily rate of production equal to seventy-five per cent (75% of the delivery capacity of each well)". See also J. Michel Medina, *The Take-or-Pay wars: a Cautionary analysis for the Future* (1991), *Tulsa Law Review*, Vol. 27, Issue 2, p. 288.

dependence on Russian gas, LUCs were originally signed with a ToP level of 85% of the delivery capacity of each well and, post-2008, it has been reduced in many of these contracts to 70%.<sup>149</sup>

ToP clauses being instruments to assure security of supply, the EU has created incentives for their perpetuation since the first hints of the positive integration strategy. LUC contracts with ToP clauses had derogation access rights in TPA systems as this thesis explains in the coming section 4.

#### *2.3.4. Entry-Exit Point based on Point-to-Point Contractual Physical Capacity*

Commercial contracts involving sales of goods commonly establish the *place of delivery*. If one purchases goods online, the fulfillment of the obligation is accomplished when a postal service delivers the good to the address indicated by the buyers. Natural Gas is a traded good and, like any sales agreement, it requires the establishment of *places of delivery*. However, instead of addresses as reference for place of delivery, gas supply contracts use as reference entry and exit delivery points, which are precise locations along pipelines. Before liberalization, parties of LUCs used to negotiate the physical location where the gas would be injected and withdrawn along pipelines. These clauses were compatible when the system of pipelines (within and connecting Continental Europe) relied on transmission based on the market model called *point-to-point contractual capacity rights*.<sup>150</sup> When pipelines were project-financed on the back of long-term supply contracts, one or more parties of LUCs held ownership and operated transmission systems as single pipelines that

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<sup>149</sup> Ralf Dickel, Elham Hassanzadeh, James Henderson, Anouk Honoré, Laura El-Katiri, Simon Pirani, Howard Rogers, Jonathan Stern and Katja Yafimava (2014), *Reducing European Dependence on Russian Gas: distinguishing natural gas security from geopolitics*, Oxford Institute for Energy Studies, OIES Paper: NG 92, p. 4-5. Although the study is conclusive about the contractual governance change, the reduction of take-or-pay level from 85% to 70%, the data does not cover how this reshaping in governance has in fact occurred, whether it has taken place while contracts were subject to renewal or if there were renegotiations of valid contracts. Additionally, the authors included a disclaimer that long-term gas contracts are subject to commercial confidentiality, which makes it difficult to be categorical about their terms.

<sup>150</sup> “In the EU the pipelines also sold long term point-to-point transportation contracts for decades as it worked so well with long term gas buying contracts upstream and franchise distribution monopolies downstream”. Vazquez, Mighel, Michelle Hallack, and Jean-Michel Glachant. “Gas Network and Market: À La Carte?” *Robert Schuman Centre for Advanced Studies*, no. RSCAS 2013/73 (n.d.). See also Vezquez, Miguel, Michelle Hallack, and Jean-Michel Glachant. “Building Gas Market: US versus EU, Market versus Market Model.” *European Energy Journal* 2, no. 1 (April 2012): 37–47.

linked two points: from the promisor to the promisee of the LUCs.<sup>151</sup> *Point-to-point capacity contractual rights* of using pipelines then guaranteed the performance of LUCs. In that context, the gas supply chain was vertically integrated or quasi-vertically integrated and capacity rights were set intra-firm or through Long-term Capacity Reservation (LCRs). Moreover, non-discrimination duties were not enforced in Energy Markets, nor did third-party access rights exist in EU Energy Law.

With the gradual opening of transmission systems to the market, LUCs still have to specify the location where the gas is injected and withdrawn, as any other supply contract in OTC Markets and Exchange Markets.<sup>152</sup> However, they no longer correspond to the precise physical location represented by the point-to-point model, but through *entry-exit schemes* that could correspond to physical or virtual delivery zones.<sup>153</sup>

### 2.3.5. *Destination Restriction Clauses: from territorial/use restrictions to profit sharing*

LUCs were commonly negotiated with resale prohibitions or restriction clauses imposed on buyers. Since the Groningen Model, there have been two different categories of destination restriction clauses commonly associated with LUCs transported via pipelines: territorial or use restriction. Later, with gas delivered in LNG Terminals, resale restriction associated with profit sharing clauses started to be included in LUCs shipped to LNG Terminals. All types of destination restriction clauses – territorial, use, and profit sharing – has been the object of investigation by the Commission since the early 2000s and they continue in some LUCs delivered for Eastern European Countries, as will be discussed in the following chapter 6. At the moment, it is important to outline a short description of the content of these clauses.

The territory restriction clause was designed to prohibit buyers from reselling gas into other neighbors or regions beyond the territory for which it was originally delivered (i.e. exit

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<sup>151</sup> Ruff, Larry E. “Rethinking Gas Markets--and Capacity.” *Economics of Energy & Environmental Policy* Volume 1, no. Number 3 (2012). [http://EconPapers.repec.org/RePEc:aen:eeepjl:1\\_3\\_a01](http://EconPapers.repec.org/RePEc:aen:eeepjl:1_3_a01).

<sup>152</sup> Implementing Regulation No 1348/2014, Article 2(b)(c)(f).

<sup>153</sup> Hallack, Michelle, and Miguel Vazquez. “European Union Regulation of Gas Transmission Services: Challenges in the Allocation of Network Resources through Entry/Exit Schemes.” *Utilities Policy* 25 (June 2013): 23–32.

point).<sup>154</sup> Irrespective of whether the demand was lower than the minimum volume gas contracted though ToP clauses, territorial restrictions precluded the flow of gas in the internal market since buyers could not resell gas to undertakings beyond its territory restriction, which used to correspond to national territory or specific national zones. First introduced by Dutch firms in the EU gas market in the 1970s, territory restriction assured that gas sold with a low price at the exit point at the Dutch borders, designated for far way markets like Italy, were not used to undercut higher priced gas sales in the German market, for instance.<sup>155</sup> Gas producers in Third-Countries then replicated territorial restriction clauses in their contracts. Besides territorial restrictions, there were also resale prohibitions restricting the use of contracted gas. While the former precluded the buyer of LUCs' from reselling gas to undertakings in different Members State or regions, the latter have not targeted geographic barriers, but market players. For example, buyers in LUCs could not resell gas to fossil fuel power plants, which would have had to trade directly with gas producers.

In a market with unbalanced bargaining power and low enforcement of competition rules, sellers have economic incentives to exclude the power to resell gas. Gas producers would retain control of the prices traded in the upstream and downstream supply contracts in different territorial destinations.<sup>156</sup> Market conditions explain why territorial and use restriction clauses persisted in LUCs in Western European Countries until the early 2000s, as well as the fact that they continue to persist in some Eastern European Member States.

While territorial and use restrictions clauses are commonly associated with LUCs performed via pipelines, profit sharing mechanisms have been introduced in transactions involving gas shipped to LNG Terminals. Whereas point-to-point transportation via pipelines determined the exit-point location, gas transported in LNG ships (carriers) could be deviated to a different port of destination – to a different LNG terminal. Profit sharing mechanisms have been inserted in LUCs to split the additional profit made by buyers if the destination of the LNG carriers is reallocated to a different LNG terminal, not foreseen in the agreement. Such request to deviate the ship could take place when gas price in the market served by the port of destination drops and becomes lower than in other locations served by different LNG

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<sup>154</sup> Kim Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law* (2011) Wolters Kluwer Law & Business, p. 159.

<sup>155</sup> Aad Correljé, Coby van der Linde and Theo Westerwoudt, *Natural and Gas in Netherlands: From Cooperation to Competition?* (2003), op. cit., p. 68-69.

<sup>156</sup> Anthony J. Meeling. *Natural Gas Pricing and Its Future: Europe as the Battleground* (2010), Carnegie Endowment for International Peace, p. 69.

Terminals. Therefore, buyers have economic incentives to change the port of destination. Profit sharing restriction clauses impose duties on buyers to share the profits with gas producers derived from the resale of gas in markets with higher wholesale price.<sup>157</sup>

### 2.3.6. Oil-indexation price and Renegotiation Clauses

Last but certainly not least in importance, LUCs have been traded with oil-indexed price clauses in Continental Europe until very recently.<sup>158</sup> Suppliers and buyers used to rely on prior negotiated algorithms for determining the gas price in long-term supply contracts. As a variable in the equation, LUCs endorsed the indexation of oil products (i.e. crude oil or gasoline prices) with periodic reviews every three years.<sup>159</sup> Since 2008,<sup>160</sup> LUCs have been either renegotiated or renewed by replacing oil-indexation clauses with hub-indexation prices (or gas-to-gas market prices). According to the estimation in the ACER/CEER Gas Market monitoring report of 2016,<sup>161</sup> 64% of the physical volume purchased in Europe is hub-price linked.<sup>162</sup>

Going back to the 1960s, the EU gas market was not effectively launched until the discovery of the Groningen field, which was a large onshore reserve with low costs of development and production. In order to maximize revenues for the Netherlands by charging royalties over gas exports, the Minister of Economic Affairs approved the Dutch gas policy in 1962 with a domestic public law including, among other conditions, a gas pricing mechanism

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<sup>157</sup> Harold Nyssens and Iain Osborne, (2005), p. 26-27.

<sup>158</sup> Luca Franza, *Long-term Gas Import Contracts in Europe: the Evolution in Pricing Mechanism*, CIEP, 2014, p. 12.

<sup>159</sup> Jonathan Stern and Howard V Rogers, *The Dynamics of a Liberalised European Gas Market: key determinants of hub prices, and roles and risks of major players* (2014), The Oxford Institute for Energy Studies, OIES Paper: NG 94, p. 2.

<sup>160</sup> Harris, Nigel. "Should Natural Gas Prices in Europe and Asia Be Delinked from Oil?" *The Oxford - Princeton Programme*, December 2013. Stern, Jonathan, and Howard V Rogers. "The Dynamics of a Liberalised European Gas Market: Key Determinants of Hub Prices, and Roles and Risks of Major Players." *The Oxford Institute for Energy Studies OIES Paper NG 95* (December 2014).

<sup>161</sup> ACER/CEER Report, Annual Report on the Results of Monitoring the Internal Natural Gas Markets, September 2016, p. 7. See also Heather, 2015, p. 13.

<sup>162</sup> Heather stressed the existence of LUCs in central Europe that have neither oil-indexed price, nor hub-indexed prices. In Central Europe, 15% of LUCs importing are based either on cost-of service or non-market based prices (i.e. politically-motivated prices). Yet the volume of gas purchased with these price mechanisms are irrelevant within the EU. See Heather, 2015, p. 12-15.

called market value principle.<sup>163</sup> In spite of using a cost-plus pricing approach – which means pricing the good according to production cost with a reasonable *surplus value* added – the national government choose to weigh the price of gas with that of other fuels, principally oil products. As a justification, the Netherlands’ government argued gas was by nature a good that would compete with oil and coal for home heating and power generation.<sup>164</sup>

While oil-indexation pricing in LUCs was an invention of Dutch authorities imposed on gas producers in the Netherlands, non-Dutch gas producers in Continental Europe replicated the price mechanism and it became the reference price of gas for over half a century.

Notwithstanding the persistence of the oil-indexation price in LUCs over half a century, this pricing mechanism has rapidly changed since 2009. The sudden increase of liquidity of gas traded in organized markets (i.e. Exchanges) for contingent reasons over 2008 and 2009<sup>165</sup> provoked the decoupling of Gas Hub Prices from the average price of contracted gas in LUCs, whereby the former was lower than the later. Given the transparency of gas prices in Exchanges,<sup>166</sup> buyers in LUCs started to claim difficulties in reselling gas in the downstream gas markets. This motivated suppliers to bring disputes in Arbitration Courts invoking renegotiation clauses<sup>167</sup> based on rights to review oil indexation prices on account of *force*

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<sup>163</sup> It is worth reading the historical research done by Aad Correljé, Coby van der Linde and Theo Westerwoudt. The authors dug official documents to come up with how the negotiation between the Netherlands Minister and the oil and gas firms DSM, Shell and Exxon ended in the market-value principle. “Thus, three years after the discovery of the large Groningen gas field in 1959, the Minister of Economic Affairs, de Pous, established the main principles of the Dutch gas policy in the *Nota inzake het aardgas* (“*Nota de Pous*” – MEZ 1962). In order to generate maximum revenue for the State and the holder of the concession, NAM, the Minister introduced the “market-value” principle as the basis on which the gas should be produced. The price of gas was linked to the price of alternative fuels that were most likely to be substituted by the different types of consumers (e.g., gas oil for small-scale users and fuel oil for large-scale users). Accordingly, consumers would never have to pay *more* for gas than for alternative fuels, but the market-value principle also ensured that they would not pay *less*”. Aad Correljé, Coby van der Linde and Theo Westerwoudt, *Natural and Gas in Netherlands: From Cooperation to Competition?* (2003), op. cit. p. 34. Correljé, Aad, Coby van der Linde, and Theo Westerwoudt. *Natural Gas in the Netherlands: From Cooperation to Competition?* Amsterdam: Oranje - Nassa Groep, p. 34

<sup>164</sup> Harris, Nigel. “Should Natural Gas Prices in Europe and Asia Be Delinked from Oil?” *The Oxford - Princeton Programme*, December 2013.

<sup>165</sup> Gas demand in the EU dropped 5.7% in 2009 and a further 11% in 2013. Combining the 2008 financial crisis with the loss of market share due to the growth of renewables consumption, gas producers faced the problem of production surplus and to solve it they reallocated the remnant gas to hubs. The consequence was an unprecedented increase of liquidity in gas traded in OTC Markets and Exchanges, which are the reference for hub prices. This economic conjuncture lead to the detaching of the hub price from the oil-indexation price of LUCs. Graphics comparing gas prices purchased by LUCs and Hubs showed a divergence form June of 2008 after five years of convergence.

<sup>166</sup> Heather emphasizes the importance of transparent prices of Exchanges as the reason for triggering the renegotiation of LUCs.

<sup>167</sup> Block (2010).

*majeure*. By the sequential releasing of Arbitration Award in favor of buyers,<sup>168</sup> the massive renegotiation of LUCs has rapidly lead to the increase of volume of gas purchased with Hub-price indexation.

Bearing in mind the common clause and features of LUCs in the EU gas market, this thesis moves to analyze EU law, how it reacted by ruling contracts either to expand, guarantee, or restrict autonomy.

### **3. Negative Integration through Private Law: Import-Export and Exclusive Rights**

By reading common features and clauses of LUCs, someone could have hit the nail on the head inquiring as to the extent to which clauses like use or territorial restrictions have not infringed EU competition rules and also the most fundamental values of the Treaty since the Treaty of Rome. National laws imposing Import Monopolies restricted the autonomy of suppliers in relation to their freedom of choosing promisees in LUCs, as much as Export monopolies restricted the freedom of buyers. Territorial restriction clauses preclude the flow of gas from Member States geographically located close to the producers' borders to further Neighboring States within the Union and, therefore, this contractual barrier could be contested as an infringement to the free movement of goods. Moreover, gas producers' behavior of charging different prices for the same good could be arguable as well as a transgression of the non-discrimination principle. Altogether, semantically *vague rules* of the Treaty of Rome – freedom of goods and services, non-discrimination, and competition – could have been used to raise either a claim against the national law as regulatory barrier to trade, or customary negotiated clauses since the 1960s.

However, if today there is mainstream consensus that commercial practices in LUCs (e.g. territorial restriction) or national laws (e.g. Import-Export restriction) were incompatible with the Treaty, the legal discourse was different before the 1990s. Throughout the two

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<sup>168</sup> In 2009, Guy Block reported disputes brought to the International Court of Arbitration requesting the review of oil-indexation. LUCs' buyers reported resellers' difficulties when hub-prices were lower than oil indexation prices. In its review of ICC awards, the Arbitration Court tended to accept the buyers' claim that the decoupling of gas-hubs prices from Brent prices filled a *force majeure* reason for renegotiation of oil-indexation clauses. In 2014, Kaj Hóber describes the renegotiation of oil-indexation clause of LUCs as a trend in energy disputes. See Guy Block (2009), Kaj Hóber (2014).

decades of European Integration through Negative Strategy, the Gas Sector, similar to electricity and other Utility industries (and Universal Services) such as telecommunication and Railways, was perceived as an “activity of non-economic interest” not only by the CJEU and national Courts, but worldwide. By perceiving the Natural Gas Industry as a non-economic activity, the EU Legal System excluded it from the scope of the Internal Market. Even though LUCs and LDCs were commercial transactions where parties freely negotiated terms like prices and delivery conditions from the late 1960s, they were still perceived as of “non-economic interest”. This fact upholds Gather Davies’s assertion about the legal concept of non-economic interest: non-economic interests can be treated as derogation from economic ones.<sup>169</sup> However, the ideological and later political movement towards the Liberalization (or commodification) of Network industries – first in the United States and United Kingdom in the late 1970s and early 1980s – undermined the legal argumentation that Utility Industries were a non-economic activity. The change of legal discourse was then consolidated when endorsed by the CJEU.

To understand how the change of the *legal discourses* in perceiving the Gas Industry from non-economic to economic interest affected Gas Supply Contracts between businesses, there is a need to first understand how *speeches of* the CJEU affected the national legal systems of Member States. Particularly in the Natural Gas Industry, Member States used to grant two types of exclusive rights with different purposes. One was the Import-Export exclusive right in the Upstream side of the supply chain.<sup>170</sup> The other referred to exclusive rights granted to operators of Universal Services: the supply of natural gas for end-users as customers and consumers associated with Public Service Obligations or Services of General Economic Interest. While the former were addressed to LUCs, the latter targeted LDCs and Consumer Supply Contracts.

On the upstream side, Member States granted Import-Export exclusive rights. Member States producing Gas granted exclusive rights to one or more legal entities (privately or publicly owned) to explore, produce, and offer gas within and beyond national’s borders. This

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<sup>169</sup> Gather Davie (2013).

<sup>170</sup> In 1986 Terence Dainith and Stephen F. Williams published a remarkable work on the effects of the European Integration in the Energy Market under the framework of the European Market Integration Project (Integration through Law Project) hosted by the European University Institute. By comparing the energy markets in Europe and the United States and the effects of the European Integration in the Gas Market, Dainith and Williams challenged the understanding of that the Gas Industry in upstream level as an activity of “non-economic interest”. The normative proposal for the Energy Sector included the unconformity of Import-Export Exclusive Rights according to the provisions of the Treaty. Dainith and Williams (1987).

was the regulatory framework of both the Netherlands and Denmark. On the buyers' side, Member States importing gas also granted special rights to one or more legal entities to bargain and purchase gas beyond national borders. Import-Export exclusive rights compromised to a great extent the cross-border trade. Upstream Gas Supply Contracts were transactions in which the *entry point* and *exit point* connected only Gas Producers with Gas Importers. Once the gas crossed the territorial borders of the Importer, it was allocated in the domestic market. For this reason, ToP clauses in LUCs were attractive for both Gas Producers and Gas Importers. They allowed gas producers to plan the extraction of gas according to the provisional consumption of Member States importing natural gas. Within this Governance design, wholesale Markets barely existed until the 1990s.

Besides Import-Export exclusive rights, Member States also granted to one or few legal entities the exclusive rights to supply gas to end-users on the downstream side of gas markets. Legal entities holding legal monopolies had rights to exclusively supply consumers and customers. In some Member States, the legal entity holding the exclusive to import natural gas (e.g. Gaz de France in France and ENI in Italy) was the same juridical person entitled to operate the supply of gas downstream.

If today those exclusive rights are incompatible with the Treaty, the Legal Doctrine was different before the 1990s. Despite the *Costa v. Enel case* being widely known for the establishment of the *principle of supremacy* of the EU Legal System, the case is remarkable also for distinguishing Universal Services as operations with non-economic interest. While the Court accepted the formal claim in Law of Mr. Costa on the *direct effect* of the provision of the Treaty, the judges rejected his material claim asserting that nationalization of Enel by the Italian Government violated the Treaty's provisions. *Enel* being an Italian electricity operator, the Court argued that the supply of electricity to end-users is an operation of "non-commercial character".<sup>171</sup> In so doing, the Court basically excluded Electricity services from the Market Integration project. The perception of Universal Services as activity of non-economic interest was later reinforced by the *Sacchi case*, in which the Court established that

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<sup>171</sup> The landmark cases C-6/64, *Costa vs Enel* [1964] ECR 1253, the Court concluded that Article 37(1) ECC Treaty should not preclude Member States from creating any State monopolies, "but merely those of a commercial character" with two features: "first, have as their object transactions regarding commercial products capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade". The Court decided that electricity sector did not have a commercial character.

postal service monopolies could be justified by “public interest of a non-economic nature”.<sup>172</sup> The legal reasoning of the Court was grounded on the interpretation of Articles 37 and 90 of the ECC Treaty.<sup>173</sup> The Treaty’s measures did not list Universal Services as an operation of non-economic interest; neither did they categorically state the conformity of exclusive rights with EU Law. The conformity of exclusive rights for natural Gas Industries was a legal discourse constructed by the CJEU judgments applied to Universal Services on the downstream side of the supply chain, which nevertheless spilled over to the upstream side. Therefore, the Court’s precedents upheld the understanding of monopolies operating in the Energy Sector through the supply chain as activities of non-economic interest.

Reading the CJEU’s judgments and the legal scholarship, it is undisputable that both exclusive rights – Import-Export Gas and provide Universal Services – were not considered a violation of internal market rules until the 1990s. The *Natural Gas Industry* was not perceived as the *Natural Gas Market* yet. However, if this thesis is committed to understand the Integration Project through European Private Law, one could raise the question to what extent national laws granting exclusive rights are rules of Private Law. This thesis claims that, yes, they can, and that this argument is even stronger when it is applied to LUCs and LDCs.

In any legal system of private law, either common or civil law, there are rules determining *Contractual Capacity*.<sup>174</sup> These are rules regarding the conditions individuals and legal entities have to fulfill for entering into a contract. Entering into agreements with individuals without contractual capacity (e.g. minor age or lacking mental capacity) is a formation-based defense to invalidate the contract. Going back in time, women lacked contractual capacity to enter into agreements. In *Roman Law*, no one but the “head of family” had contractual capacity. As there is a large consensus in legal scholarship that *contractual capacity* rules belong to private law, provisions of national law granting exclusive rights to one or more legal entities are hybrid provisions: measures that could be understood as public and private law. These provisions determined the contractual capacity of both promisors and

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<sup>172</sup> Sacchi [1974] ECR 1291, when the Court reinforced the *Costa v. Enel* case by confirming the public interest of a non-economic nature justified RAI’s broadcasting monopoly and exclusive rights could even be extended to Sacchi’s public display.

<sup>173</sup> M Brothwood, *The Court of Justice on Article 90 of the ECC Treaty*, MLR, 1983.

<sup>174</sup> Contractual capacity is a legal concept meaning the *legal* capacity of being a contractual party in transactions. Similar to provisions of Civil Codes determining the age in which an individual are capable of creating duties and obligations through consent, national laws also ruled *contractual capacity* through Decree-Laws as in the Energy Law. However, the fact that rules were not written in codified civil codes does not mean they are not private law. For a better discussion on the concept of Private Law, see chapter 2.

promisees in LUCs, and promisors in LDCs. LUCs and LDCs are contracts either between gas undertakings or between gas undertaking and large customers. If a large firm A established in the borders of Member State X wanted to negotiate natural gas with a supplier B established in the Member States Y, both Member State X and Y could impose sanctions on supplier B and large firm A for violation of exclusive rights, and parties could question the validity of the contract, grounding their claim in a formation-based defense.

If national laws granting exclusive rights are hybrid rules with both a public and private law dimension, the CJEU's judgment questioning the conformity of national laws according to rules of the Treaty was the first step towards Integration through European Private Law.

From 1988 to 1997, the CJEU's judgments not only reassessed its own legal doctrine with respect to the conformity of exclusive rights to operate Universal Services, but also it set the precedent that rolled back import-export monopolies. The Court reopened the discussion about the commodification of Universal Services in 1988. It did so firstly by deciding several cases concerning exclusive rights granted by Member States to operate Utility Services to end-users. The issue of law founding these cases was to answer whether Utilities Services could still be perceived as activities of "non-economic interest". Among those cases, two were particularly remarkable for ruling expanding parties' autonomy in Gas Supply Contracts: the *Corbeau case*<sup>175</sup> for considering the non-conformity of exclusive rights imposed in sectors with operation that gained potential commercial character; as well as *France v Commission*,<sup>176</sup> which confirmed the EU Competence to eliminate exclusive rights through EU Secondary Law.

In the *Corbeau case*, the Court questioned the "non-commercial character" of monopolies given to the Belgian postal service and concluded that national laws imposing penalties on competitors operating similar economic activities were incompatible with EU Law. The *Corbeau case* not only changed the body of EU primary rules by reforming the Court's precedent set in the *Sacchi Doctrine* (i.e. the reasoning of public interest of a non-economic nature), but it also opened the possibility of imposing duties of EU competition

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<sup>175</sup> See the *Corbeau case*, in which Belgians Authorities sanctioned a legal entity for illegally providing post service. C-320/91, *Corbeau*.

<sup>176</sup> See Piet Jan. "Cases C-157/94, Commission v. Netherlands; C-158/94, Commission v. Italy; C-159/94, Commission v. France; C-160/94, Commission v. Spain; C-189/95, Harry Franzen; Judgments of 23 October 1997, Full Court, [1997] ECR I-5699, I-5789, I-5815, I-5851, I-5909." *Common Market Law Review* 35 (1998): 1183-1203.

rules on legal entities operating SGEI. *France v Commission* was the second landmark case.<sup>177</sup> Since the telecommunications sector was one of the first SGEI to be ruled by EU Secondary Law,<sup>178</sup> the Court answered whether the Commission was competent to roll back exclusive rights through Directives. It did so by imposing on Member States the duties of authorizing new operators to offer service in non-discriminatory ways. In the judgment, the Union's competence was confirmed and this case represented the green light to roll back exclusive rights for operating Universal Services through regulation with "immediate effect". By so doing, the Court guaranteed free avenue for *liberalization* through EU Secondary Law also in Energy Markets.

While the CJEU reformed EU Legal Doctrine on exclusive rights with regard to PSOs between 1988 and 1991, the Commission shifted its efforts towards exclusive rights to import-export in 1992.<sup>179</sup> It did so by carrying on 12 preliminary infringement procedures against Member States, four of which were litigated in front of the CJEU in 1994: the Netherlands, Italy, France, and Spain.<sup>180</sup> While the Court accepted the claim in law that exclusive rights to import-export energy could potentially violate the Treaty's rules, it dismissed the Commission requests under the argument that it failed in filling the burden of proof. Notably, the Court ultimately rejected the Commission's claim, but it did so because of a matter of fact, instead of a matter of law.<sup>181</sup> Therefore, Peter Cameron stressed the relevance of CJEU's judgment in 1997.<sup>182</sup> It provided reason for action to Member States for rolling back national laws enshrining duties of trading gas exclusively with one gas undertaking, and it gave reason for actions to gas undertakings to bring actions against Member States that insisted in keeping these exclusive rights.

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<sup>177</sup> Cases C-157/94, *Commission v. Netherlands*; C-158/94, *Commission v. Italy*; C-159/94, *Commission v. France*; C-160/94, *Commission v. Spain*; C-189/95. See also Harry Franzen; judgments of 23 October 1997, Full Court, [1997] ECR I-5699, I-5789, I-5815, I-5851, I-5909.

<sup>178</sup> Commission Directive 88/301/EEC

<sup>179</sup> In electricity markets, see *Almelo case in electricity*. Hancher, Leigh. "Case C-393/92, *Gemeente Almelo and Others v. Energiebedrijf IJsselmij NV*, Judgment of 27 April 1994 (Full Court)." *Common Market Law Review* 32, no. 1 (February 1, 1995): 305–25.

<sup>180</sup> See Piet Jan. "Cases C-157/94, *Commission v. Netherlands*; C-158/94, *Commission v. Italy*; C-159/94, *Commission v. France*; C-160/94, *Commission v. Spain*; C-189/95, Harry Franzen; Judgments of 23 October 1997, Full Court, [1997] ECR I-5699, I-5789, I-5815, I-5851, I-5909." *Common Market Law Review* 35 (1998): 1183–1203.

<sup>181</sup> C-270/89, *ERT*

<sup>182</sup> Peter Cameron (2002).

Given the overturn of precedents by the CJEU in the early 1990s, this thesis claims that this new body of *authoritative determinations* supplementing vague rules of the Treaty was the first move of the market integration project through European Private Law in Energy Markets. This first move basically alleged the incompatibility with EU law of mandatory State laws that restricted *contractual capacity* for trading natural gas.

#### 4. Positive Integration through Private Law: Enabling and Restricting Freedom

The first piece of the EU Legislative act (i.e. EU Secondary Law) regulating the gas market was the approval of the Transit Directive of Natural Gas of 21 May 1991.<sup>183</sup> This was the first attempt to monitor the transit of natural gas between grids involving the cross of at least “one intra-Community frontier”.<sup>184</sup> Similar to LCRs, the EU Sector-Regulation was addressed to legal entities carrying out the transportation of natural gas between grids regardless of the nature of the legal entity – that is, regardless of whether the ownership of gas undertakings was private or public.<sup>185</sup>

Transit Contracts are not Gas Supply Contracts. The former regulates the transmission capacity in pipelines, while the latter is about sales of natural gas. However, the Transit Directive matters here because it represented the first movement of the EU towards the enactment of Sector-Regulation in the gas market. It transposed *non-discrimination duties*, which were so far a principle in the Treaty, to Directives determining that legal entities carrying out a pipeline would have to comply with non-discrimination duties.<sup>186</sup> Therefore, even if the Transit Directive regulated pipelines rather than supply, it indeed set the scene for the further 1<sup>st</sup> Directive regulating the internal market of natural gas. This Directive targeted

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<sup>183</sup> Council Directive 1991/296/EEC of 31 May 1991 on the transit of Natural Gas through Grids, OJ L 147, 12.6.1991.

<sup>184</sup> Council Directive 1991/296/EEC, Article 1 (1).

<sup>185</sup> ACER, *Transit Contracts in EU Member States: Final results of ACER inquiry* (2013), [http://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Publication/ACER\\_Report\\_Inquiry\\_on\\_Transit\\_Contracts\\_9\\_April\\_2013.pdf](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER_Report_Inquiry_on_Transit_Contracts_9_April_2013.pdf).

<sup>186</sup> Kim Talus underlined that Transit Directives gave the rights to gas undertakings to invoke EU law against pipelines operators.

not only the regulation of cross-border transmission systems, but also commercial and consumer sales of natural gas from the upstream to the downstream.

From the Transit Directive of 1991 to the approval of the 1<sup>st</sup> Gas Directive in 1998, there was a temporal gap of seven years filled with intense discussions on how to set the rules that would be applied to the whole internal market of natural gas, including gas undertakings, customers, and consumers. Already in February 1992, the Commission formally released the first proposal for a stand-alone Directive concerning common rules for the internal market in natural gas<sup>187</sup> The European Parliament and Council approved it far later, in June 1998, and it is commonly referred to as the 1<sup>st</sup> Gas Directive for the internal market for natural gas. Taking into account the large temporal gap between the proposal and the approval of the Directive, scholars argue that the regulatory framework of the 1<sup>st</sup> Package was obsolete when finally put into force by EU Lawmakers. Some of the Regulatory strategies suggested by the Gas Directive in 1998 had already been implemented by Member States on a voluntary basis before the Directive entered into force.<sup>188</sup>

Contrary to this claim, this thesis draws attention to the understanding of EU Energy Law as a *dynamic* system of primary rules designed to accomplish EU purposes. By comparing the regulatory framework of Directives from the 1<sup>st</sup> Package to the 3<sup>rd</sup> Package and later Regulations, one could claim that the policy goals of the EU remain the same nowadays. Since the 1<sup>st</sup> Directive, EU Legislative acts explicitly state the three pillars of EU policies on natural gas markets: Competition, Internal Market, and Security of Supply. Later the Lisbon Treaty constitutionalized the Union policy on Energy in Article 198 TFEU, which reinforces the three pillars of the gas markets and adds Solidarity as a fourth pillar. While the EU Legal System established its *ends* since the early stages of integration through Secondary Law, the same assertion does not apply to the *means*. Primary rules enshrining rights and duties are *means* in legal systems. They provide reason for action applied to *individuals or legal officials* through communicating orders about what one ought to do or to abstain from doing. Since the 1<sup>st</sup> Directive, EU Energy Law comprises rules enshrining rights and duties as a means to shape individuals' behavior. Package-by-Package, primary rules as *means* changed according to the contingent needs of the EU to reach the creation and later completion of the competitive and internal market where there was none. Transactions being the target of these

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<sup>187</sup> COM/91/548 Final, SYN 384, 21 February 1992.

<sup>188</sup> Slot, Piet Jan. "The Impact of Liberalization on Long-Term Energy Contracts." *Journal of Network Industry* 287 (2000).

primary rules, they are rules of European private law interacting with overlapping rules of private law in national legal systems.

This thesis claims that the construction of a competitive *Wholesale Market* occurs thanks to the private dimension of EU Energy Law. Already in the 1<sup>st</sup> Gas Directive, EU Legislation set out rules creating rights (not yet duties) for promisees in LUCs and LDCs. EU Energy Law granted rights to promisees when it first established the concept of *eligible customers* for large suppliers, which later was expanded to wholesale customers and end-users with lower consumption. In parallel, to accomplish the security of supply, EU Energy Law further guaranteed derogation rights to LUCs with take-or-pay clauses. Rules enshrining rights in the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Packages were approved through Directives (the Directives Trilogy) and the measures range from semantically vague to rigid rules. Following the Security of Supply Crisis of 2008, EU lawmakers drafted a new set of rules expanding the regulatory framework addressed to LUCs and LDCs by imposing duties. While the prior measures enabled the freedom to choose and guaranteed freedom to contract, the latter EU Regulation restrained freedom of contractual parties to protect “customers”, which could be aligned with *social values*.

#### *4.1. The Gas Directives Trilogy: Regulating Freedom to Competitive and Secure Markets*

The Council adopted the 1<sup>st</sup> Gas Directive establishing common rules for the internal market in natural gas in April 1998, two years after the approval of the 1<sup>st</sup> Electricity Directive. The reason for the delay was impasses reached in 1994 with the draft text, leading the Energy Council to suspend its efforts until agreement was reached on the content of the 1<sup>st</sup> Electricity Directive. Peter Cameron points out two principal areas of controversy: measures for opening the gas market, and take-or-pay contracts. Coincidence or not, these two controversies refer to provisions with a private law dimension of the 1<sup>st</sup> Directive with impact in both LUCs and LDCs, which will be discussed below: the rights to choose suppliers as opening markets measures, as well as take-or-pay derogations.<sup>189</sup>

There are two principal areas of controversy: (i) market access and (ii) take-or-pay contracts. (i) The Directive proposed an initial minimum market-

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<sup>189</sup> Peter Cameron (2002), p. 166.

opening percentage access, unspecified in the text (art 18), with the Commission required to public a minimum market-opening percentage for each subsequent year; (ii) The take-or-pay provision (Art 23) provided for the granting of derogation in respect of access obligations only for contracts entered into before 25 July 1996. These transitional régimes were to be granted by the Commission on the application by Member States.

Since the 1<sup>st</sup> Gas Directive, rights for being eligible customers applied to buyers in LDCs, as well as derogation rights for take-or-pay clauses applied to parties in LUCs, played an important role in establishing the balance between the openness of gas market for competition and assurance of security of supply. Moreover, the approval of these two provisions *proves* that Sector-Regulation has indeed governed not only private transactions dealing with capacity reservation in transmission systems, as seen in the previous chapter, but also gas supply agreements in competitive business markets. Therefore, the impasse described by Peter Cameron on the draft of the 1<sup>st</sup> Gas Directive is evidence of how critical be the approval of secondary legislation could be when EU lawmakers step in to private transactions: private contracts.

The two following subsections are focused on explaining the rights to be eligible customer (or rights to choose suppliers), as well as the derogation rights to take-or-pay clauses. They do so through the Internal Point of View *and* through the lens of private law. The aim is to show how these measures have affected private transactions and private contracts. They stress how the EU legislator carefully drafted these legal norms, playing with the semantic content of rules to accomplish *less* or *more* intrusion into national systems of private law. This chapter then shows how the phenomenon of self-standing European Private Law has taken shape within EU Energy Law.

#### *4.1.1. Rights to be Eligible Customers: Enabling Freedom of Eligible Wholesale Customers*

European Private Law scholars working on EU consumer law have long turned attention to duty-imposing rules of EU Law creating rights for consumers at the supranational level. Private lawyers have noticed how EU Lawmakers have shifted consumer policy towards a normative system that values more the *empowerment of consumers* than national

systems of private law, which tend to *protect consumers*.<sup>190</sup> While the latter have protected consumers from exploitative behavior of suppliers from misleading information, the latter tends to value the empowerment of consumers by assuring access to competitive markets and access to information. Private lawyers have then underlined provisions of the Unfair Commercial Practices Directive inclined to create private rights for consumers (and also buyers) to access market and exercise rational choices. While provisions of EU Law providing rights to consumers has long been understood as provisions of private law, EU Energy Lawyers have mostly discussed similar provisions on EU Energy law only as a public law provision.

Since the 1<sup>st</sup> Gas Directive, EU Energy Law has established some measures to grant the gradual openness of the energy market for competition. One of them was the obligation on Member States to ensure that at least certain customers would have become *eligible customers* after a specified period in time. In the 1998, the 1<sup>st</sup> Gas Directive defined *eligible customers* in Article 18. *Eligible customers* were then “customers inside (...) territory [of Member States] which have the legal capacity to contract for natural gas in accordance with Article 15 and 16, given that all customers mentioned in paragraph 2 must be included”. Given before the 1990s relationship between natural gas suppliers and final customers were considered public contracts regulated through public regime,<sup>191</sup> the concept of eligible customer aimed to privatize transactions until then considered public contracts. To do so, the 1<sup>st</sup> Gas Directive imposed duties on Member States to grant *legal capacity* to final customers, who were buyers in LDCs. Therefore, since the 1<sup>st</sup> Gas Directive, the EU Energy Law had intruded on national system of private law. It imposed the obligation on Member State to consider gas supply contracts with eligible customers transactions governed by private regimes and private law.

Article 18 of the 1<sup>st</sup> Gas Directive provides for this thesis an example of the hybridity of EU Law, which is a proposition that certainly extends to EU Energy Law. Back at that time, the second paragraph 2 of Article 18 established that “Member States should take the necessary measures to ensure that at least [certain] customers are designated as eligible

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<sup>190</sup> “EU consumer policy is built on two pillars, empowerment and protection, but has typically privileged empowerment” Esposito, Fabrizio. “A Dismal Reality: Behavioural Analysis and Consumer Policy.” *Journal of Consumer Policy*, January 5, 2017, 1–24.

<sup>191</sup> See Wolfgang Friedman’s description of how French Law distinguished utility services as public relationships between public authorities and citizens. Friedmann, Wolfgang. *Law in a Changing Society*. Abridged edition. Penguin Books, 1964, p. 373.

customers”. This measure could be then read from two different perspectives. On the one hand, the 1<sup>st</sup> Gas Directive imposed on Member State the obligation to open natural gas markets by granting for a certain group of final customers the legal capacity to contract for natural gas. This is the public dimension of the hybrid provision. On the other hand, the same legal provision also granted rights to legal capacity for final customers, which is the private dimension of the Gas Directive. The hybridity of the provision in the secondary legislation relies on the constitutional character of the Treaty, which granted rights for individuals to bring action against Member States. In the context of gas markets, Article 18 granted the rights for buyers, then eligible customers, to legal capacity and access to contracts governed by civil law rather than administrative law. This is then the undeniable private law dimension of EU Energy Law, which has played an important role in the creation of the internal energy market. Given eligible customers were first defined as Gas Power Plants and large industries, those final customers were the buyers in LDCs with legal capacity and willingness to purchase natural gas beyond the borders of domestic markets and, by doing so, created cross-border trade and wholesale markets until then non-existent.

Besides the private law dimension associated with eligible customers, these measures in the 1<sup>st</sup> Gas Directive are also interesting for another aspect: its semantic dimension. In a previous discussion, the thesis quoted from Article 18 of the 1<sup>st</sup> Gas Directive, where EU Legislator defined *eligible customers*. Member States were then obliged to grant legal capacity for eligible costumers. But this is not only consideration. Next to the definition of an eligible customer, EU secondary legislation already determined that certain customers must be considered eligible on the date the Directive entered in force. These final customers where listed in paragraph two:<sup>192</sup>

Member States shall take the necessary measures to ensure that at least the following customers are designated as eligible customers: (i) gas-fired power generators, irrespective of their annual consumption level (...); (ii) other final customers consuming more than 25 million cubic meters of gas per year on a consumption-site basis.

The 1<sup>st</sup> Directive established that Member States had to decide which final customers were considered “eligible”, but it established a very objective threshold. Rather than addressing rights to “large industries”, EU Law granted rights to all “final customers

consuming more than 25 million cubic meters of gas per year”, as well as Gas Power Plants. Addressees of rights were not identified as Large Industries, where concepts such as “large” or “industry” would request a subject interpretation according to national legal discourses of what could be large, middle, or small enterprises. Precise numbers – 25 *mcm* and 1 year consumption – preempted “large industries”. Germans could have a different perception of what is a “large industry” than Finns, or Greeks. The 1<sup>st</sup> Gas Directive then illuminates a peculiarity of European Private Law in regulated markets. It is a normative system with some precise and rigid rules.

Following *two* decades and *two* Packages, there have been changes in the regulatory framework and, therefore, change in the definition of eligible customers. While in the 1<sup>st</sup> Gas Directive eligible customers were final costumers that should have been granted legal capacity in LUCs, the 2<sup>nd</sup> Gas Directive defined eligible customer as “customers who were free to purchase gas from the supplier of their choice”. Article 2 (38) of the 2<sup>nd</sup> Directive was then read together with Article 23(1)(b)(c), which determined that all *non-household* customers should have been eligible customers until 1 July 2004, and all *customers* until 1 July 2007. Given the definition of household costumers in Article 2(5), meaning “customers purchasing gas for their own household consumption”, this thesis claims that the EU legislator has continued to draft secondary legislation with semantically rigid terms. The 2<sup>nd</sup> Directive already established rights to become eligible customers for all *non-household customers*, which has a more precise meaning than actually *non-consumers*. The concept of consumer could diverge from one national system of private law to other, or even within the same legal system. In the EU legal system, for example, consumers could be either individuals purchasing goods for their own consumption as in the Unfair Terms Directive, or any promisees in bilateral transactions as in Article 101 TFEU. Hence, again, EU lawmaker has carefully drafted the Directive to assure high degree of harmonization even though the Gas Directive has always had minimum harmonization.

If rights to be an eligible customer had been extended for all customers in the 2<sup>nd</sup> Gas Directive from 1 July on, and reiterated in the 3<sup>rd</sup> Gas Directive, this thesis could claim that the legal provisions of EU energy law had established private rights impacting parties in all gas supply contracts: from LUCs, to LDCs, and even business-to-consumer supply agreements. Buyers in LUCs and LDCs are customers – wholesale customers or final

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<sup>192</sup> 1<sup>st</sup> Gas Directive, 98/30/EC, Article 18(2).

customers – and EU energy law has granted these buyers the right to freely purchase gas from the supplier of their choices. The right to freely purchase has been applied to agreements as mandatory rules. It impacts parties' behavior while negotiation clauses, who are precluded to draft contracts with clauses limiting freedom to switch supplier such as termination penalty clauses in supply agreements. In the introduction of this thesis, this author has provided an example about how EU energy law could be public enforced by NRAs to combat termination rates precluding costumers to switch. Besides In the coming chapter 6, this thesis also describes how the Commission has *de facto* enforced EU law and, by so doing, determined a number of prohibited clauses that were precluding customers in LDCs to switch. Since the Commission has no competence to enforce EU secondary legation on market actor, it did so though enforcing Article 101 TFEU.

#### *4.1.2. Rights for Derogation: Guarantying Freedom of Contract through Take-or-Pay Clauses*

Take-or-pay clauses represent a derogation from mandatory rules on non-discriminatory established since the 1<sup>st</sup> Directive, which has been treated as third party access (TPA). The derogation of network access by take-or-pay contracts for safeguarding economic viability of gas importers was the justification originally given by the Commission, to which the EU legislator added security of supply. This conclusion could be drawn by simply reading the preamble, as well as the Articles 17 and 25 of the 1<sup>st</sup> Gas Package. Already in the preamble, the Directive entrusted Member States with the monitoring function of take-or-pay contracts “in order to keep up to date with the situation on supply” and also acknowledged that “take-or-pay contracts are a market reality for securing Member States security of supply”. Besides the clear statement in the preamble about the connection between take-or-pay contracts and security of supply, the EU Legislator also inserted into the substantive law of the 1<sup>st</sup> Gas Directive provisions clearly establishing the right to derogate access to networks if it jeopardizes the performance of take-or-pay contracts. If a pipeline has committed the totality or part of its capacity to the performance of take-or-pay contracts, TSOs and DSOs could refuse access to a third party based on existing take-or-pay commitments with undertakings. When there is no available capacity to third parties for this reason, the Directive considers it a contractual congestion of network capacity. However, the right to derogation, of course, was not unrestricted. The network operator could refuse access insofar as providing access would

engender serious economic and financial difficulties to the gas importer – the promisee in the take-or-pay contract. Furthermore, any derogation has to be notified to the Commission by Member States or NRAs, which in turn holds the rights to request the withdraw or amendments to the decision granting derogation. This multi-level assessment of the derogation is to ensure that this refusal does not undermine the creation of an integrated and competitive gas market.

#### *4.2. SoS Regulations after Crisis: Restricting Freedom for Security of Supply*

From the 1<sup>st</sup> Gas Package in 1998 to 3<sup>rd</sup> Package in 2009, EU Energy Law has been cautious in establishing duty-imposing rules to private parties in LUCs and LDCs. Provisions granting rights for customers to become *eligible customers* are duty-imposing rules that have governed individuals' behavior to expand their freedom. These are rules impacting private relationships to expand parties' freedom to contract: meaning freedom to choose, freedom to switch, or freedom to competitive prices. The same proposition can be applied to derogation rights. EU Sector-Regulation granting derogation rights to parties in LUCs with take-or-pay clauses granted the performance of those supply contracts in an era of TPA rights and restriction to capacity reservation contracts. Therefore, one could conclude that from the 1<sup>st</sup> to the 3<sup>rd</sup> Package, meaning from the 1<sup>st</sup> to the 3<sup>rd</sup> Directive, EU Energy Law regulated LUCs and LDCs, but it has done so through enabling and guaranteeing freedom. If this proposition is uncontestable until 2009, the same cannot be said since 2010.

Discussing the reasons why the EU legislator had not been more intrusive into the clause of LUCs, as well as LDCs, until the 3<sup>rd</sup> Gas Package requires an understanding about the political and economic dimensions of these upstream and downstream agreements in gas markets. It requires also an understanding of European Foreign Policy before the Lisbon Treaty, and most important, the absence of EU competence in external relations.<sup>193</sup> Discussing these reasons is certainly far from the aim of this chapter. However, there have been ongoing changes in the EU Energy Law approach to LUCs and LDCs since 2010 and this is what matters for this research. As Kim Talus states, most of the changes in the regulatory framework have been reflections of changes in the political notion of security of

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<sup>193</sup> COM(2006) 105 final, *Green Paper: A European Strategy for Sustainable, Competitive and security Energy*, 8 March 2006, p. 8-9.

supply since the mid-2000s.<sup>194</sup> To understand the change in the political notion of security of supply, there is a need to describe the political tensions beyond EU borders between 2006-2007, which provoked the security of supply crisis within the EU borders.

First in March 2006<sup>195</sup> and later in January 2007,<sup>196</sup> the Commission alerted the European Parliament and Council about the risks of interruption of gas supply. Taking into consideration the increasing dependence of gas supply on a small number of natural gas producers in third countries, the Commission tried to tune attention to disputes between Ukraine and Russia in 2006. Tensions between Ukrainians and Russians concerning the indebtedness of Ukrainian gas undertakings had subsisted since the 1990s, but disputes had never affected third countries before 2006. The tensions spilled over to the EU when Ukraine deviated Russian gas transiting to the EU. The failure in the negotiations over the gas price delivered to the Ukrainian domestic market led Gazprom to reduce the pressure in pipelines from Russia to Ukraine on 1 January 2006. In retaliation, Ukrainian undertakings deviated natural gas in transit to Europe to compensate the short-flow into the domestic market. This was the first time the tension between Ukraine and Russia spilled over to the supply of gas to the EU.<sup>197</sup>

The very short-term interruption of gas flow in 2006 was a foretaste of what would happen on 10 January 2009, when Russian natural gas suppliers and Ukrainians buyers again failed to reach an agreement on gas prices for 2009. In something of a *déjà vu*, the Russians again reduced the pressure of pipelines connecting them to Ukraine, which again deviated gas in transit to EU. Different than the 2006 supply crisis, the volume of gas short-closed and deviated was considerable higher.<sup>198</sup> This second dispute between the Russians and

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<sup>194</sup> Talus, Kim. "Security of Supply - An Increasingly Political Notion." In *EU Energy Law and Policy Issues*, edited by Bram Delvaux, Michael Hunt, and Kim Talus, 1st ed., 125-49. ELRF Collection. Rixensart: Euroconfidentiel, 2008.

<sup>195</sup> COM(2006) 105 final, *Green Paper: A European Strategy for Sustainable, Competitive and security Energy*, 8 March 2006, p. 8-9.

<sup>196</sup> COM(2007) 1 Final, *An energy Policy for Europe*, 10 January 2007, p. 3-4.

<sup>197</sup> "The fall in volumes delivered to European Union countries caused an outcry all over Europe. By January 2, Hungary was reported to have lost up to 40% of its Russian supplies; Austrian, Slovakian and Romania supplies were said to be down by one third, France 25-30% and Poland by 14% Italy reported having lost 32 million cubic meters, around 25% of deliveries, during January 1-3. German deliveries were also affected but no further details are known". Jonathan Stern, *The Russian-Ukrainian gas crisis of January 2006* (2006), Oxford Institute for Energy Studies, p. 8-9 Jonathan Stern. *2006 Natural Gas Security Problems in Europe: The 2006 Russian-Ukrainian Crisis of 2006*, (2206) Asia-Pacif Review, vol. 13, no.1, p. 33.

<sup>198</sup> "One quarter of all energy consumed in the EU is gas. 58% of this gas is imported. Of this, 42% comes from Russia, and around 80% of EU imports of gas from Russia pass via Ukraine. Among the 8 new eastern European

Ukrainians resulted in a sizeable fall in gas supply in most of the Member States, like an avalanche beginning from the east and relentlessly devastating the west. Hungary, the Czech Republic, Germany, Italy, France, Romania, Poland, Bulgaria, and Greece reported very low gas in entry points; even the UK announced it would draw from its gas reserves. Extreme situations were reported in eastern countries like Hungary, where citizens had been deprived of heating in the winter season as the region received only 20% of the normal volume.<sup>199</sup> Despite the several appeals for clemency by the international community, Russians and Ukrainians reached a settlement only on 19 January and only on 20 January did the gas return to normal flows.

This terrifying experience for the EU and Member States precipitated by the security of supply crisis provided political reasons for the Commission to mobilize efforts at the EU level. The Commission, on 16 July 2009, a proposal for a Regulation concerning the security of supply, repealing the Directive of 2004 then in force, and an exchange information mechanism where Member States would have to disclose IGAs to the EU. In the Energy Strategy 2020, the Commission explicitly stated that the supply crisis exposed to citizens Europe's vulnerability regarding natural gas supply.<sup>200</sup> By claiming EU external energy policy had never been commonly developed before 2010, the Commission meant that the EU, as a single legal entity, had never signed or intervened in IGAs involving supply and transit of gas, nor had the EU ever set a coherent regulatory framework to regulate the private dimension of those transactions: LUC or transit contracts. The Commission even advanced then a claim that a coherent set of rules had to replace the several and fragmented binding IGAs signed bilaterally between the Member States and third countries. However, in negotiations for the Energy 2020 report, the Commission narrowed down its ambitious political programme, and approved two legislative acts: the Security of Supply (SoS)

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Member States, dependence on Russian imports averages 77%. In practical terms, some 300-350 million cubic metres per day (mcm/day) of gas passes through Ukraine towards the EU, around one fifth of total gas demand in the EU. Ukraine transits the same quantity of gas on behalf of the EU as it consumes in its national market (around 300 mcm/day in winter)". COM(2009) 363 of 16 July 2009, Commission Staff Working Document on The January 2009 Gas Supply Disruption to the EU (an Assessment), accompanying document to the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard of gas supply and repealing Directive 2004/67/EC, p. 2. See also Chow, Edward C, Bocair, Jennifer L. *The European Gas Crisis* (2009).

<sup>199</sup> COM(2209) 363, op. cit. p. 4.

<sup>200</sup> Commission Communication, *Energy 2020, A strategy for Competitive, Sustainable and Secure Energy*, Brussels, 10 November 2010, COM(2010) 639 final.

Regulation 994/2010,<sup>201</sup> and the Decision 994/2012/EU<sup>202</sup> establishing an information exchange mechanism with regards to IGAs between Member States and third countries.

If the Commission had the ambition to set a coherent body of rules to regulate the private dimension of transactions with external dimensions, both LUC and transit contracts, it failed in 2010. With regards to LUCs, the regulatory framework approved by the EU Legislator did not establish any obligations to suppliers or buyers that would fall under European Private Law. Instead, EU lawmakers approved a set of rules imposing obligation on private parties and Member States to disclose to the Commission, ACER, and NRAs information regards LUCs and IGAs. The information duty imposed on States and private parties cannot be understood as a rule of private law, as data is provided to governmental bodies and kept as confidential. Yet the collection of data has enabled the Commission to open the Pandora's Box of IGAs and LUCs, increasing awareness of the violation of the extant and potential violations of the Treaty. The expansion of knowledge of the Commission can be confirmed by recent reports issued by the Commission in 2014 and the new regulatory framework proposed in 2016<sup>203</sup> under the framework of the Energy Union, which is now in the middle of negotiations. Given the parts related to the Winter Package have yet to be enacted as law, this thesis would rather focus on the reports where the commission underlined negotiated clauses in LUCs that potentially violate the Treaty, though there has not yet been a CJEU decision.

While the SoS Regulation did not impose mandatory rules on private parties of LUCs, the same inference cannot be applied to LDCs. LDCs are private transactions where parties are not firms controlled by foreign States negotiating natural resources that, in most of cases, are also publicly owned by foreign States.<sup>204</sup> As such, the proposal of a regulatory framework impacting the private relations of parties in LUCs has been followed by less political tension. While the SoS Regulation did advance mandatory rules towards the private order of parties in LUCs, the secondary legislation had an entire Article entitled "supply standards", which are duty-imposing rules applied to private transactions in case of disruption of supply. The

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<sup>201</sup> Regulation 994/2010 of 20 October 2010.

<sup>202</sup> Decision 994/2012/EU of 25 October 2012.

<sup>203</sup> See the Energy Security Package and Winter Package as parts of the overall proposal to change the regulatory framework of EU Energy Law, the Energy Union.

<sup>204</sup> The proposition that creating mandatory rules in secondary legislation governing LUCs, or enforcing the provisions of the Treaty on LUCs, are more politically sensitive will be reinforced in the coming chapter, when this thesis discusses the enforcement of competition law on those two types of supply agreements.

measure falls into the core of national systems of private law when it intrudes the conditions for the application of *force majeure*. Beside SoS Regulation, changes in the secondary legislation as regards regulation of transmission systems also spilled over to LUCs and LDCs. The political reasons that motivated the approval of regulation were not *directly* connected with the security of supply crisis of 2009. Yet the changes spilled over to LUCs and LDCs when the EU legislator determined that delivery points of natural gas in supply agreements between businesses would be considered virtual points allocated in different regions.

The following subsections would be then divided in three sections: the first on the duty-imposing rules on Member States and parties in LUCs to disclose information to governmental bodies, the second on duty-imposing rules on suppliers on LDC to not interrupt supply, and the third on the imposing-duty rules on both LUCs and LDCs to deliver natural gas to virtual points.

#### *4.2.1. Duty to Disclose LUCs and IGAs: Opening the Pandora Box through Administrative Law*

Following the resistance of Member States to approve a more intrusive SoS Regulation in 2010, the Decision 994/2012/EU could be considered as a move backward by the Commission. Instead of imposing rules governing private parties in LUCs or Member States in IGAs, the Commission imposed the exchange information mechanism where IGAs and private contracts would have to be disclosed to EU governmental bodies. Since 2012, Member States notified 124 IGAs to the Commission.<sup>205</sup> The Commission expressed doubts on the compatibility with EU law of 17 of them. The EU law in question mainly concerned either 3<sup>rd</sup> Gas Package provisions concerning unbundling, TPA rights and tariff setting, which concerns transmission agreements rather than LUCs. With regards to LUCs, the Commission reported that there are approximately 300 LUCs in operation in the EU and concerns were related to destination clauses,<sup>206</sup> which has been already the subject of investigation by DG Competition. Beside the destination clause reported by DG Energy, DG Competition has opened investigations against Gazprom concerning divergent commercial practices adopted by the Russian gas suppliers in its LUCs agreed with gas undertakings in Eastern and Central

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<sup>205</sup> SWD(2016) 27 final, p. 9.

<sup>206</sup> SWD(2014) 325 final, p. 18.

European Countries. It refers to the investigation as regards discriminatory practices of Gazprom when negotiating prices, which will be briefly discussed in the coming chapter. Given the competition concerns of DG Competition derived from the comparison of commercial practices of Gazprom and gas undertakings throughout Europe, it is plausible to think that the investigation would have not been possible without the duty-imposing rules on Member States and private parties to disclose IGAs and LUCs.

If the EU lawmakers or adjudicating authorities advance a set of robust regulations governing LUCs in the framework of European Union, it will open a new phase of European Private Law: the external dimension of European Private Law through Sector-Regulation. Yet this thesis cannot have a conclusive answer until the approval of whole packages of the Energy Union. More than ever, this is a time to stand and stare.<sup>207</sup>

#### *4.2.2. Duty to Supply in Time of Crisis: Supply Standard for Restraining “Force Majeure”*

Despite the absence of duty-imposing rules *restricting* freedom of contract of parties in LUCs for security of supply after the crisis in 2009, this proposition cannot be extended to LDCs. The security of supply crisis created a political context favorable to approve a regulatory framework protecting citizens from further crisis. As such, the SoS Regulation devoted Article 8, entitled curiously “Supply Standard”, to govern LDCs in cases of declared emergency. At this time, duty-imposing rules were neither enabling nor guaranteeing of freedom, but rather simply protecting citizens from security of supply crisis by imposing obligations on natural gas suppliers to household and non-household customers. As such, Article 8 of the SoS Regulation includes LDCs.

In the preamble of the SoS Regulation, the EU Legislator explained the SoS Regulation as a normative system applied to private undertakings and Member States. Further, the EU Legislator even claimed that gas undertakings and Member States share responsibility about the security of supply of the EU. Recital 23 explains that “security of supply is a shared responsibility of natural gas undertakings, Member States, notable through their Competent

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<sup>207</sup> Brownsword, Roger. “The Theoretical Foundations of European Private Law: A Time to Stand and Stare.” In *The Foundations of European Private Law*, edited by Roger Brownsword, Hans-W. Micklitz, Leone Niglia, and Stephen Weatherill, 453–64. Oxford, UK: Hart Publishing, 2011.

Authority, and the Commission”.<sup>208</sup> Notice that the EU Energy Law explicitly shares the responsibility for the implementation of the SoS Regulation to private parties and Member States,<sup>209</sup> which is later reinforced in Recital 24. The reading of the SoS Regulation sends a clear message to European Private Lawyers who still discuss the lack of horizontal effects of EU Law in private relationships. SoS Regulation not only creates duty-imposing rules for gas undertakings in LDCs, but claims to share responsibility as regards the implementation of the Regulation to those private parties. Obviously, the European Constitutionalism model would have to be reviewed if gas undertakings become indeed legally responsible (liability terms) for implementing EU Regulations into Member States, but yet the provisions of recital are indeed food for thought.

In this thesis, Article 8 of the SoS Regulation is what matters most. This is so because it established two obligations. The Regulation imposed on Member States the obligation to regulate LDCs for situations where the EU declared emergence of security of gas supply. By doing so, secondary legislation also anticipated minimum obligations already applied to suppliers in LDCs. The SoS Regulation establishes the conditions in which the EU could declare an emergency. Once these conditions are met and there is an official declaration of emergence, mandatory rules created by EU secondary legislation and national laws become immediately enforceable to parties in LDCs. In the article 8, EU legislator established the following obligations:

Article 8 (1). The Competent Authority shall require the natural gas undertakings, that it identifies, to take measures to ensure gas supply to the protected customers of the Member State in the following cases:

- (a) extreme temperatures during a 7-day peak period occurring with a statistical probability of once in 20 years;
- (b) any period of at least 30 days of exceptionally high gas demand, occurring with a statistical probability of once in 20 years; and
- (c) for a period of at least 30 days in case of the disruption of the single largest gas infrastructure under average winter conditions.

In Article 8, the EU Legislator established that natural gas undertakings are obliged to ensure the non-interruption of supply of natural gas to “protected customers” in case of

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<sup>208</sup> Regulation 994/2010, Preamble 23.

<sup>209</sup> Competent Authorities are not necessarily NRAs. The legislator made the decision to give the Member States autonomy to choose another institution to be responsible for the activities involving security of supply. Regulation 994/2010 of 20 October 2010, Preamble 4(1).

declared emergence in a supply crisis. Notice that the EU lawmakers are extremely precise in identifying the period in which suppliers have to continue providing gas: 7 days or 30 days. Moreover, if lawmakers were not rigid in defining who “protected customers” are in Article 8, they do so in Article 2.

Article 2 (1). ‘protected customers’ means all household customers connected to a gas distribution network and, in addition, where the Member State concerned so decides, may also include:

(a) small and medium-sized enterprises, provided that they are connected to a gas distribution network, and essential social services, provided that they are connected to a gas distribution or transmission network, and provided that all these additional customers do not represent more than 20 % of the final use of gas; and/or

(b) district heating installations to the extent that they deliver heating to household customers and to the customers referred to in point (a) provided that these installations are not able to switch to other fuels and are connected to a gas distribution or transmission network.

In Article 2, the EU Legislator defined who “protected customers” are and did so through precisely determining that protected customers are household-customers. Yet besides determining “protected customers” as household-customers, it adopted the same regulatory strategy seen in the Network Codes. EU lawmakers requested Member States to manifest their choice of including or *not* including additional customers into the category of “protected customers” in paragraphs (a) and (b). Rather than leave to Member States the discretion to decide whether legislate or not legislate about the matter, to decide whether is of their interest to expand the rights to be “protected customers” to small and medium-sized enterprises and district heating installation, the SoS Regulation imposed the obligation on States to manifest their choices into a certain period of time. In doing so, EU legislator seem to be putting in practice new strategies to the Harmonization of European Private Law that deserves further investigation. Different from Directives with minimum Harmonization in which Member States would transpose EU Legislation holding discretion to increase the level of protection to individuals, in Regulations, Member States can exercise discretion solely by *opting-in or opting-out* (that is, by including or excusing small and middle enterprises).

The duty of non-interruption of gas supply in case of emergency deserves particular attention for explicitly intruding into national system of private law. The semantic rigidity of EU Regulations determining the conditions in which suppliers cannot interrupt gas supply for “protected customers” suggests intrusion of European private law into the national systems of

private law. It removes the possibility for national judges to excuse suppliers for the failure of performance due to *force majeure* in case of a security of supply crisis. This mandatory rules in the SoS Regulation governing parties in LDCs, together with provision in Network Codes regulating LCRs, proves then the factual claim of this thesis. Yes, European Private Law has indeed advanced a set of mandatory rules applied to transactions. Yes, these rules are enacted in EU Regulations, which the horizontal effect in not contested. And yes, the semantically rigidity of these specific set of rules has shrunk the open texture of law and, in doing so, provoked the phenomenon of “intrusions and substitution” investigated by this thesis.

#### *4.2.3. Duties to Delivery on Virtual Exit-Points: the Spill over of Gas Target Model on Supply Contracts*

Case II started by revisiting the negotiated clauses of LUCs before the liberalization, which included the delivery points of supplied gas. As asserted before, parties in LUCs used to negotiate precisely the physical location where the gas would be injected and withdrawn along pipelines. These clauses were compatible when the system of pipelines (within and connecting Continental Europe) relied on transmission based on the market model called *point-to-point contractual capacity rights*.<sup>210</sup>

Similar to the electricity markets investigated in Case I, EU lawmakers approved a set of rules governing transmission service agreements between TSOs and gas undertakings including duty of non-discriminatory for TSOs, as well as tariffs. Rules of EU Sector-Regulation in natural gas markets are similar. The gradual opening of the market for new entrants was proportional to the expansion of mandatory rules ruling transmission service contracts (and LCRs), which *a priori* did not intersect with private order of LUCs or LDCs *until* the third package and approval Implementing Acts covering the Gas Target Model. Different from the prior 1<sup>st</sup> and 2<sup>nd</sup> Gas Packages, the 3<sup>rd</sup> Package delegates lawmaking authority to the European Commission for approving Network Codes through *comitology*. With the aim of maximize capacity allocation and the congestion management mechanism, EU lawmakers replaced *point-to-point contractual capacity rights*. As the transmission system to the market, LUCs still have to specify the location where the gas is injected and

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<sup>210</sup> “In the EU the pipelines also sold long term point to point transportation contracts for decades as it worked so well with long term gas buying contracts upstream and franchise distribution monopolies downstream”. Miguel, Michelle, JM, *Gas Network and Market: à la Carte?*

withdrawn, as any other supply contract in OTC Markets and Exchange Markets.<sup>211</sup> However, they do not correspond to the precisely physical location represented by the point-to-point model, but through *entry-exit schemes* that could correspond to the physical or virtual delivery zones.<sup>212</sup>

Although the EU regulation on balancing, congestion and capacity allocation has dramatically change rights of LUCs' parties that are equally undertaking in LCRs, these rules had minor impact in LUCs.

## **5. Slow and Steady European Private Law: moving the Sector-Regulation towards business-to-business supply contracts**

This chapter has investigated the impact of the secondary legislation of EU energy law in *Long-term Upstream Supply Contracts* (LUCs) business-to-business relationships, as the main subject and considering *Downstream Long-term Supply Contracts* (LDCs) as a comparative reference. Despite LUCs and LDCs being contracts operating in competitive markets, this chapter revealed a set of rules in Directives and Regulations creating rights to contractual parties. These are granted rights to choose since the foundation of tEU Energy Law. There are also the mandatory rules derived after the Security of Supply Crisis of 2008. The crisis changed the political discourse of the EU toward LUCs, which could lead to more intrusive mandatory rules into the private order of parties. Yet the SoS Regulations and Decisions impose disclosure duties on private parties, but data is submitted to the NRAs and Commission and confidentiality is granted by Sector-Regulation.

On the one hand, the conclusion undermines assertions that EU Competition Law was the only *means* to correct market failure in competitive markets. On the other hand, it confirms this thesis' claim about the self-standing nature of European private law. Moreover, it provides very strong evidence of this thesis's claim. In the previous chapter, this thesis showed that LCRs are extensively regulated by Network codes because the Transmission Systems are natural monopolies, or networks. Granting access to grids is the *sine qua non*

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<sup>211</sup> Implementing Regulation No 1348/2014, Article 2(b)(c)(f).

<sup>212</sup> See Michelle Hallack and Mighel Vasquez, EU regulation entry, exit

condition to boost competition in the market. On the contrary, LUCs and LDCs are operations in competitive markets and, nevertheless, they have been regulated since the 1<sup>st</sup> Package. Moreover, since the 1<sup>st</sup> Package, the EU lawmakers have carefully drafted and approved Directives the objective determination of which has been to grant buyers rights to choose suppliers. Whereas in LCRs EU lawmakers have advanced an extensive normative system of semantically rigid rules after the 3<sup>rd</sup> Package, regulating terms and conditions at the supranational level, EU Energy Law has been less expansive in LUCs and LDCs. Nevertheless, by isolating the measures imposed on those contractual relationships since the early years of positive integration, this chapter proves that the EU lawmakers have employed the strategy of regulating through semantically rigid rules since the 1<sup>st</sup> Package.

**European Private Law and Competition:**

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**European Private Law and Competition:**

**Neither Commitments, Nor Decisions and (yet) a Black List of Prohibited Clauses**

In the previous chapter, this thesis investigated the impact of the secondary legislation of EU Energy Law in *Long-term Upstream Supply Contracts* (LUCs) business-to-business relationships, taking into account *Long-term Downstream Supply Contracts* (LDCs) as a comparative reference. Despite LUCs and LDCs being contracts operating in competitive markets, the previous chapter revealed a set of rules in Directives and Regulations creating rights and duties to those contractual parties. The proposition that EU sector-regulation has indeed governed contract undermines the assertion that EU Competition Law has been the only *means* to correct market failure in competitive markets. Furthermore, the previous chapter also revealed that, although few duty-imposing rules are applied to LUCs and LDCs, those rules are semantically rigid. This latter finding is then a persuasive proof of this thesis' claim regarding *self-standing* European Private Law: the emergence of a set of rules that governs transactions with semantically rigid command. Yet the EU substantive Law in EU Sector-Regulation refers only to primary rules made by the EU Legislator. Given LUCs and LDCs are contracts operating in Competitive Markets, one could have foreseen a more extensive intrusion into the private order of parties through the enforcement of EU Competition Law. The aim of this chapter, then, is to answer the following proposition: Has EU Law also governed LUCs and LDCs through enforcing competition Law provisions in the Treaty and, therefore, supplemented these primary rules? If so, how?

There are two opposite answers to this proposition depending on Theories of Law. If one were to consider the CJEU's speech acts as the only supplementary source of EU Law, the answer to the proposition raised in this chapter would be negative. So far there are no judgments of the CJEU concerning the enforcement of EU competition Law to transactions in LUCs and LDCs. However, if a second observer were to take into account the concept of secondary rules of adjudication to understand the phenomenon of EU Law from the *Internal Point of View*, the answer would certainly be positive. The answer would be positive because the concept of secondary rules of adjudication suggests that primary rules are supplemented by adjudicating authorities. Indeed the Commission, which has conferred powers to investigate *and* enforce EU Competition Law, has been active in investigating LUCs and LDCs that were foreclosing gas markets from competition. None of these authoritative decisions motivated requests for judicial review to the CJEU. One of the reasons that justifies the lack of juridical review relies on the fact that the Commission has opted to enforce EU competition law through *commitment-decisions*.

Since the late 1990s, the DG Competition has advanced investigations against gas undertakings in Energy Markets. Since the early 2000s, investigations turned to examine LUCs and LDCs. By using its adjudicating powers, the Commission opened and closed investigations through informal sorts of settlements until 2003, which was later formalized and named *commitment-decisions* in Article 9, Council Regulation 1/2003. Different than the "formal decision" of Article 7, Commitment-Decisions are enforcement mechanisms that allow gas undertakings to offer commitments addressing competition concerns before the conclusion of investigations, as well as conferring power to the Commission to accept those commitments and close proceedings without finding infringement. Through Commitment-decisions, gas undertakings have offered to exclude *negotiated clauses* from LUCs and LDCs that raised competition concerns and, in exchange, the commission closed proceedings by publishing notices with summaries of investigation, descriptions of accepted commitments, and *proportionality tests* of final commitments.

The term commitment-decision *per se* cannot be voiced without someone raising an eyebrow. Is it a commitment, or a decision? This mechanism for public enforcement of EU Competition Law is hybrid: it could be either a commitment or a decision and at the same time neither a commitment nor a decision. It could not be a commitment (or settlement) because the Commission is a party and, at the same time, an adjudicating authority. Therefore, it is harder to build an analogy between commitment-decisions and normal

settlements. Whereas in the latter, parties are plaintiffs and defendants having adjudicating authorities as mediators, in the former parties are the Commission (as adjudicating authority) and undertakings (as defendants). Moreover, commitment-decisions could not be a decision because acceptance of offered commitments closes proceedings without finding infringement. There is no authoritative determination of what the law is. This was the CJEU's conclusion in the landmark *Alrosa case*, where judges excluded the possibility of judicial review of commitment-decisions.

Given the lack of a *formal decision* enforcing competition law against natural gas undertakings, these *commitment-decisions* have long been analyzed by legal scholars who develop legal doctrines about "prohibited clauses" in horizontal and vertical agreements. LUCs and LDCs are vertical agreements in Energy Markets and both type of contracts have been subjected to investigations, which were later short-closed through commitment-decisions. These commitment-decisions against LUCs and LDCs are then object of studies in this chapter 6, which aims to understand *how* the enforcement of EU competition Law through has contributed to the construction of a *legal discourse*, which led to the determination of a black list of prohibited clauses applied to LUCs and LDCs. Following the previous Chapter 5, LUCs are the main subject of the investigations and LDCs are referred to as a comparative tool.

This chapter is then divided in *three* sections. The first section (1) starts by inquiring why (commitment-)decisions enforcing EU Competition Law matter for European Private Law. If European Private Law is a normative system of rules governing individuals while conducting transactions, authoritative determinations establishing limits to *freedom of contract* fall into the subject of European Private Law. The second section (2) then moves to describe how the Commission has enforced competition law against parties in LUCs and LDCs and, therefore, defined limits of what could be considered competitive and anticompetitive clauses in those contracts: namely, that which this thesis calls the *black list* of prohibited clauses. This section aims to contrast substantive obligations applied to LUCs and LDCs, considering the former is more sensitive to economic efficiency arguments regarding security of supply than the latter. This section then concludes that the entire number of prohibited clause in LUCs, and almost all prohibited clauses in LDCs, have been supplemented by *commitment-decisions*. The fourth section (3) concludes by inquiring why commitment-decisions are more decision than commitments and, if so, why these commitment-decisions are supplementary sources of European Private Law.

## 1. Standard Contracts? Restricting Freedom through Competition

Whether and how has EU Law regulated LUCs? On the one hand, as analysed in the prior chapter, the EU secondary legislation has regulated LUCs and LDCs, although those agreements are transitions competitive market. It does so through by establishing key rights to parties in LUCs and LDCs, which enabled undertakings to access competitive markets and, therefore, exercised their freedom. On the other had, if the path of regulating contracts through sector-regulation has mostly enabled freedom, this path changes when the enforcement of competition law is under scrutiny. Through enforcing competition law on market actors, the Commission has supplemented primary rules in the Treaty and, in doing so, established a large set of mandatory rules applied to both LUCs and LDCs. But is competition law part of private law? Yes, it is, if one asks the following question: Has the enforcement of competition rules at EU level determined the incompatibility of negotiated clauses in LUCs with EU law?

In classical contract law, either in short-term or long-term transactions, there is an assumption that parties have an incentive to *restrain* one another, avoiding that one party imposes clauses that would cause harm to the other. This *mutually restraining* character is the expected behavior of economic actors making reciprocal commitments with equal bargaining power, which can and do construct arrangements pursuing optimal solutions. However, markets are not perfect, nor are LUCs agreements in which both parties could fully exercise *mutual-restraint*.<sup>1</sup> In the market where there has still been few large gas producers connected to pipelines that transport the large portion of natural gas consumed by EU Member States, through growth of LNG gas, gas producers still hold the ability to exert influence over buyers by imposing clauses that would ultimately protect their dominant position through *vertical restraint* in their own favor.

EU competition policy acknowledges that long-term supply contracts could produce economic benefits in the short and long run, such as security of supply and joint-investment in

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<sup>1</sup> See the distinction between classic contract law, neoclassical contract law and relational contracts developed by Williamson in his well-known paper where he develops his theory of contract theory of relational contracts. Oliver Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, Journal of Law and Economics 22, 233-61.

infrastructure. If so, in case of vertical restraints, undertakings could argue a defense based on the exemption rule of Article 101(3) TFEU. By contracts, the EU competition policy also acknowledges that the concentration of bargaining power in the hands of a few gas producers with access to pipelines has long prevented buyers from exerting mutual-restraint. Therefore, gas producers have economic incentives to get advantage from the unbalanced bargaining power by imposing vertical restraints that provoke the foreclosure of the wholesale market to new entrants, as well as the flow of gas into the internal market. EU competition law could serve as an *ex post* instrument to counterbalance the abuse of bargaining power by giant gas suppliers when there is no economic defense argument that could justify such typical behaviors.

Considering the long-standing unbalance of bargaining power between gas producers and buyers, there are some anticompetitive contractual arrangements that are most likely to be found in the upstream gas market. Some of them are related to horizontal restraints, like single sale mechanisms between gas producers.<sup>2</sup> Others are vertical restraints between gas producers and wholesales importing gas into the Union. LUCs are vertical agreement in which suppliers are larger firms involved in E&P of natural gas. Therefore, those types of transactions are mostly likely to raise competition concern considering the natural condition of dominant position of gas suppliers.

This thesis is committed to identifying European Private Law through the lens of the Modern Concept of Private Law. In this vein, European Private Law corresponds to a normative system of rules imposing obligations on individuals and private relationships. When EU Law prohibits agreements affecting competition or freedoms (Article 101 TFEU), it provides *vague* reasons for actions applied to parties involved in transactions (e.g. agreements should not foreclose competition). When adjudicating authorities (e.g. the Commission, NCAs, or Courts) enforce these vague provisions case by case, these decisions represent authoritative determinations of what law is (e.g. proposition like LDCs upon 5 years foreclosures the market). In any legal system, decisions are supplementary sources of law as they provide precise information about what the law is to market actors and legal officials.<sup>3</sup>

The proposition that decisions issued by the Commission or other authorities with adjudicating powers are indeed supplementary sources of EU Law seems to have long been

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<sup>2</sup> See GFU case, Coabe case and DUNC/DUG cases.

<sup>3</sup> See the concept of secondary rules of adjudication as developed in chapter 3.

accepted among lawyers operating within the field of energy and competition law. While the CJEU has had few cases over its history dealing with contracts in Energy Markets, and no cases on LUCs and LDCs, Competition Lawyers have devoted entire books to systematizing decisions issued by the Commission regarding enforcement of competition rules upon vertical and horizontal agreements.<sup>4</sup> The result has been the compilation of decisions determining a black list of prohibited clauses. As Peter Cameron asserted in his 2002 book on *Competition in Energy Markets*, the Commission's decisions between 1993 and 1996<sup>5</sup> already established 15 years as the maximum duration of long-term upstream supply contracts in the electricity Markets, what he calls contractual "standard terms".<sup>6</sup> Therefore, it seems that Competition lawyers are those who are more aligned to the study of EU contract law in regulated markets. LUCs and LDCs being the subject of this thesis, the focus will be on enforcements addressed in those specific contracts.

Since the late 1990s, the Commission has advanced investigations towards the realm of private ordering of parties in LUCs and LDCs. With regard to LUCs, it started with investigations into Norwegian joint-sales operations in Statoil/Nork Hydro (hereafter GFU case)<sup>7</sup> and ended by shifting attention also to gas supply contracts between GFU and gas buyers. At the same time as the DG Energy was between negotiations regarding the second set of norms to *ex ante* regulate the internal gas market, the DG Competition was already acting in parallel, opening several investigations targeting commercial contracts, including LUCs where gas producers were foreign undertakings.

Among the Commission's initiatives enforcing EU Competition Law to LUCs and LDCs, in particular the former type of transaction, there are two specificities regarding the enforcement mechanism and the reaction of legal scholarship to it. Firstly, in all the cases

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<sup>4</sup> See the series of edited books by Professor Christopher Jones and Emmanuel Cabau on EU Competition Law and Energy Markets, where there are entire chapters dedicated to build the doctrine of EU contract Law by systematizing Commission's decision in vertical and horizontal agreements. Jones, Christopher, and Emmanuel Cabau. *EU Competition Law and Energy Markets*. Second edition. Claeys & Casteels, 2007. Jones, Christopher, and Emmanuel Cabau. *The Internal Energy Market : The Third Liberalisation Package*. Third edition. Claeys & Casteels, 2010.

<sup>5</sup> *Electricidade de Portugal/Prego Project* [1993] OJ C265/3; *REN/Turbogas* [1996] OJ C118/7; *ISAB Energy* [1996] C138/3.

<sup>6</sup> Cameron, Peter D. *Competition in Energy Markets : Law and Regulation in the European Union*. Oxford University Press, 2002, p. 241.

<sup>7</sup> Press release IP/02/1084 of 17 July 2002«Commission successfully settles GFU case with Norwegian gas producers». This case concerned a joint-selling agreement between producers from the Norwegian continental shelf, but incidentally the abolition of territorial restrictions was also achieved.

against parties in LUCs, and almost all the cases against parties in LDCs, the Commission short-closed investigations through settlements or commitment-decisions, which *in theory* had serial implications to be referred to as sources of law. So far, they are not authoritative determinations of what the law is, but rather a bargain process taken place before concrete application of law. Secondly, notwithstanding the option of short-closing investigation through settlements or commitment-decisions, legal scholars working on EU Energy Law and EU Competition Law has massively referred to those commitment-decisions as if they are sources of law. In fact, most of the scholars devoting their studies to systematize EU Law through doctrine of the Commission do not even distinguish commitment-decisions from formal decisions. Therefore, considering the large endorsement of legal discourse to the proposition that commitment-decisions are source of (Private) Law, it is worth a closer look.

## **2. Long-Term Upstream v. Downstream Supply Contracts in Gas**

The European Commission has long recognized that LUCs and LDCs have to be carefully examined. Dominant suppliers could use their bargaining power to foreclose downstream markets.<sup>8</sup> However, the bargaining power relationships between parties in LUCs and LDCs are different, as well as how Competition Law is applied to each of these types of contracts. Because of those differences, EU Law has created (through supplementation) different obligations to each of these contracts. They can be distinguished according to substance and enforcement mechanism.

Before Market Integration, LUCs and LDCs had similar clauses and features. Those who were buyers in LUCs passed their obligations to buyers in LDCs, where promisors were then resellers and buyers were large industries, gas-fired power plants, or retailers. Both contracts had long-term time clauses, exclusive volume purchase, use or territorial restriction and even take-or-pay clauses. Yet competition rules have interfered in the private ordering of parties engaged in these contracts differently and those differences rely on substance and enforcement mechanisms.

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<sup>8</sup> European Commission, DG Competition, Report on Energy Sector Enquiry, SEC (2007) 1724, 10 January 2007, pp. 47-67, and European Commission, MEMO 07/15, 10 January 2007, p. 7, and European Commission, MEMO 07/407, 11 October 2007.

Enforcement of competition rules in the autonomy of LUCs has been moderated, concerning mostly vertical restraints that fall into the category of hardcore restrictions (i.e. territorial restriction) and *semi*-hardcore restrictions (profit sharing). Only in the 2015 did the commission advance towards Unfair Commercial Practices regarding prices. Besides substance, these public enforcements have so far relied on settlement/commitment-decisions. In contrast to LUCs, competition law has been more intrusive in the autonomy of parties in LDCs. Moreover, competition authorities have closed investigation through commitment-decisions, but also formal decisions. To identify the differences between the intrusion of competition rules into private ordering of LUCs and LDCs, it is necessary to understand what legal doctrines tell us about competition concerns both in Upstream and Downstream gas markets and later analyse the *de facto* enforcement of competition law.

Vertical agreements, which includes both *upstream* and *downstream* long-term gas supply agreements could contain provisions that *de facto* foreclosure of the downstream market.<sup>9</sup> If so, the vertical restraint could be caught either by Article 101, addressing those that fall into the category of anticompetitive agreements, and also 102 TFEU, as long as most of the promisors in long-term gas supply agreements, either *upstream* or *downstream*, occupied dominant positions in their markets. On the other hand, even if undertakings are caught by anticompetitive practice, they could argue in their defence that the practice confers sufficient benefits to outweigh the anticompetitive effects with reference to Article 101(3), which are economic efficiency arguments.<sup>10</sup> These efficiency defences, despite their exceptional function, are unlikely to be considered as either a defence or an objective justification when contractual arrangements fall into the category of hardcore restriction.<sup>11</sup>

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<sup>9</sup> “In short, the new viewpoint of the European Commission states that long contract duration is not in itself anti-competitive. Instead, the European Commission focuses its investigation on the risk of foreclosing the downstream market of potentially more efficient competitors. As a result of this new approach, the European Commission will examine, when assessing an individual long-term gas supply contract *in concreto*, the actual restrictions and actual possibility of new competitors entering in the relevant market”. See Anthony Verhelpen. *The Assessment of Vertical Long-Term Gas Supply Contracts and the Tension Between the Upstream and Downstream Markets*. In EU Energy Law and Policy Issues, edited by Bram Delvaux, Michael Hunt, and Kim Talus, 2nd ed., 91–117. ELRF Collection. Rixensart: Euroconfidentiel, 2010.

<sup>10</sup> European Commission Guidelines on Vertical Restraints. OJ C 291/1. 13 October 2000, nr. 5.

<sup>11</sup> See Vertical Restraints Guidelines, paragraph 7, 46, 49, Appendix 4.

The role of economic and non-economic gains in EU competition law has been largely debated in the context of economic efficiencies.<sup>12</sup> With reference to Article 101(3), the Commission's guidance paper establishes that the dominant company needs to prove that certain cumulative conditions are met.<sup>13</sup>

In this regard, the Commission seems to rely on the fact that Article 101(3) and 102(3) TFEU pursue the same objective.<sup>14</sup> Given that this is the case, whenever LUCs and LDCs distort competition by imposing vertical restraints, undertakings could consider as a defense efficiency arguments, such as claiming they solve *free rider* problems<sup>15</sup> or, most importantly, provide security of supply. Security of supply is an efficiency argument in favor of vertical restraints that could be used as a defense for both LUCs and LDCs, insofar they do not fall into the category of hardcore restrictions. Whilst the EU's dependence on external gas sources has turned the security of supply into a reasonable defense argument under Article 101(3) for LUCs, this defense has been far less convincing for LDCs.

With regards to LUCs, the EU legislator has explicitly acknowledged the importance of them for the economic activity of the common market and internal market,<sup>16</sup> which was studied in the last chapter. Although the EU legislator does not give further explanations about the reason why LUCs can secure supply, they may *prima facie* be justifiable under

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<sup>12</sup> Giorgio Monti, *EC Competition Law*, Cambridge University Press, 2007. See also Paul Lugard and Leigh Hancher, *Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty*, *European Competition Law Review*, 25, 2004, p. 419-420.

<sup>13</sup> Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abuse exclusionary conduct by dominant undertaking C(2009) 864 Final, Brussels, 9.2.2009, p. 104. "(i) The efficiencies have been or are likely to be realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution. (ii) The conduct is indispensable to the realisation of these efficiencies. (iii) There must be no less anti-competitive alternatives to the conduct that are capable of producing the same effect; the conduct is indispensable to the realisation of these efficiencies. (iv) There must be no less anti-competitive alternatives to the conduct that are capable of producing the same effect; the conduct is indispensable to the realisation of these efficiencies. There must be no less anti-competitive alternatives to the conduct that are capable of producing the same effect".

<sup>14</sup> Kim Talus. *Long-Term Upstream Natural Gas Contracts and EC Competition Law - Efficient Under Article 81(3) EC and Objective Justifications Under Article 82 EC*, In *EU Energy Law and Policy Issues*, edited by Bram Delvaux, Michael Hunt, and Kim Talus, 2nd ed., 143–62. ELRF Collection. Rixensart: Euroconfidentiel, 2010, p. 145.

<sup>15</sup> European Commission Guidelines on Vertical Restraints. OJC 291/1. 13 October 2000, nr. 116 (1).

<sup>16</sup> "Long-term contracts have played a very important role in securing gas supplies for Europe and will continue to do so. The current level of long-term contracts is adequate on the Community level, and it is believed that such contracts will continue to make a significant contribution to overall gas supplies as companies continue to include such contracts in their overall supply portfolio". Recital 1 and 8 of the Council Directive 2004/67/EC of 26.04.2004 concerning the measure to safeguard security of natural gas supply, OJ L 127/92 of 29.04.2004. See also Recital 42 of the Directive 2009/73/EC concerning common rules for the internal market of gas.

Article 101(3) as long as there are narrowly-defined circumstances in which can be considered as a legitimate argument<sup>17</sup> such as reserve depletion, necessary investment in infrastructure or insecurity of transit routes.<sup>18</sup> For instance, we can presume that these contracts are instruments in supporting large-scale investment of producers in the exploration and production of gas in third countries.<sup>19</sup> Nonetheless, this justification has to be provided for each individual LUC<sup>20</sup> if any of the vertical restraints raise competition concerns.

By contrast, the efficiency argument in favor of vertical restraints in LDCs is harder to be understood as a legitimate defense argument. Not surprisingly, whilst the enforcement of competition rules of LUCs has frequently been pondered by the efficiency argument of security of supply and the political sensibility of involving undertakings that produce gas in third countries,<sup>21</sup> the foreclosure of gas markets by a second tier of supply contracts along the supply chain, LDCs, has not been tolerated. Since the narrowly-defined circumstances are harder to be met in LDCs, Article 101(3) has not been considered as a legitimate argument for the defense.

Even though LUCs and LDCs had similar clauses and features before market integration, the enforcement of competition rules upon these private relationships were in particular different. Differences can be found in three dimensions: the substantive dimension of decisions, enforcement mechanisms, and interplay between multi-level adjudicating authorities. Obligations imposed on LDCs are more intrusive into private orders of parties; have been created through commitment-decisions and, though few, formal decisions; and by the interplay of adjudicating authorities at EU and national levels. By contrast, enforcement of competition law on LUCs has established few mandatory rules; it has been done so far

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<sup>17</sup> The CJEU has accepted the security of supply as a legitimate argument but only in narrowly-defined circumstances and coupled with strict proportionality requirements. See free movement of goods cases: Case C-72/83, *Campus Oil Ltd v. Minister of Industry and Energy* [1984] ECR, p. 2727; Case C-347/88, *Commission v. Greece* [1990] ECR, p. 1-4747; Case C-398/98 *Commission v. Greece* [2001] ECR I-7915. See also the free movement of capital cases: Case C-367/98 *Commission v. Portugal* [2002] ECR I-4731; Case C-483/99 *Commission v. France* [2002] ECR I-4781; Case C-503/99 *Commission v. Belgium* [2002] ECR I-4809; Case C-462/00 *Commission v. Spain* [2003] ECR I-4581; Case C-98/01 *Commission v. Greta Britain* [2003] ECR I-4641; Case C-174/04 *Commission v. Italy* [2005] ECR I-4933.

<sup>18</sup> Sanam S Haghghi, *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries*, Oxford and Portland, Oregon: Hart Publishing, 2007, p. 13-20.

<sup>19</sup> Peter Roberts, *Bankable Gas Sales Agreements in the Project Financing of Offshore Gas Production Projects*, *Journal of Energy and Natural Resources Law*, vol. 16, 1998, p. 200.

<sup>20</sup> Lars Kjølbye, *Vertical Agreements*, in *EU Energy Law: EU Competition Law and Energy Markets*, edited by Christopher Jones, Vol. 2, Claves & Casteels: Leuven, 2007, p. 234.

<sup>21</sup> Anthony Verhelpen (2010), p. 129.

through commitment-decisions and not formal decisions; and the Commission has been so far the only adjudicating authority with willingness to regulate those contracts through competition.

### *2.1. LDCs: Interplay between Commission and NCAs, Most Commitment but yet few Decisions*

LDCs are natural gas supply contracts where sellers are not gas producers, but in fact resellers of gas. As such, Article 101(3) has not been accepted as a defense argument and the enforcement of competition law upon those transactions has been much more intrusive into the private order of parties throughout the three decades of the Integration Project.

Pursuing the creation of the integrated and competitive market, EU competition law has been enforced on LDCs since mid-1996, even before the approval of the 1<sup>st</sup> Gas Directive. The competition concerns were raised against *two* types of negotiated clauses in LDCs: negotiated clauses that could prohibit the resale of gas by large customers into wholesale markets (e.g. non-compete clauses); as well as negotiated clauses that could preclude large customers from switching gas suppliers from dominant gas suppliers to new competitors (e.g. tacit renewal or minimum purchase volume). By targeting those *two clauses* on LDCs, the DG Competition advanced a clear policy-oriented agenda aligned with DG Energy in Sector-Regulation. It aimed to enhance the resale of gas into wholesale markets, at that time underdeveloped, as well as to create demand for new competitors to access the market.

Since the mid-1990s, the enforcement of competition law over parties in LDCs can be divided in *three rounds*. Each round corresponds to a period of time where the multi-level enforcement system adopted different strategies to enforce competition law. In the first round, from 1996 to 2004, the Commission enforced competition law to LDCs between gas suppliers and Gas Power Plants. In the second round, from 2004 to 2006, the German Competition Authority played an important role in advancing the enforcement of competition law over LDCs between gas suppliers and large industries in general. There was then no enforcement of competition law without distinguishing contracts and buyers. Following the German authority, the Commission has adopted a similar strategy at the EU level since 2007, which completed then the third round. Throughout the three rounds, the active role of the Commission, together with NCAs, led to the large intrusion of EU Competition Law into the

private order of LDCs. Vague provisions of Article 101 TFEU have been supplemented by (a sort of) authoritative determination establishing a black list of *prohibited clauses*, which have been largely endorsed as “standard clauses” by Energy and Competition lawyers. Interestingly, though, the enforcement of competition law has been done through commitment-decisions, instead of formal decisions. Moreover, although commitment-decisions are addressed to a single gas undertaking, those decisions do determine very precise and rigid mandatory rules to be respected by gas suppliers in further contracts. If law is a social phenomenon driven by legal discourses, this thesis takes the position that commitment-decisions, those decisions (more than commitments) have been an important supplementary source of European Private Law. They have indeed regulated contracts through enforcing competition law by adjudicating authorities beyond Courts and by commitment-decisions.

### *2.1.1. 1<sup>st</sup> Round: The Commission v. LDCs between Gas Suppliers and Gas Power Plants*

Already in 1995–1996, the LDC signed between the gas importer Transgás and the electricity generator Turbogás attracted the attention of the Commission.<sup>22</sup> At that time, the competition concern was only related to *use restriction clauses*. In the LDC between Transgás and Turbogás, Transgás restricted the use of natural gas purchased by Turbogás to its operations in fired-power plants. The purchased Natural gas was restricted to electricity generation operations. Therefore, the *use restriction clause* prohibited Turbogás to resell natural gas in the market and compete with Transgás. Throughout the investigations, Transgás and Turbogás offered the Commission the commitment to reduce the duration of the *use restriction clause*, which was then accepted by the Commission. Investigations were short-closed without infringement procedures. Back then, a commitment-decision was not a formal mechanism to enforce EU Competition Law. Yet the case reveals the Commission had already implemented in practice the strategy of short-closing investigation through settlements even before the approval of Council Regulation 1/2003, when commitment-decisions were formally recognized as enforcement mechanisms.

Following the Transgás/Turbogás investigation, the Commission opened the second investigation against other parties in LDCs after four years. In 2000, the LDC between the

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<sup>22</sup> Transgas/Turbogas case, XXVith Competition Report [1996], p. 135.

Spanish gas importer Gas Natural and the electricity generator Endesa was subject to investigation. While the Commission indicated the *use restriction clause* in Transgás/Turbogás agreements as reasons for competition concerns, the adjudicating authority went far beyond in the Gas Natural/Endesa case. The Commission listed several negotiated clauses in the LDC between Gas Natural and Endesa as reasons for competition concerns: its long-term duration, *de facto* exclusivity, and prohibitions on resale. These were then the first black lists of prohibited clauses in LDCs endorsed by the Commission.<sup>23</sup> As in the prior case, both Gas Natural and Endesa voluntarily amended the agreement to close investigations before infringement procedures began. The volume of exclusive purchasing capacity was reduced by one-fourth, and the duration was limited to no more than 12 years during the plateau period.<sup>24</sup> Gas volume and time-clause basics were, and are still, the most essential terms and conditions of LDCs. Any Gas Supply Contracts must establish duration and volume. The Gas Natural/Endesa case then represented the first bold move of the Commission towards the private order of parties in LDCs. It also confirmed that the efficiency argument of Article 101(3) was unsuitable for LDCs.

In the Gas Natural/Endesa case, the Commission was indeed more intrusive in the private order of parties than in the Transgás/Turbogás case. Nevertheless, both investigations were closed without infringement procedures. Parties voluntarily changed their agreements before an authoritative determination of whether clauses were indeed anticompetitive or not. Only in 2004 did the Commission enforce EU competition Law on parties in LDCs through a formal decision in the *GDF/ENI/ENEL* case. Yet the formal decision targeted only *territorial restriction clauses*, which has been considered *hardcore restrictions* under the Bock Exemption Regulation since 1999.<sup>25</sup>

In the *GDF/ENI/ENEL* case, the Commission opened investigations against two intertwined contracts: a LUC and a LDC. The Capacity Reservation Contract was signed with Gas importer ENI concerning the transportation of natural gas from the north-western border of France to the border of Switzerland with GDF. The LDC was then the agreement between

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<sup>23</sup> Gas Natural/Endesa case, Commission Report 2000, p. 154. Press Release IP/00/297 of 27.03.2000.

<sup>24</sup> The amendments proposed by the parties and accepted by the Commission were to: (i) substantially reduce the gas volume covered by the contract (around 25%) in order to free part of Endesa's purchasing capacity and thereby eliminate *de facto* exclusivity, (ii) reduce the long-term duration of the supply contracts by one-third establishing a maximum duration of 12 years during the plateau period and; (iii) allow Endesa to resell the gas after a start-up period. Gas Natural/Endesa case, Commission Report 2000, p. 154. Press Release IP/00/297 of 27.03.2000. Marina Fernandez Sales, *op. cit.*, p. 55

ENI and the electricity generator ENEL selling the gas transported from the north-western border to electricity generation in gas-fired power plants. To what concerns the later agreement, the LDC precluded the ENEL from reselling the gas purchased for power plants into French territory, which would have created competition with GDF.<sup>26</sup> Like the prior cases, the parties voluntarily removed the territorial restriction clause from the LDC. Nevertheless, unlike the prior cases, the Commission opted to release a formal decision against territorial restriction clauses, instead of closing the investigation without the infringement decision.

The *GDF/ENI/ENEL* case was the only case where the Commission enforced competition Law through formal decisions regarding LDCs and LUCs. Not surprisingly, in this case the competition concern referred to territorial restriction clauses, which can be considered an easy case as long as territorial restriction is largely recognized as a *hardcore restriction*. Therefore, already in early 2000s, the enforcement of competition by the Commission was largely relying on settlements and commitment-decisions. Moreover, also in the early 2000s, legal scholarship already referred to this settlement and commitment-decision as specie of “case-law” or “standard contract terms”, which could explain the large endorsement by NCAs of those settlements as sources of EU Law.

### 2.1.2. 2<sup>nd</sup> Round: ECN and Bundeskartelleramt

Influenced by the Commission’s approach, the NCAs also engaged with the enforcement of Competition Law on parties in LDCs. The issue was first discussed within the framework of the European Competition Network (ECN),<sup>27</sup> within its energy subgroup, on two occasions in 2005.<sup>28</sup> Among the ECN members, there was a notable development in enforcing competition rules by the German Federal Cartel Office (FCO) (*Bundeskartelleramt*).

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<sup>25</sup> The Block Exemption Regulation 2790/1999.

<sup>26</sup> See Commission press release IP/04/1310 of 26.10.2004 and decisions of 26.10.2004, COMP/38662 – GDF/ENI and COMP/38662 – GDF/ENEL.

<sup>27</sup> ECN is a regulatory network composed by the Competition Authorities of European Member States with the aim to coordinate the national enforcement of competition law at transnational level. To understand the regulatory governance system of ECN, see Cseres, Katalin J. *Competition Law Enforcement Beyond The Nation-State: A Model for Transnational Enforcement Mechanisms?*, In *The Transformation of Enforcement: European Economic Law in a Global Perspective*, edited by Hans-W. Micklitz and Andrea Wechsler, 319–41. Oxford and Portland, Oregon: Hart Publishing, 2016.

<sup>28</sup> European Commission, Report Competition Policy 2005, 25-26 at point 46.

In January 2005, the FCO released the report called “Principles of Evaluation of Long-term Gas Supply Contracts under Competition”. The guidelines were so extensive that Peter Cameron called them “standard contracts clauses”:<sup>29</sup>

- (i) Prohibition of Exclusive purchase clause;
- (ii) Obligation of free volume 20% gas demand for secondary suppliers in contracts between 2-4 years: free volume must correspond with the actual demand. In other words, if the main suppliers seeks to conclude a contracts for a period of two to four years, the secondary suppliers must have the opportunity effectively to obtain a 20% share of the customers’ actual needs;
- (iii) Limited Liability of secondary supplier: The share of financial risks held by a secondary supplier must not exceed his share of total contractual supply quantity.
- (iii) Prohibition of virtual splitting of one contract: multiple supply contracts with the same supplier are considered to be one agreement. An artificial splitting of a contract to circumvent thresholds by stapling different contracts together is not allowed;
- (iv) Prohibition of so-called English Clauses: supply contracts that allow the customer to inform the supplier of rival offers below their respective contract price and leave it to the supplier to respond, perhaps with a price reduction, are not permitted;
- (v) Prohibition of tacit renewal clauses: Clauses that permit tacit extension after the set contract period has expired are deemed to be contracts concluded for an indefinite period of time.

Besides releasing non-binding Guidelines, the German NCAs went further by recommending the Guidelines to LDCs as a benchmark to define which contract clauses were in conformity or not in conformity with Article 81(1) ECC at that time. By doing so, these guidelines eventually led to investigations against 17 of the biggest gas suppliers.<sup>30</sup> Whereas the majority of the gas suppliers voluntarily agreed with the removal of these clauses through a sort of collective settlement,<sup>31</sup> few gas suppliers resisted voluntarily changes. Among those, the FCO initiated formal proceeding against E.ON/Ruhrgas as the major and representative gas supplier in Germany requesting that that the term of gas supply contracts should not exceed (i) 2 years if more than 80% of the supplier’s demand were covered and (ii) 4 years if 50-80% of the supplier’s demand were covered. Having the investigation ended by a formal prohibition,<sup>32</sup> E.ON/Ruhrgas requested the judicial review of the FCO’s decision, a plea that

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<sup>29</sup> Peter D. Cameron, 2007, *op. cit.*, p. 326. See also *Bundeskarterllamt*, 8<sup>th</sup> Decision Division, B8-113/03, Bonn, 28 January 2005.

<sup>30</sup> See Jonas Von Kalben, *The trend towards 'consensual competition law' : a comparative study of commitment procedures and policies in Germany and the United Kingdom*, LLM Thesis, European University Institute, 2014.

<sup>31</sup> On 7 July 2010, the German NCA accepted commitments from energy suppliers RWE, EWE, RheinEnergie, Wingas, N-Ergie, . *Energy and Restrictive Practices: An Overview of EU and National Case Law*, E-Competitions Bulletin No. 70451, 201, 4 December 2014, pp. 23-24.

<sup>32</sup> *Bundeskarterllamt*, 8<sup>th</sup> Decision Division, B8-113/03, Bonn, 13 January 2006.

was later rejected first by the Regional Court of Düsseldorf (*Oberlandsgericht*) in June 2006<sup>33</sup> and later by the German Federal Supreme Court in 10 February 2009.<sup>34</sup>

The E.ON/Ruhrgas case illustrates that NCAs had faced more resistance than the Commission to solve competition concerns through negotiations. Despite the initiatives of NCAs, the Energy Enquiry released in 2007 revealed that LDCs were still foreclosing competition and forbidding the evolution of wholesale markets, which then led the Commission to open other investigations in against parties in LDCs.<sup>35</sup>

### 2.1.3. 3<sup>rd</sup> Round: the Commission v. LDCs between Gas Suppliers and Large Industries

By endorsing the view of the *Bundeskartellamt* expressed in the Principle Evaluation of Long-term Gas Supply Contracts,<sup>36</sup> the Commission adopted the German position as regards the incompatibility of several terms and conditions commonly imposed by gas suppliers with EU Competition Law. While the Sector-Regulation in the 2<sup>nd</sup> Gas Directive granted rights to large customers to switch, those large firms could still not exercise these rights because of terms and conditions in LDCs. It was the conclusion of the Energy Sector Inquiry released in 2007 that motivated the commission to open two investigations addressing LDCs. Different from the investigations between 1996–2004, the Commission did not target single contracts between Gas Suppliers and Electricity Generators operating Gas Power Plants. The Commission opened investigation against Gas Suppliers and the whole portfolio of LDCs signed with large firms.

The first case was against the Belgian *Distrigas* – the investigations started in 2004.<sup>37</sup> The Commission opened investigations against LDCs signed between *Distrigas* and its whole portfolio with large customers. Therefore, following German NCAs, investigations targeted gas suppliers and covered all LDCs without distinguishing the legal personality of buyers or

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<sup>33</sup> Düsseldorf Court of Appeal, 20 June 2006, Case n° VI-2 Kart 1/06 (V). See also *Bundeskartellamt, Düsseldorf Higher Regional Court confirms Bundeskartellamt decision in the proceedings against E.ON Ruhrgas*, 20 June 2006, Accessed on 12 December 2015, [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2006/20\\_06\\_2006\\_OLG\\_EON\\_eng.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2006/20_06_2006_OLG_EON_eng.html)

<sup>34</sup> German Federal Court of Justice, 10 February 2009, Case n° KVR67/07, Gaslieferverträge.

<sup>35</sup> European Commission, Energy Sector Inquiry 2007.

<sup>36</sup> Anthony Verhelpen (2010), pp. 128-129.

<sup>37</sup> Case COMP/B-1/37.966 – *Distrigaz*. OJ C 77/48 5.4.2007.

specific contracts. In those LDCs, there were three clauses that found competition concerns: exclusively-purchased volumes of gas, the long-term duration of contracts, and tacit renewal clauses. Throughout the investigation, including the statement of objection and preliminary assessment, Distrigas offered a commitment in 2007 to short-close investigations and solve competition concerns. The commitments offered by Distrigas and accepted by the Commission covered the following obligations:<sup>38</sup>

First, on average a minimum of 70 % of the gas volumes supplied by Distrigas and connected undertakings to industrial users and electricity producers in Belgium will return to the market each year. If Distrigas' total sales decrease from their 2007 level, then Distrigas will be able to tie a certain fixed volume of gas sales, which represents less than 20 % of the total market concerned. Secondly, contracts with industrial users and electricity producers cannot be longer than 5 years, however contracts relating to new power plants with a capacity exceeding 10 MW are not subject to the commitments. Thirdly, Distrigas undertakes not to conclude any gas supply agreements with resellers with a duration of over 2 years. Fourthly, Distrigas confirms that it will not introduce use restrictions into its supply contracts.

In the Commission Working Paper accompanying the “Report of the functioning of Regulation 1/2003” released in 2009,<sup>39</sup> the Commission listed the *Distrigas case as a landmark case* on exclusionary abuses for the future competition enforcement of downstream long-term supply contracts in energy. Notice that the Commission emphasized the *Distrigas case* as a landmark case without any reservation regarding the fact it is a commitment-decision. The same statement has been endorsed by legal scholarship.<sup>40</sup> Moreover, the rigidity of the mandatory rules created by commitment-decision follows the same tendency of Sector-Regulation in EU secondary legislation. Commitment-decision refers to the prohibition of long-term contracts longer than 5 years, although not subjected to Gas Power Plants with capacity exceeding 10 MW; and also prohibition of concluding agreement with resellers with duration over 2 years. The preciseness of the commitment-decisions is also an

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<sup>38</sup>According to the summary of Commitment-decisions (2008/C 9/05). See also Case COMP/B-1/37.966 – Distrigaz. OJ C 77/48 5.4.2007.

<sup>39</sup> Commission Working Paper accompanying the Report on the functioning of Regulation 1/2003, SEC(2009) final of 9 April 2009, p. 17.

<sup>40</sup> The same statement is also confirmed by Adrien De Hauteclocque: “the second sort of energy-specific remedy was created in the context of the Distrigas case. According to the Commission, the Distrigas decision constitutes the landmark case for the future of competition enforcement on long-term contracts in energy. Adrien De Hauteclocque, *Market Building through Antitrust: Long-Term Contract Regulation in EU Electricity Markets*. Edward Elgar Publishing, 2013, p. 92.

element to be considered when European Private Lawyers try to explain the phenomenon of “intrusion and substitution”.

The *Distrigas* commitment-decision was indeed a landmark case. In 2009, the commitments offered by *Distrigas* and accepted by the Commission were the benchmark for a similar investigation electricity markets: the *EDF case*.<sup>41</sup> Despite the fact this later case concerns a long-term electricity supply agreement, the commitments offered by EDF were almost identical of those offered by *Distrigas*.<sup>42</sup>

Understanding how the Commission and NCAs have enforced EU competition law on parties in LDCs matters for *three* reasons. Firstly, it proves how EU competition Law is far-reaching in the private order of contracts. By doing so, it restrained the freedom of contract of parties involved in LDCs through establishing a list of *mandatory rules* to be considered by market actors. Secondly, it reveals how the Commission and NCAs have supplemented the vague content of Article 101 TFEU with precise determination of clauses (e.g. no longer than 5 years or 10 MW). Thirdly, although legal scholars and legal officials have cited these competition cases as “case-law”, “landmark cases”, or even “precedents”, there is not a clear reference that commitment-decisions are not formal decisions, or vice versa. The reasons will be then better investigated in the LUCs, when the language used by legal officials is under scrutiny.

## 2.2. LUCs: only Commission, only Commitment-Decisions

In spite of the similarities of the negotiated terms and conditions in LUCs and LDCs before the integration project, the enforcement of competition law has had different approaches to those two types of transactions. Those differences can be noticed in terms of substance, enforcement mechanism, and enforcement authority.

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<sup>41</sup> Case COMP/ 39.386 – EDF Long-term Contracts.

<sup>42</sup> Similar to the *Distrigas case*, EDF committed to ensuring that 65% of the total volume available from its portfolio, per year, returned to the market in order to be accessed by third parties. Second, EDF also committed not to sign supply agreements longer than five years. Third, EDF committed to offer contracts without *de jure* exclusivity supply clauses in future negotiations. Then the large customer would be free to choose whether they would have a second supplier. Furthermore, the French supplier committed to not only exclude the resale clause in future contracts, but also to never enforce this clause in ongoing contracts. Case COMP/ 39.386 – EDF Long-term Contracts.

Regarding substance, the intrusion of competition law into the private ordering of LUCs has been *less* extensive than LDCs. There are some reasons that can explain such disparity. Firstly, Article 101(3) TFEU is most likely to be considered as a defense argument as long as LUCs have been historically associated with up-front investments in the oil and gas industries. Moreover, even when Article 101(3) is not anymore applicable case by case, there are the legal and political restraints related to competence and willingness to enforce competition law by adjudicating authorities. LUCs are supply agreements between gas producers and buyers, where producers are located in foreign countries and buyers are gas undertakings located in Member States sometimes (or even mostly) dependent on imported natural gas. Therefore, the willingness of enforcing competition law upon private order of LUCs has been counterbalanced with unbalanced political powers, rather than unbalanced private bargaining power. Furthermore, LUCs being cross-border contracts, the overlapping of competences of the Commission and NCAs is undisputable. These considerations then justify why the Commission has played a key role in enforcing competition law.

Besides differences in substance and adjudicating authority, the Commission has not issued any formal decision against parties to LUCs, even when agreements included hardcore restrictions, such as territorial restrictions. All the investigations carried out by the Commission regarding LUCs were short-closed through commitment-decisions in which the parties committed to remove from agreements in performance and further agreements three types of clauses. Like in LDCs, the Commission advanced towards the private order of parties in LUCs through different rounds, where each round attached certain types of clause. In the first rounds, from 2000 to 2004, the Commission opened investigations against territorial and use restriction. In the second round in 2007, the Commission focused on profit sharing clauses. Since 2011, the Commission has claimed that commercial practices of LUCs have violated competition law. Whereas the territorial restriction clause could be considered a *hardcore violation*, the others cannot fall into the category of easy cases.

This thesis claims that, considering the lack of infringement decisions involving LUCs, the outcome of commitment-decisions has been used as a reference to regulate this upstream gas supply agreement. To understand the Commission's practice regarding the LUCs, it is important to advance the analysis towards describing matters case by case. However, to understand how commitment-decisions have been endorsed as "case-law" by legal discourse, it is also important to understand the role of the Commission in the construction of the

discourse. Therefore, the coming subsection proposes to first describe the Avant-garde DG Competition, and later introduce the commitment-decisions.

### *2.2.1. Avant-garde DG Competition: Giving Loud Voice to Commitment-Decisions*

On 22 November 1999 Mario Monti, while Director-General of the DG Competition, made a public speech about the relation between competition and regulation to an Italian audience.<sup>43</sup> Just a year after the approval of the 1<sup>st</sup> Gas Directive by the EU legislator, the Commission called for the enforcement of competition law to boost the creation of a market in Utilities Services in telecommunications, postal services and energy. His speech, albeit addressed in general terms, announced what have been seen as the enforcement priorities of the DG Competition. Surprisingly, the Director-General made a bold move towards an external policy of EU Energy Law by addressing competition concerns in supply contracts with foreign gas producers. Considering the regulatory framework studied in the last chapter, the DG Competition was indeed Avant-garde when added to the enforcement of competition law over foreign undertakings before the Lisbon Treaty and the establishment of the debate on EU and its external relations. Following what was addressed in the first speech, the sequential annual reports disclosed, among others, investigations into the gas sector against numerous import contracts containing clauses preventing cross-border flows of natural gas in the internal market.<sup>44</sup>

Four years later, on 6 October 2003, Mario Monti stood again to make another formal public statement announcing that investigations had been concentrated on territorial sales restriction and, moreover, the competitive issues had been solved so far through settlements based on commitments offered by companies. By citing the *Gazprom/ENI*<sup>45</sup> case as one example of pledging changes in LUCs, the commissioner raised a strong claim on what extent settlements could be employed as a regulatory tool to model future alike agreement.

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<sup>43</sup> Speech/99/173, European Commissioner for Competition, *Concorrenza e Regolazione nell'Unione europea: convegno dell'Autorità Garante della Concorrenza e del Mercato* (Speech delivered in Rome, 22 November 1999).

<sup>44</sup> Speech/02/101, European Commissioner for Competition, *The Single Energy Market: the relationship between competition policy and regulation* (Speech delivered at the 10<sup>th</sup> Commission on Productive Activities, Commerce and Tourism, Rome, 7 March 1999).

<sup>45</sup> Press release IP/03/1345 of 6 October 2003, «Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses».

I consider this settlement to be a major breakthrough for the creation of the gas market in the European Union. At the same time, the settlements demonstrate that validity of long-term supply contracts – a common feature in the gas industry – is not put in doubt as long as they don't contain anti-competitive clauses. Following the examples set by the settlement, I trust that Gazprom will soon bring its contracts with other European importers into line with the EU competition Law. I also hope that the settlement of the Gazprom/ENI case concerning supply contracts will encourage the Algerian gas producer Sonatrach to follow the same path.<sup>46</sup>

From the public speech of Mario Monti, we can argue that the European Commissioner for competition, already in 2003, built his speech based on two assumptions. First, he affirmed the LUC between Gazprom and ENI was incompatible with EU competition law because of territorial sales restrictions that would preclude ENI from reselling gas. Observe that, considering the investigation was indeed closed through settlement, we could come to the conclusion that there was not a finding infringement. There was no inquisitorial model with prosecutorial bias<sup>47</sup> establishing whether the contractual clause was indeed incompatible with EU competition law, nor whether EU law is applicable to gas producers in third countries. Nonetheless, the declaration of the Commissioner implies that the Gazprom/ENI case, albeit short-closed through settlement, had established a precedent about the application of EU Law. Second, besides the application of law, Mario Monti also asserted that not only would Gazprom bring its contracts with other European importers into line with competition law by implementing the same offered commitment in the Gazprom/ENI case, but that other gas producers in foreign States like the Algerian oil and gas company Sonatrach would be encouraged to follow the same path. The competition concerns were not only reframed to resemble infringements, but the offered commitments by Gazprom/ENI were also presented as remedies imposed in a formal decision, despite the absence of a proportionality test. Although the settlements could not *in theory* be referred as normative statements that would regulate the behavior of economic actors, this is not the conclusion that can be drawn from Mario Monti's speech. The Commissioner for Competition was clearly intent on building a normative statement using settlements as pillars, which validates the proposition that settlements have been perceived as *quasi-case law*.

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<sup>46</sup> "Speech/03/447, European Commissioner for Competition, *Applying EU Competition Law to the newly liberalized energy markets* (Speech delivered at the World Forum on Energy Regulation, Rome, 6 October 2003).

<sup>47</sup> See Damien J. Neven, *Competition Economics and Antitrust in Europe*, Economic Policy 21, no. 48, October 2006, p. 741–91.

Four years after the Mario Monti's speech, the DG Competition released the final conclusions of the Energy Sector Inquiry in January 2007,<sup>48</sup> which was a five hundred page report on the effects of the market liberalization of the gas and electricity sectors. It aimed to highlight areas where competition was not yet functioning well and the reasons why. While reporting the existing importing contracts in section II.2.1. (Long-term contracts between producers and suppliers),<sup>49</sup> the report mentioned the restriction of resale clauses that were historically included in the LUCs and a series of cases opened by the Commission in this regard.

(141) In particular, a number of contracts relating to new Member States contain territorial restrictions that prevent buyers from re-selling the gas outside a defined area (or other terms with equivalent effect, such as various forms of profit-splitting mechanism). Such provisions were historically included in many other contracts through which companies in Western Europe bought gas, but following a series of cases opened by the Commission those investigated to date have largely been removed. *Some of these cases were concluded by formal decisions stating that territorial restrictions infringe Article 81 of the EC Treaty.*

Similar to Mario Monti's speech, the DG Competition clearly stated that territorial restrictions that prevent buyers from reselling the gas, and also included other terms with equivalent effects like profit share, were found in a series of cases as incompatible with Article 101 TFEU (Article 81 EC Treaty). Therefore, the European Commission claimed that, following investigations, these clauses had been largely removed. Notice that the Commission did not acknowledge that the series of investigations involving LUCs were all short-closed through commitment-decision. To make the employed normative language even more emphatic, the Energy Sector Inquiry inaccurately announced that some of the cases were concluded by formal decision, information that derived from a flawed reference with evident error in citation. In fact, the footnote of the report only refers to the GDF/ENI/ENEL case, which related to vertical restraints in LDCs, not LUCs as affirmed in the Energy Sector Inquiry. Recalling what was discussed earlier in this chapter, the differences in the application of Article 101 and the economic efficiency defense argument is considerable. The divergence

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<sup>48</sup> Energy Sector Inquiry, 2007,

<sup>49</sup> Energy Sector Inquiry, 2007, p. 55.

between LDC and LUCs undermines any analogy between the decision in the GDF/ENI/ENEL case<sup>50</sup> and vertical restraints in LUCs.

The competition concerns and settlements that motivated the authoritative normative statements in Mario Monti's speech in 2003, as well as in the Energy Sector Inquiry of 2007, were a number of investigations carried out by the commission between 2000 and 2006, which had as competition concerns negotiated clauses in LUCs. Alongside Gazprom/ENI cited by Mario Monti, there were five more investigations dealing with competition concern in LUCs. Statoil/Nork Hydro (hereafter GFU case),<sup>51</sup> NLNG,<sup>52</sup> Gazprom/OMV,<sup>53</sup> Gazprom/Ruhrgas,<sup>54</sup> and Sonatrach.<sup>55</sup> Comparing all six cases, *three* have similarities, of which two have already been pointed out. Firstly, all the investigations targeted clauses that were claimed to *direct and indirect* partitioning of the gas market by territory or by use. Therefore, the restraint would fall into the category of hardcore restriction, Article 101(1) TFEU. The first five investigations focused directly and indirectly on territorial and/or use sales restrictions, which are indisputably hardcore vertical restraints and more unlikely to be exempted by Article 101(3) TFEU,<sup>56</sup> despite the opposition argument given by Peter Cameron.<sup>57</sup> Besides the direct market portioning, the last investigation of this *series of cases* involved the profit sharing mechanism, claimed by the Commission as a type of indirect market portioning. Although the Commission raised the claim that profit sharing mechanisms

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<sup>50</sup> COMP/38.662 – GDF/ENI of 26 October 2004 and COMP/38662 – GDF/ENEL of 26 October 2006, known as the GDF/ENI/ENEL case. Commission Press Release IP/04/1310 of 26.10.2004.

<sup>51</sup> COMP/36.072, GFU case. This case concerned a joint-selling agreement between producers from the Norwegian continental shelf, but incidentally the abolition of territorial restrictions was also achieved.

<sup>52</sup> Press release IP/02/1869 of 12 December 2002, «Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG».

<sup>53</sup> COMP/38.085, Gazprom/OMV, case.

<sup>54</sup> COMP/38.307, Gazprom/Ruhrgas case.

<sup>55</sup> COMP/37.811, Sonatrach case.

<sup>56</sup> See Article 4(b)(i) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p.1).

<sup>57</sup> The Volkswagen case proves that the claim of the incompatibility between EU Competition Law and Territorial Restrictions is contestable. In this case, the Court of First Instance judgment annulling a Commission Decision to impose a fine on Volkswagen in 2003. See Case T-208/01 *Volkswagen AG v Commission* [2003] ECR II-5141. See also the published version of the PhD thesis defended by Barbara Jedlicková describing a historical account of the interpretation of Article 101 in relation to territorial restriction. Barbara Jedlicková. *Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law*. New Horizons in Competition Law and Economics. Cheltenham, UK: Edward Elgar Publishing, 2016. <http://ebookcentral.proquest.com/lib/EUI/detail.action?docID=4501553>.

were used as an alternative to territorial restriction,<sup>58</sup> we cannot infer they are indisputably hardcore vertical restraints.

Besides all the commitment-decisions involving negotiated clauses of LUCs, those in which the investigation have already reached the conclusion, the chapter will also examine the most recent investigations conducted by the Commission targeting LUCs. Following the announcement in September 2011,<sup>59</sup> the Commission has investigated contractual practices between Gazprom and gas undertakings located in Central and Eastern European (henceforth Gazprom case).<sup>60</sup> Even though Gazprom has announced its interest in settling the case but not yet signed the agreement, the case is particularly interesting as it challenges the legality of Gazprom's commercial practices as unfair pricing practices.

### 2.2.2. 1<sup>st</sup> Round: Prohibition of Territorial and Use Restriction

In LUCs, restrictions by object in agreements between non-competitors can be distinguished as to whether they relate to market partitioning by territory or customer group, or to limitations on the buyer's ability to determine its resale price.<sup>61</sup> While the former restraint is conceived as direct market partitioning and is easily detected in the agreement, the later is classified as indirect market partitioning and the burden of proof demands an economic understanding of cause-effect between the clause and determination of price.<sup>62</sup>

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<sup>58</sup> See the opinion and comments of Eleonora Wåktare on the case involving profit sharing mechanisms. Eleonora Wåktare, *Territorial Restrictions and Profit Sharing Mechanisms in the Gas Sector: The Algerian Case*. Competition Policy Newsletter 3 (2007): 19-20.

<sup>59</sup> "The Commission is investigating potential anticompetitive practices in the supply of natural gas in Central and Eastern European Member States. The investigation focuses on the upstream supply level, where, unilaterally or through agreements, competition may be hampered or delayed. The Commission suspects exclusionary behaviour, such as market partitioning, obstacles to network access, barriers to supply diversification, as well as possible exploitative behaviour, such as excessive pricing." MEMO/11/641, *Antitrust: Commission confirms unannounced inspection in the natural gas sector*, 27 September 2011.

<sup>60</sup> COMP/39.816, Gazprom case

<sup>61</sup> European Commission, Commission Staff Working Document: Guidance on restrictions of competition "by object" for the purpose of defending which agreements may benefit from De Minimis Notice, SWD (2014) 198 final, 26 June 2014. See also Recital 50, European Commission, *Guidelines on Vertical Restraints*, 15 May 2010.

<sup>62</sup> See the difference between direct and indirect market partitioning in Lars Kjølbye, *Vertical Agreements* in Christopher Jones, *EU Energy Law: EU Competition Law and Energy Markets*, Claeys & Casteels, 2007, p. 243-251. See also in chapter 5 the description of common clauses in LUCs before the market integration project.

Direct and indirect market partitioning are the competition concerns raised by the Commission in the investigations between 2000 and 2006. The European Commission guidelines on vertical restraint claims *in general* that direct market partitioning – territorial and use destination clauses – are hardcore restrictions and, thus, are unlikely to be defended under the economic efficiency exemption. On the other hand, indirect market partitioning – the profit sharing mechanism – is not an indisputable hardcore restriction. Regardless of whether the market portion would be considered as a hardcore restriction or not, all the competition concerns were short-closed through settlement, which means that the undertakings did not reach the adversarial part of the proceeding, nor was a defence presented.

The GFU<sup>63</sup> was the first case in which destination clauses in LUCs were under the scrutiny of the DG Competition. Surprisingly, in this specific case, destination clauses were not the competition concern that motivated investigation. Back then, the Commission opened investigations against a joint-sales scheme carried out through the GFU (Gas Negotiation Committee). The Commission noticed approximately 30 Norwegian gas producers and parties in the joint sales of gas carried out by GFU, which was in breach of the EU competition rules as it fixed the price of natural gas sold to Europe.<sup>64</sup> GFU was then a joint-sales (or single seller) mechanism whereby whole gas producers in Norway, whether state owned or not, had been obliged to sell their gas production through the GFU system as intermediaries since 1987. In the same vein, the *Corrib case*<sup>65</sup> and *DUC/DONG case*<sup>66</sup> also challenged joint marketing of upstream supplies of gas in Ireland and Denmark, respectively.<sup>67</sup> However, the GFU case is interesting for this thesis because of further commitments offered by Statoil and Norsk Hydro, which were permanent members of GDF. Both Statoil and Norsk Hydro, which are

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<sup>63</sup> COMP 36.072, GFU case.

<sup>64</sup> The European Commission has warned Norwegian gas producers that the joint sales of Norwegian gas carried out through the Gas Negotiations Committee (GFU) was in breach of the European Union competition rules as it “fixed, among other things, the price and quantities sold”. European Commission Press Release, Commission Objects to GFU joint gas sales in Norway, *op. cit.*

<sup>65</sup> COMP/37.708, *Corrib case*. European Commission Press Release, Enterprise Oil, Statoil and Marathon to market Irish Corrib gas separately, IP/01/578, 20 April 2001.

<sup>66</sup> The investigation by the Commission's Competition Directorate-General (DG Competition) of the joint marketing of North Sea gas by the parties' to the Danish Underground Consortium (DUC) started in July 2001. COMP/38.187, *DUC/DONG case*. European Commission Press Release, Commission and Danish Competition Authorities jointly open up Danish gas markets, IP/03/566, 24 April 2003. See Dominik Schnichels and Fabien Valli, *Vertical and Horizontal Restraints in the European Gas Sector – Lessons Learnt from the DONG/DUC Case. Newsletter 2* (Summer 2003).

<sup>67</sup> Joint Marketing of gas by gas producers has been a traditional practice tacitly permitted for some time but it came under new scrutiny in the late 1990s and was deemed to be in breach of Article 81(1) EC. See J. Dinnage,

natural gas producers, committed not to include use restriction clauses and territorial restriction clauses in LUCs signed with gas undertakings thereon.

The commitment offered by Statoil and Norsk Hydro in the GFU case was essential to draw attention of the Commission to some aspects in the upstream gas market. Firstly, the GFU case revealed that LUCs between European gas undertakings and foreign gas producers could have direct market partitioning, which was an uncontestable barrier for the creation of the internal market. Through contracts, it blocked cross-border trade in the internal market.<sup>68</sup> Secondly, despite foreign gas producers claiming the enforcement of EU competition law is contestable to undertakings operating in third countries, the close of investigations through settlements were *soft* solutions and, therefore, preferred by foreign undertakings. It avoided formal decisions confirming the applicability of EU Law to their transactions.

Following the GFU case, the Commission opened *four* more investigations targeting LUCs between a Nigerian gas company, NLNG, and Gazprom. All the investigations were short-closed and there were no infringement decision. Before 2003, like GFU, the investigation ended with an informal settlement before 2003: NLNG,<sup>69</sup> and Gazprom/ENI.<sup>70</sup> After the approval of Regulation 1/2003, investigations continued to be closed through commitment-decisions: Gazprom/OMV<sup>71</sup> and Gazprom/Ruhrgas.<sup>72</sup> The enforcement of competition law upon LUCs between 2001 and 2005 matters for this thesis as long as they opened an avenue for the Commission to advance a set of mandatory rules to gas supply agreements with foreign gas producers. Yet these cases did not represent a game change since territorial restrictions has been well defined under the Block Exception Regulation on vertical

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“Competition in Gas Supply: The Competition Man Cometh”, Energy Natural Resources Law, 1998, 16, p. 249-85. See also Peter Cameron, 2007, op.cit., p. 304-305.

<sup>68</sup> Lindroos, Maarit, Dominik Schnichels, and Lars Peter Svane. “Liberalisation of European Gas Markets - Commission Settles GFU Case with Norwegian Gas Producers.” *Competition Policy Newsletter* 3 (October 2002).

<sup>69</sup> Press release IP/02/1869 of 12 December 2002, «Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG».

<sup>70</sup> Press release IP/03/1345 of 06 October 2003, «Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses».

<sup>71</sup> COMP/38.085, Gazprom/OMV.

<sup>72</sup> COMP/38.085, Gazprom/E.ON. Ruhrgas case.

agreements.<sup>73</sup> This changed when the Commission shifted its attention to Profit Sharing Mechanisms.

### 2.2.3. 2<sup>nd</sup> Round: Prohibition of Profit Sharing Mechanism

In parallel to the effects of competition law upon the private ordering of LUCs concerning territorial and use restrictions clauses, the use of *profit sharing mechanisms* (PSMs) was the second set of clauses in LUCs into which the Commission opened investigations. The Commission turned its attention to competition concerns regarding PSMs in LUCs of the Algerian national supply company Sonatrach at the same time it opened investigations about territorial restriction in LUCs with Gazprom. However, given PSMs do not fall into the category of hardcore restrictions (or easy cases), negotiations between the Commission and Sonatrach lasted for four years. Through long negotiation, the Commission and Sonatrach reached agreements in 2007, which was then followed by a commitment-decision. Therefore, the Sonatrach case represents the second round of commitment-decision supplementing Article 101 TFEU and regulating LUCs.

For Eleonora Wåktare, PSMs were alternative mechanisms created to circumvent the Commission's initiative to enforce competition law on parties establishing territorial restriction.<sup>74</sup> However, this proposition cannot be raised without controversy. PSMs are common clauses used in LUCs where the good is liquefied natural gas and it is shipped and delivered via LNG Terminals worldwide.<sup>75</sup> Therefore, the causality between the adoption of PSMs by Sonatrach and the enforcement of competition law against territorial restriction clauses in LUCs is not clear. The LUCs signed between Sonatrach and European gas

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<sup>73</sup> See both European Commission Regulation and Guidelines on Vertical Restraints of 1999, which were later replaced by new Commission Regulations and Guidelines in 2010 without substantial change to what concerns territorial restriction. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the Application of the Article 101(3) of the TFEU to categories of vertical agreements and concerned practices. See also European Commission, *Guidelines on Vertical Restraints*, OJ L 102/01, 19 May 2010. See also Barbora Jedlicková, supporting the claim that the change of the Regulation and Guidelines in 2010 did not change the understanding that territorial restrictions clauses are hardcore restriction clause. Barbara Jedlicková, *Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law*. New Horizons in Competition Law and Economics. Cheltenham, UK: Edward Elgar Publishing, 2016.

<sup>74</sup> Wåktare, Eleonora. "Territorial Restrictions and Profit Sharing Mechanisms in the Gas Sector: The Algerian Case." *Competition Policy Newsletter* 3 (2007).

<sup>75</sup> Harold Nyssens and Iain Osborne, *Profit Splitting Mechanism in a liberalized gas Market: the devil lies in the details* (2005) *Competition Policy Newsletter*, number 1.

undertakings were indeed an agreement where natural gas was delivered at LNG Terminals, instead of pipelines.

Whereas *territorial and use restrictions clauses* have long been understood as hardcore restrictions, PSMs employs a much softer private regulatory mechanism that renders natural gas resales economically less attractive. PSMs establish obligations between natural gas suppliers and buyers in LUCs concerning deviation of a ship away from pre-planned delivery schedules in sales of LNG. Whereas in LUCs natural gas is transported through fixed pipelines, LNG contracts are different. Transported through ships, deliveries can be re-routed from one LNG Terminal to another. However, given LNG involves coordinating and time-tabling a complex supply chain of facilities, including cooling facilities, tankers, and re-gasification pipelines, deviation can increase transaction costs. Given coordinating matters, PSMs are valid means of maintaining a commercial equilibrium between suppliers and buyers. PSMs impose obligations on suppliers and buyers to share profit whenever there are deviations from pre-planned delivery points. Moreover, typically the profit sharing clause is written in a way to provide for a 50/50 split of the additional profits between promisor and promisee, although the interpretation of what means additional profit has been the subject of disputes on how to calculate them.<sup>76</sup>

In the Sonatrach case, the Commission distinguished profit sharing mechanisms in LNG cargos according to delivery regimes: FOB (Free on Board), DES (Delivered Ex Ship), and CIF (Cost, Insurance and Freight). These contractual regimes are internationally-recognized terms established by the ICC (International Chamber of Commerce).<sup>77</sup> FOB means that gas suppliers perform obligations when liquefied natural gas passes the ship's rail at the named port of *shipment*. Therefore, buyers bear costs and risks of loss from that point. DES means that gas suppliers perform obligations when liquefied gas is placed at the disposal of the buyers on board the ship at the named port of *destination*. CIF is an acronym for Cost, Insurance, and Freight and there is a reason why. Within LNG cargoes, gas suppliers perform obligations when liquefied gas passes the ship's rail in the port of *shipment*. Gas suppliers pay costs and freight, while the risks of loss or damages are transferred from sellers to buyers. The

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<sup>76</sup> Harold Nyssens and Iain Osborne, *op. cit.* See also Hancher, Leigh. "Splitting Hairs? Profit Sharing Mechanism in Gas Contracts under EC Competition Law." In *European Energy Law Report V*, edited by Marta M. Roggkamp and Ulf Hammer, 23–33. Energy & Law. Cambridge, Antwerp, Portland: Intertec, 2008.

<sup>77</sup> The Incoterms rules 2010, ICC.

Commission distinguishes the delivery regimes to assess to what extent LUCs with profit sharing mechanisms would harm competition depending on the delivery regime.

Following four years of negotiation, the Commission announced the acceptance of commitment offered by Sonatrach. Besides the commitment of excluding territorial restrictions, the Sonatrach case also covered commitment regards PSMs applied in LNG contracts, falling into the definition given by this thesis as LUCs in natural gas market. The commitment-decision covered the obligations below:<sup>78</sup>

- (i) Deletion of territorial restriction from all existing contracts and no insertion in future contracts.
- (ii) Profit sharing mechanisms (so called “PSMs”) only to be applied in LNG contracts under which the title of the gas remains with the seller until the ship is unloaded (in practice, sales under DES terms). Consequently, Sonatrach is aiming to transform the remaining FOB and CIF existing LNG contracts to sales under DES terms.
- (iii) No PSMs in future LNG contracts under which the title of the gas passes to the purchaser at the port of loading (in practice, for sales under FOB and CIF terms).
- (iv) No PSMs in existing or future pipeline gas supply contracts.

In the commitment-decision, PSMs in LNG contracts with delivery regimes under FOB and CIF terms became prohibited clauses in LUC contracts applied to LNG; being allowed only in contracts with DES terms. Thereon the release of Sonatrach’s commitment-decision provoked a reaction in the market and legal scholarship. For the first time, the Commission had pushed a commitment-decision towards negotiated clauses in LUCs that were not hardcore restrictions. Sonatrach being a gas producer located in Algeria, it represented a remarkable case. The case approximated the enforcement strategies of the Commission in LDCs with LUCs, though the degree of intrusion of competition law in the former is far broader than the latter, establishing mandatory rules like cap durations, reselling restrictions, and to some extent even market share. The Commission being the authority with adjudicating powers and, at the same time, a party in the commitment, it is to be expected that the market reacted to the commitment-decision as a reference of what are prohibited clauses even though they do not represent interpretation of the law.

Despite the Sonatrach commitment-decision shifting the attention of legal scholarship and legal officials in 2007, the Commission has again investigated Gazprom more recently. Since 2012, the Commission has turned its eyes to LUCs between Gazprom and gas

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<sup>78</sup> COMP/37.811, Sonatrach case. See IP/07/1074. Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts, 11 July 2007.

undertakings in the Central and Eastern European Countries. Some of the LUCs still have territorial restrictions, but at this time, the center of the Commission's concerns had moved to commercial practices advanced by Gazprom regarding *gas prices*.

#### 2.2.4. 3<sup>rd</sup> Round: Prohibition of Unfair Prices?

In the previous chapter, this thesis discussed commercial practices adopted by parties in LUCs for establishing prices of natural gas in long-term agreements. Before the impact of positive integration on natural gas markets, parties in LUCs used to negotiate natural gas prices by prior negotiated algorithms based on oil price-indexation. Since 2009, with the emergence of wholesale market for natural gas and the decoupling of Gas Hub Prices from oil prices, commercial practices in LUCs contracts has changed. New LUCs have already substituted oil-indexation clause by Gas Hubs Prices, while LUCs in performance has been brought disputes to arbitration requesting the change of clauses on account of *force majeure*. So far, EU energy law has played an important role in creating competition in natural gas markets, which then led to the emergence of wholesale markets and Gas Price Hubs. Yet EU law had never made any move towards the regulation of *price clause* in LUCs until 13 March of 2017.

The day before the final submission of this thesis, on 13 March 2017 the Commission released the commitments offered by Gazprom.<sup>79</sup> As the Commissioner Vestager has declared, the Commission has addressed competition concern regards the Gazprom commercial practices regards the price clause in its contracts with Eastern and Center European Countries. For the Commission, the fact that Gazprom has *not* persisted in maintaining price clauses based on oil-indexation is could be considered as an “unfair practice” as long as it putted this countries in disadvantage.

The commitment decision offered by Gazprom on March 2017 derived from its 2015 statement of objections. Back then, the Commission contested to Gazprom anticompetitive behavior in the form of abuse of dominance.<sup>80</sup> More precisely, Gazprom has allegedly

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<sup>79</sup> See the press release at [europa.eu/rapid/press-release\\_IP-17-555\\_en.htm](http://europa.eu/rapid/press-release_IP-17-555_en.htm).

<sup>80</sup> European Commission Press Release, Antitrust: Commission send Statement of Objections to Gazprom for alleged abused of dominance on Central and Eastern European gas supply markets, IP=15-4828, Available at [http://europa.eu/rapid/press-release\\_IP-15-4828\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4828_en.htm).

partitioned the Central and Eastern European gas markets. In last semester of 2016, the Gazprom announced ongoing negotiation with the Commission, which is now public for market consultation. Gazprom's commitments go in two different directions that are relevant for LUCs and this thesis. First, in conformity to previous cases, Gazprom will have to remove its territorial and use restrictions. Second, and this is innovative, Gazprom will change substantially the price clauses in its contract. Not only price reviews will be more frequent, but will also adopt competitive benchmarks for the determination of prices. Importantly, this creates a clear conceptual connection between (un)fair prices in Article 102 TFEU and (anti)competitive prices.

By considering the prior experiences, where undertakings and the Commission short-closed investigation through commitment-decisions, it is likely this investigations would have the same end. If so, it will reinforce this thesis' claim that Commission has regulated contracts through three paths: through enforcing EU competition law, through commitment-decisions as enforcement mechanism and, in doing so, through adding one more prohibited clause in its black list.

### **3. Is it Commitment or Decision? An Inquiry into the Secondary Rule of Adjudication and Commitment-Decisions**

Despite the fact that there is a large on-going debate on the limits of the external effects of EU Law and European Private Law,<sup>81</sup> the Commission has closed the whole investigation against foreign gas producers through settlements. Since the 2000s, the Commission has shifted its attention to LUCs and foreign gas suppliers. Through raising competition concerns, opening investigations, initiating negotiations, and closing investigations through commitment-decisions, the Commission has established mandatory rules for these contracts: no territorial restriction, no use restriction, and most interestingly, no profit sharing. Since 2012, the Commission has advanced investigations regarding the pricing practices of Gazprom and now it is one step closer to making also the concept of fair pricing more rigid

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<sup>81</sup> See Introduction of Marisa Cremona and Hans W-Micklitz, *Private Law and External Relations of the EU*, Oxford University Press, 2015.

for LUCs. If one looks at LDCs, the role of the DG Competition in determining mandatory rules for contracts is even more visible and established.

Since 1996, the Commission has advanced a sequence of investigations about contractual practices in LDCs. It did so advancing hand-in-hand with Sector-Regulation. While the 1<sup>st</sup> Gas Directive created rights for Gas Power Plants to become eligible customers and, therefore, to choose suppliers, the DG Competition raised competition concerns regarding clauses in LDCs that could potentially preclude buyers from switching supplier, contracting additional supply, or reselling purchased gas into the market. While the 2<sup>nd</sup> Gas Directive expanded the rights to be an eligible customer to large industries as final customers, the Commission opened a new round of investigations against gas suppliers, suggesting that several clauses in LDCs were precluding the flourishing of a competitive market. Henceforth, a black list of prohibited clauses in LDCs has so far been accepted: no long-terms up to 5 years, no tacit renewal clause, no exclusive purchase clause.

In this thesis, the proposition that the enforcement of competition law by the Commission has regulated contracts matters. It proves that European Private Law is not only determined by the CJEU's speeches. On the contrary, most of the mandatory rules imposed on LUCs and LDCs have come from the enforcement of competition law by the Commission. Therefore, to understand how EU Law has spilled over into private relationships, researchers have to consider how EU Law has been supplemented by all authorities with adjudicating power. This, then, includes the Commission. Yet there is a second feature in this chapter that matters for this thesis. Despite the fact that legal scholars and market actors have long endorsed those decisions on LUCs and LDCs as determinations of what is legal and illegal, and what constitute prohibited and non-prohibited clauses, few have indeed questioned the contradiction in the term "commitment-decision". There is a massive agreement that these "commitment-decisions" are sources of law. If law is a social phenomenon made by and through legal discourse, this thesis does not contest that commitment-decisions are source of EU Law and European Private Law. These decisions supplement vague provisions of Article 101 and 102 TFEU and, as such, provide precise commands of which contractual practices are incompatible with EU competition Law. However, are they indeed decisions?

The Commission's practice of closing investigations through settlements was adopted even before the approval of Council Regulation 1/2003, when the EU secondary law formally stated this alternative mechanism of solving disputes in Article 9 and coined the term

commitment-decision.<sup>82</sup> Both settlements and commitment-decisions are enforcement mechanisms designed to restore effective competition without bearing the costs of carrying proceedings until the establishment of the infringement – that is, the determination of wrongdoing and punishment. Regulation 1/2003 was fundamental to regulate the proceeding of commitment-decisions. It imposed the obligation on the Commission to submit offered commitments to market test. Moreover, it also assured the enforceability of commitment-decisions in case of non-compliance and the possibility of reopening investigations if the implementation of behavior or structural commitments did not *in fact* solve the identified competition concern.

Entering into negotiations to remove the competition concern based on non-contested and voluntarily remedial action, rather than fully adversarial disposal of cases, is ordinarily understood as involving *three* benefits to both defendants and the Commission.

As the first benefit, closing investigations through settlements removes from the Commission's shoulders the legal burden of proving that a competition norm has been indeed infringed by undertakings.<sup>83</sup> Neither informal settlements agreed before the Regulation 1/2003, nor commitment-decisions issued later on, needed to be based on full-scale investigation to prove facts of the case.<sup>84</sup> Commitment-decisions are indeed based on the consideration of procedural economy.<sup>85</sup> At the earliest stage of the preliminary assessment, even before launching the statement of objections, undertakings could voluntarily submit commitments with the intent of short-closing the investigation. Fewer procedural steps – no access to the file is expressly foreseen, no hearing stage, and a shorter decision usually –

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<sup>82</sup> DG Competition, *Antitrust Manual of Procedures: Internal DG Competition Working Documents on procedures for the application of the Articles 101 and 102 TFEU*, March 2012, Available in [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf)

<sup>83</sup> Cooke, John D. *Negotiated Settlements under EC Competition Law: A Judicial Perspective*. In *Antitrust Settlements under Competition Law*, edited by Mel Marquis and Claus-Dieter Ehlermann. European Competition Law Annual 2008. Oxford: Hart Publishing, 2010, p. 261-2.

<sup>84</sup> See European Competition Network, *ECN Recommendations on Commitment Procedures*, 09 December 2013, Available in: [http://ec.europa.eu/competition/ecn/ecn\\_recommendation\\_commitments\\_09122013\\_en.pdf](http://ec.europa.eu/competition/ecn/ecn_recommendation_commitments_09122013_en.pdf)

<sup>85</sup> Paragraph 35, C-441/07 P, Commission v. Alrosa Company Ltd. [2010] ECR I-5949. See also Heike Schweitzer, *Commitment Decisions under Article 9 of Regulation 1/2003*, In *Antitrust Settlements under EC Competition Law*, edited by Claus-Dieter Ehlermann and Mel Marquis. European Competition Law Annual 2008. Oxford: Hart Publishing, 2010, p. 548.

reduce the costs associated with these further stages of investigation, statement of objection and undertakings' defence.<sup>86</sup>

Besides procedural economies, as a second benefit commitment-decisions do not need to engage in the line of argumentation about the application of the law and, therefore, could not be considered a pronouncement of what the meaning of competition law is, in the way that judgements by courts or infringement decisions by competition authorities is. The lack of an obligation to justify commitment-decisions is explicitly stated in the Antitrust Manual of Procedures: Internal DG Competition Working Document.<sup>87</sup> Therefore, despite the ambiguous etymology of the name given to the enforcement mechanism (commitment-decision), it really is more a *commitment* than a *decision*.

Third and finally, commitment-decisions cannot be used as evidence of violation of competition law by harmed parties seeking compensation because they are the result of an agreement with the undertakings.<sup>88</sup> These features of commitment-decisions represent a serious challenge to understand them as authoritative reasons for actions. Following this line of reasoning leads to questioning the very idea that commitment-decisions are indeed decisions.

Commitment-decisions are alternative enforcement mechanism in which, on the one hand, undertakings make an offer (behavioural or structural commitment) that could potentially remove the "competition concern", which is not yet a "proved infringement". On the other hand, the Commission accepts, suggests amendments, or rejects the offer. The dynamic of *offer* and *acceptance* endows commitment-decisions with contractual overtone.

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<sup>86</sup> "Commitment decisions involve less procedural steps (and therefore less resources) than a final decision under Article 7 (e.g. Preliminary Assessment instead Statement of Objections; no access to the file is expressly foreseen, no hearing; usually a shorter decision). As a result, the 'commitment path' can bring a swifter change to the market, without necessarily being less effective". DG Competition, *Antitrust Manual of Procedures: Internal DG Competition Working Documents on procedures for the application of the Articles 101 and 102 TFEU*, *op. cit.*

<sup>87</sup> "Commitment Decisions are not based on full investigation and so not reach definitive conclusion on the facts of the case or the application of the law". DG Competition, *Antitrust Manual of Procedures: Internal DG Competition Working Documents on procedures for the application of the Articles 101 and 102 TFEU*, *op. cit.*

<sup>88</sup> See below the discussion of the *Arosa* case. To understand how precedents are authoritative reasons for actions in both civil law and common law systems, See Robert Summer, Two Types of Substantive reasons, *Cornell Law Review*, 63, 1978, p. 707. Also Donald Neil MacCormick and Robert S. Summers, *Introduction*, in *Interpreting Precedents*, edited by Donald Neil MacCormick and Robert S. Summers, Dartmouth Publishing, 1997; and Zenon Bankowski, Donald Neil MacCormick, Lech Morawski, Alfonso Ruiz, *Rationales for Precedents*, in *Interpreting Precedents*, edited by Donald Neil MacCormick and Robert S. Summers, Dartmouth Publishing, 1997.

Given the acceptance, the investigation is short-closed before the adversarial dispute common in litigations, with no hearing of the defendant and no confirmation of the wrongdoing/infringement.<sup>89</sup> This is the reason why undertakings, while offering commitments, typically make explicit two strong statements. Commitments are offered with two reservations: parties disagree with the preliminary assessment regarding the competition concern, disassociating the offer from the admission of wrongdoing; and, specifically in the case of LUCs, reinforce their position claiming that EU law is not binding to foreign undertakings that extract the gas outside the Union territorial jurisdiction. The proposition of commitment-decisions being more commitment than decisions gained the support of the CJEU after the *Alrosa case*.

### 3.1. *The Alrosa Case: More Commitment than Decision*

The contractual interpretation of commitment-decisions is the “specific characteristic” of this alternative enforcement mechanism highlighted by the CJEU in the *Alrosa case*,<sup>90</sup> ultimately distinguishing them from infringement-decisions.<sup>91</sup> In a nutshell, settlements are not equivalent to infringement-decisions issued by the European Commission since they do not fall into the category of administrative acts, translated at the EU level as Union acts.<sup>92</sup> For Florian Wagner-von Papp,<sup>93</sup> infringement-decisions under Article 7 of Regulation 1/2003 and the sanctions derived from them are subject to the constraints of the *rule of law*: the judicial review. Borrowing from elements of constitutional law, infringement-decisions as administrative acts issued by the competition authority at the EU level have to comply with the elements of the proportionality test – necessity and proportionality – respecting

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<sup>89</sup> Since the commitment-decision cannot prove wrongdoing, it cannot be used as burden of proof with implications for the private enforcement of competition law. See Dorin Rat, *Commitment Decision and Private Enforcement of EU Competition Law: Friend or Foe?* *World Competition*, V. 38, Issue 4, p 527-545.

<sup>90</sup> Case C-441/07 *Commission v Alrosa* [2010] I-05949, judgment of the Court (Grand Chamber) of 29 June 2010. See also Harold Mische and Blaz Visnar, *The European Courts of Justice confirms approach in De Beers Commitment Decision*, *Competition Policy Newsletter*, 3, 2010, pp. 17-22.

<sup>91</sup> Florian Wagner-von Papp, *Best and Even Better Practices in Commitment Procedures after Alrosa: The Danger of Abandoning the ‘Struggle for Competition Law’*, op. cit.

<sup>92</sup> About the Union Acts, see Anthony Amull, *Judicial Review in the European Union*. In *The Oxford Handbook of European Union Law*, edited by Damian Chalmers and Anthony Amull, 2015. <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-18>.

<sup>93</sup> Florian Wagner-von Papp, *Best and Even Better Practices in Commitment Procedures after Alrosa: The Danger of Abandoning the ‘Struggle for Competition Law’*, *Common Market Law Review*, vol. 49, no. 3, 2012.

nonetheless similarities and differences when compared to the proportionality test applied by national Courts and EU Courts<sup>94</sup> or the proportionality test applied to internal market and competition case law.<sup>95</sup> Both the finding of infringement (the connection between evidence and the application of law) and the proportionality of the remedy (the balance between the infringement and imposed remedy) could be subject to judicial review. In competition law ending with commitment-decisions, the *rule of law* plays a minor role. The CJEU judgement in the *Alrosa case* ruled out judicial review of reassessing competition concerns and, furthermore, narrowed the proportionality test.<sup>96</sup>

In the context of enforcement of EU competition law through infringement procedure, judicial review plays an indispensable role in restricting the European Commission's discretion. Judges are able to examine all questions of law and fact relevant to a disputed competition decision, which includes, of course, the Commission's discretion in balancing the proportionality of the imposed remedy,<sup>97</sup> regardless of the remedy being one-dimensional (e.g. fines) or multidimensional (e.g. behaviour or structural remedies).<sup>98</sup> In contrast, as previously mentioned, under Article 9 the Commission is not required to make a finding of an infringement, but only to examine the commitments offered by the concerned undertaking. In addition to the categorization of semi-contractual instruments, the *Alrosa case* established a controversial borderline between infringement and commitment-decisions as to what concerns judicial review, substantially revising the decision by the General Court.<sup>99</sup> Whereas the General Court interpreted the principle of proportionality under Article 9 by referring to

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<sup>94</sup> In national law the introduction of proportionality is associated with the emergence of the Social State under the rule of law in late 19<sup>th</sup> century and early 20<sup>th</sup> century. The enlargement of the state competence over the realm of private freedoms required new constraints on public power and judicial balancing between these two variables. On the other hand, the integration context in EU Law adds a dimension to proportionality review that clearly differs from the national context, which Wolf Sauter calls dual tracks. In EU law, a proportionality test is applied both to EU acts and to acts of Member States. See Wolf Sauter, *Proportionality in EU Law: A Balancing Act?* *Cambridge Yearbook of European Legal Studies* 15 (January 2013): 439–466.

<sup>95</sup> See the distinction of the proportionality test applied by CJEU when the case related to internal market between those concerns competition law in Sauter, Wolf. *Op. Cit.*

<sup>96</sup> Ferit Cengiz, *Judicial Review and the Rule of Law in EU Competition law Regime after Alrosa*, *Competition Law Journal*, 7(1), 2011; See also Manuel Kellerbauer, *Playground instead of Playpen: The Court of Justice of European Union's Alrosa Judgement on Art. 9 of Regulation 1/2203*, *ECLR*, Vol. 32, Issue 1, 2011.

<sup>97</sup> See the European Court of Human Rights Judgement on the application of the right to access to a court with full jurisdiction in competition law cases. European Court of Human Rights, *A. Menarini Diagnostics S.R.L.c. Italie* (Requête no. 43509/08, judgement 27 September 2011).

<sup>98</sup> To see the distinction of proportionality test applied when remedies are fines (one-dimensional) and behavior or structural remedies (multidimensional), See Jacques Steenbergen, *Proportionality in Competition Law and Policy*, *Legal Issues of Economic Integration*, Issue 3, 2008, p. 259.

<sup>99</sup> Judgement of the General Court in Case T-170/06 *Alrosa v. Commission* of 11 July 2007.

remedies that can be adopted as part of a prohibition decision pursuant to Article 7, holding that commitment-decisions cannot make binding commitments that go beyond such remedies,<sup>100</sup> the CJEU rejected the General Court's proposition by emphasising the "specific characteristic" of commitment-decisions. By holding that Article 9 was fundamentally different from Article 7, the CJEU ruled that the Commission is confined to verify whether the offered commitments address the expressed competition concerns, or in case of more than one commitment offered, which one adequately address the competition concern.<sup>101</sup> Undertakings voluntarily offer commitments and, in so doing, consciously accept that their concession may go beyond what the Commission could itself impose on them under Article 7.<sup>102</sup> In return, the CJEU emphasized the benefits of closing the procedure such as avoiding a potential finding of a competition law infringement, avoiding also the use of the finding as evidence in liability actions,<sup>103</sup> and a resulting fine. The offer of the undertaking and the acceptance of the Commission being basically the elements required to consider the commitment-decision legally binding, excluding the judicial review of disproportionate commitments, the CJEU weighted the semantics of the word "commitment", deep-rooted in private law and freedom of contract and, in the opposite, weakened the meaning of the word "decision", common to the authority of the State and public law. Thus, the *Alrosa case* clearly supports the contractual interpretation of commitment-decisions.

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<sup>100</sup> In para 126 of judgement of the General Court: "It [was] clear from the circumstances of the case that other, less onerous, solution than the permanent prohibition in of transactions between De Beers and Alrosa were possible in order to achieve the aim pursued by the Decision, that their determination presented no particular difficulties of a technical nature and that the Commission could not relieve itself of the duty to consider such solutions". Case T-170/06 *Alrosa v. Commission* of 11 July 2007.

<sup>101</sup> In para 41 of judgment in *Alrosa* the CJEU states "Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation 1/2003 is confined to verifying that the commitment in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. Case C-441/07 *Commission v Alrosa* [2010] I-05949, judgment of the Court (Grand Chamber) of 29 June 2010.

<sup>102</sup> In the *Alrosa case*, "While the Court conceded the – undisputed – point that the principle of proportionality applied as a general principle of Union law in the commitment procedure, it held that the 'extent and content' of this principle were modified in comparison to the infringement procedure. More specifically, CJEU held that only content of the proportionality principle in the commitment procedure is that the Commission must ensure that the set of commitment it makes binding on the undertakings is not more onerous than any other set of commitments offered that still meet the concerns expressed by the Commission in the preliminary assessment. It rejected the General Court's reasoning that the Commission was required to assess whether it was sufficient to make the offered commitment partially binding. Florian Wagner-von Papp, *Best and Even Better Practices in Commitment Procedures after Alrosa: The Danger of Abandoning the 'Struggle for Competition Law'*, op. cit.

<sup>103</sup> "Apart from the use as procedural short cut in cases where a violation is relatively easy to establish or correct, the commitments mechanism can also be used to avoid the questions of liability in a problem-solving manner in a world where antitrust rules do not point clearly to the existence of violation, either due to uncertainty in the law itself or about how it applied to an unfamiliar and changing market environment". Yane Svetiev. *Settling or Learning? : Commitment Decisions as a Competition Enforcement Paradigm*, Yearbook of European Law 33 (2014): 466–500.

Yet this thesis has raised the argument that law is a social phenomenon that goes beyond the CJEU's speech acts. While the CJEU decides the *Alrosa case* by excluding the possibility of judicial review, this cannot be a categorical confirmation that commitment-decisions are merely commitments and never decisions. Two factual claims could be used to counter-argue: one is on how legal scholarship endorses commitment-decisions as decisions, the other is how national courts have perceived them in a very recent case. Besides the fact that energy and competition lawyers working on energy markets cite commitment-decisions as a reference to establish the limits of freedom of contracts, the Spanish Supreme Court also did the same very recently. Days before this thesis reaches its final editing stage, the Supreme Court of Spain's request for a preliminary ruling to the CJEU lodged on 28 October 2016.<sup>104</sup> In the preliminary request, the Spanish Court asked the CJEU whether the Court could invalidate long-term contracts derived from a "Commission Decision" in the Repsol case – which was about long-term distribution agreements between Repsol and gas retailers. It is clear that the Spanish Supreme Court does not refer to the Repsol case only as commitment, but it purports to the CJEU that it is a formal decision. As such, the preliminary reference supports what this thesis has claimed: that commitment-decisions are decisions because legal scholarship and legal officials endorsed them as such.

### *3.2. The Commission Press Release: More Decision than Commitment*

The Commission, market participants, national and European agencies and now national courts tend to refer to commitment-decisions as previous legal cases when deciding subsequent cases, drafting guidelines, or releasing reports. Constant references to commitment-decisions as precedents have given to this settlement mechanism the appearance of *case law* that does not belong to its legal nature, which was properly coined as *quasi-case law* by legal scholarship.<sup>105</sup> This idea has also been endorsed recently by Advocate General Melchior Wathelet.<sup>106</sup>

As previously discussed, commitment-decisions cannot be conceived as "authoritative determinations" as they do not follow the basic patterns of legal reasoning to justify the

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<sup>104</sup> C-547/16.

<sup>105</sup> Florian Wagner-von Papp, 2012, op. cit., p. 965.

substantive application of competition norms. Therefore, the proposition descriptive of the case and the competition concerns, which are yet competition concerns and not infringements, cannot be made into the *rule of law*.<sup>107</sup> It lacks the authority that belongs to case laws in which the meaning of law has been fulfilled. It therefore could not *in principle* be used as an example of wrongdoing in analogous cases underpinning legal argument to enforce competition law in third parties that are alien to the commitment-decision. Furthermore, as long as the Commission is not obliged to conduct a full proportionality test in the course of the commitment-decision procedure, the offered commitments cannot be a reference of necessary and proportional remedies to remove anticompetitive behaviour from the market. If, *in theory*, it is ontologically clear that the concept of legal precedent or case law is inapplicable to commitment-decisions in light of their procedural mechanism, *in practice* this distinction is blurred bearing in mind the practice of the Commission, sector regulators and undertakings. This is what supports the claim that commitment-decisions are indeed *quasi-case law*.

For Florian Wagner-von Papp, one of the reasons for the acquisition by commitment-decisions of this appearance of *quasi-case law* is the vicious circles these proceedings are embedded in.<sup>108</sup> Considering infringement procedure ends by finding infringements and imposing remedies or fines that are unilaterally established by the Commission rather than negotiated with undertakings, we could infer that undertakings have high economic incentives to offer commitments and enter into a negotiation instead of bearing the risk and uncertainty of infringement procedure.<sup>109</sup> Consequently, the resulting decrease in the number of infringement decisions<sup>110</sup> has created a lack of authoritative statements of law.<sup>111</sup> Moreover,

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<sup>106</sup> Melchior Whathelet, *Commitment Decision and the Paucity of Precedent*. Journal of European Competition Law & Practice 6, no. 8, October 2015, p. 553-55.

<sup>107</sup> Edward H. Levi (1948).

<sup>108</sup> Florian Wagner-von Papp, 2012, op. cit.

<sup>109</sup> For Jena-François de Bellis, the Commitment-decision are attractive for three main reasons: (i) absence of fine, (ii) absence of a finding infringement, (iii) ability to craft remedies which go further than those allowed in an article. See Jean-François Bellis, *EU Commitment Decisions: What makes them so Attractive?*, OECD Competition Committee, DAF/COMP/WD(2016(53)).

<sup>110</sup> As showed by Wouter P J Wils, the percentage of the commitment-decisions appears somewhat higher in 2010–2014 period (67%) than in 2005–2009 period (59%). Wouter Wils, *Ten Years of commitment decisions under article 9 of Regulation 1/2003: too much of a good thing?*, Available at <https://www.kcl.ac.uk/law/research/centres/european/10-years-of-commitment-decisions-final.pdf>.

<sup>111</sup> Heike Schweitzer proves the increase use of commitment-decisions not only by the European Commission, but also national competition authorities. See Heike Schweitzer, *Commitment Decisions under Art. 9 of Regulation 1/200: The Developing EC Practice and Case Law*, EUI Working Papers Law No. 2008/22.

undertakings look into previous commitment-decisions to estimate threat points in the bargaining process.<sup>112</sup> The reliance on prior commitment-decisions to ground future negotiations could be listed as evidence of the extent to which this settlement mechanism has effects similar to the case-law. However, this economic behavior argument is not particularly persuasive. Intuitively, taking into consideration the assumption that economic actors are continuously searching for information to calculate the risks before entering into any negotiation, referring to commitment-decisions to merely estimate threat points in the bargain process is in fact an expected reaction of undertakings insofar as there is a scarcity of sources of case law. I have the view that this reaction of market actors cannot justify the claim of the *quasi-case law* nature of commitment-decisions.

There is a second element found in commitment-decisions that is more relevant to the claim that settlement mechanisms have been pursued as quasi-case law. The second element derives primarily from the principle of *maximum transparency* that tied the Commission, and consequently the commitment-decisions, and secondarily from the language employed by the Commission while publishing the proceedings and the commitment-decision both in Official Journals and Informal Press Communication.

Let us consider first the obligation of bringing commitment-decisions to the eyes of the public. Although settlements in private disputes are mostly likely to contain confidentiality clauses, this could hardly be implemented into commitment-decisions in respect to the principle of maximum transparency that is at the root of EU administrative procedural law<sup>113</sup> and the requirement of transparency contained in Regulation No 1.049/2001.<sup>114</sup> Indeed the

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<sup>112</sup> “Lacking authoritative statements of law, undertakings look to previous commitment decision and non-binding guidelines to estimate the treat points in the bargaining process”. Florian Wagner-von Papp, 2012, op. cit., p. 931.

<sup>113</sup> Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, OJ L145, 31.5.2001, p. 3.

<sup>114</sup> Upon request by the European Parliament the in-depth analysis explains what general principles of EU administrative procedural law are, and how they can be formulated in the recitals of the Regulation on EU administrative procedure. According to the in-depth analysis, the General principles embedded in the Article 41 Charter, to the principle of an open, efficient and independent European Administration enunciated in the Article 298 TFEU are translated in (alphabetic order): access to information and access to documents, access to the file, duty of care, data protection, data quality, effective remedy, equal treatment and non-discrimination, fair hearing, fairness, good administration, impartiality, legal certainty, legality, legitimate expectations, participatory democracy, proportionality, reason giving, rule of law, timeless, transparency. European Parliament, *The General Principles of EU Administrative Procedural Law: in depth analysis for the JURI Committee*, 2015. Available at <http://www.bing.com/search?q=The+General+Principles+of+EU+Administrative+Procedural+Law%3A+in+depth+analysis+for+the+JURI+Committee,+2015&src=IE-TopResult&FORM=IETR02&conversationid=>. See also

Commission has long published documents during settlement procedures explaining the competition concerns and how the offered/accepted commitments could address them. This practice has been implemented before and after Regulation 1/2003 with only a slight difference in how it has been implemented. Before Regulation 1/2003, the Commission used to release a very short summary of settlements in DG Competition Annual Reports or Commission Press Releases. The information used to consist in a very restricted summary of the competition concern and the offered commitments, sometimes shrunk to a single page. After Regulation 1/2003, not only has the length of commitment-decisions dramatically increased from a single page to sometimes even hundreds, but also the proceedings between the first commitments offered and the commitment-decision have to be published to conduct the market test, when third parties might submit their observations about the offered commitments.<sup>115</sup> In spite of the duty to comply with the principle of *maximum* transparency,<sup>116</sup> the word *maximum* should not be understood in absolute terms, but in relative ones. The principle of transparency, despite the term maximum, correlates with the optimal degree or right balance between the Commission's aim of providing maximum transparency and its obligation to professional secrecy and the interest of protecting the investigations.

In parallel to the principle of transparency, there is a peculiar feature found in the publication of commitment-decisions and their proceedings that underpins its quasi-case law nature. This is the empowerment of commitment-decisions by the Commission through employing language that is common to case law while describing proceedings and outcomes of these settlements in the official documents. Whereas Florian Wagner-von Papp argues that commitment-decisions acquire the quasi-case law appearance because of the vicious circles that its proceedings are embedded in,<sup>117</sup> my claim goes further by looking at the language employed in the publication of commitment-decisions. In other words, I claim that the words chosen by the Commission give to commitment-decisions the *façade* of authoritative

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the European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)), Annex, Recommendation 3.

<sup>115</sup> “[The Commission] shall publish a concise summary of the case and the main content of the commitments of the proposed course of action. Interested third parties may submit their observation within a time limit which is fixed by the Commission in its publication and which may not be less than one month”. Article 2(4) Regulation 1/2003.

<sup>116</sup> “In preparing the non-confidential version of the decision for publication the Commission must balance its obligation of professional secrecy and interest in protecting its investigations on the side with the aim of providing maximum transparency on the other side”. DG Competition, *Antitrust Manual of Procedures: Internal DG Competition Working Documents on procedures for the application of the Articles 101 and 102 TFEU*, March 2012, Available at [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf)

<sup>117</sup> Florian Wagner-von Papp, 2012, op. cit., p. 965.

statements of law. Whereas Florian Wagner Von Papp claims that undertakings have economic incentives to rely on settlements to enhance certainty because of the lack of authoritative statements of law (infringement decisions), my claim goes further by moving the spotlight from undertakings to the Commission itself.

### 3.3. *Law as Legal Discourse: indeed Decisions*

To test the validity of my claim, two arguments have to be developed: one is the empirical argument related to the language used by the Commission in Official documents; the other is the epistemological argument about the authoritative *façade* given to the commitment-decisions. The former can be proved by looking into formal publications, like Official Journals, and also informal ones such as Press Releases. The latter requires the engagement of systematic efforts to use *philosophy of language* to solve problems of *philosophy of law*, which begins with Bentham's statement that law may be defined as an assemble of signs declarative of a violation conceived or adopted by the sovereign<sup>118</sup> and continues with the theories of Austin<sup>119</sup> and Hart<sup>120</sup> and many others.

In a nutshell, for legal philosophers one easy way to explain the normativity of law is by explaining the meaning and the use of normative language that is often used in making statements of law such as the use of the nouns *obligation* and *rights*, or verbs *must* and *may*.<sup>121</sup> Bearing in mind the assumption that the normativity of law is explained by the use of normative language, the language used by the Commission while releasing a commitment-decision or citing them in official reports counts to the claim that the EU institution has intentionally employed normative language to give settlements an appearance of legal precedent.

Considering that the epistemological argument about the interaction between philosophy of language and philosophy of law was developed in chapter 3, this chapter

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<sup>118</sup> Jeremy Bentham, *Of Laws in General*, H.L.A Hart ed., Athlone Press, 1782. See also H.L.A. Hart, *Essays on Bentham*, Oxford: Clarendon Press, 1982.

<sup>119</sup> J.L. Austin, *How to do things with words*, Oxford: Clarendon Pres, 1962.

<sup>120</sup> H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 2011.

<sup>121</sup> "The problem of the normativity of law is the problem of explaining the use of normative language in describing the law or legal situation". Joseph Raz, *Practical Reasons and Norms*, 2<sup>nd</sup> ed., Oxford: Clarendon Press, p. 170.

focuses on the empirical argument. Here the aim is to look at documents published along the proceeding of commitment-decisions, as well as the Energy Sector Enquiry and DG Competition Annual Reports in order to prove whether the Commission uses a normative language while releasing commitment-decisions involving LUCs, which is the case study.

As previously mentioned, there have never been infringement decisions adjudicating the compatibility of competition norms and LUCs. Despite the absence of infringement decisions, since 2000 the Commission has closed several investigations through commitment-decision, but not only this. This thesis claims that these settlements have been released by the Commission using normative language. By doing so, the Commission allows prior commitment-decisions to become a source of law to *ex post* regulate LUCs. Therefore, the Commission's practice has blurred the clear distinction between the concept of mandatory rules and negotiated clauses, a distinction that is well-established in the theory of contract law. If the freedom of contract, or the *private ordering*, is limited by mandatory rules determined by *the public ordering*, in the LUCs, settlements have been integrated as part of the public ordering as *quasi-case law*.



– CHAPTER 7 –

**Conclusion:**

**From Self-sufficient to Self-standing to the Harmonization of European Private Law**

**1. From Self-sufficient to Self-Standing European Private Law**

**2. From approaches to the Harmonization to Self-Standing European Private Law**

2.1. Assessing Harmonization through Top-Down: Shortsighted IAs

2.2. Assessing Harmonization through Bottom-up: Managing Divergence

2.3. Assessing Harmonization through the Internal Point of View: a Self-standing Model



– CHAPTER 7 –

**Conclusion:**

**From Self-sufficient to Self-standing to the Harmonization of European Private Law**

“(…) a sharpened awareness of words to sharpen our perception of,  
though not as the final arbiter of, the phenomena”

J.L. Austin in *Philosophical Papers*

This thesis is part of a *joint* intellectual development Project: the European Regulatory Private Law (ERPL) Project.<sup>1</sup> The ERPL Project started from an empirical claim that European Private Law has developed different normative modes of interaction with national legal systems in regulated markets. While in non-regulated markets European Private Law has triggered “divergence” *among* national legal systems, in regulated markets, this “divergence” has been less reported and seems to have provoked the phenomenon of “intrusion and substitution.”

While describing European Private Law in non-regulated markets, legal scholars used to define it as a set of rules with minimum standards in Treaties and Directives applied to Member States which, as a sort of collateral effect, spilled over into national systems of private law. If EU rules are supranational obligations with minimum standards, these accounts commonly describe implementation processes leading to “divergence” among national legal systems, instead of the expected Harmonization.

The ERPL Project began from the assumption that European Private Law in regulated markets has presented different features and has triggered different outcomes than those

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<sup>1</sup> This PhD Candidate joined the ERPL Project at the beginning of the 3<sup>rd</sup> year of total five-year project. The ERPL Project: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation. Prof. Hans W-Micklitz is leading the research project with a 60-month European Research Council (ERC) Grant under the European Union’s Seventh Framework Programme (FP/2007-2013) / ERC Grant Agreement n. [26972].

captured in non-regulated markets: the debate over “convergence and divergence” of European Private Law. The set of rules of EU Law regulating private transactions in regulated markets has provoked a phenomenon of “intrusion and substitution”, which is directly applied to private transactions with minor degrees of divergence among national legal systems or resistance from Member States. This factual claim of “intrusion and substitution” has motivated the ERPL to investigate with the aim of developing a normative model that could capture the phenomenon of “intrusion and substitution”.

To identify a distinguishing feature that could explain the phenomenon of “intrusion and substitution”, the ERPL Project developed the hypothesis of self-sufficient European Private Law. The hypothesis inquired as to whether “intrusion and substitution” would arise from *two* intertwined aspects of European Private Law in regulated markets. One aspect was related to new modes of Governance.<sup>2</sup> New modes of law-making (e.g. NRAs) and law-enforcement (e.g. ADRs) created a governance system detached from traditional modes of making and enforcement of national systems of private law. Given sector-related governance, the private dimension of EU Energy Law would have experienced less interference from national systems of private law. The second intertwined aspect refers to the technicality of the law in regulated sectors.<sup>3</sup> The level of complexity of each private relationship in regulated sectors such as telecommunication, energy, or financial services is so high that legal practitioners are increasingly specialized in each of these fields. Therefore, specialized legal practitioners together with specialized economists, specialized politicians, and sector-specific market actors, all engage in a sort of collective *inner*-dialogue, isolating legal discourses within sector-related silos. Hence, the ERPL Project tested the hypothesis that the phenomenon of “intrusion and substitution” occurs *through* and *because of* the detachment of the governance modes of European private law from the traditional modes of making and enforcing private law in national legal systems, as well as through the technicality of law regulating private relationships in regulated sectors.

The factual claim of the ERPL Project was endorsed by this PhD thesis at the beginning. New governance mode for making and enforcing EU law is a legal phenomenon

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<sup>2</sup> Micklitz, Hans-W. “The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation.” *Yearbook of European Law* 28, no. 1 (2009): 3–59.

<sup>3</sup> Micklitz, Hans-W., and Yane Svetiev. “A Self-Sufficient European Private Law - a Viable Concept?” *EUI Working Papers Law* 2012/31 (2012).

also found in the energy market. However, when this thesis started to develop the analysis of the substantive dimension of EU law created by those new specialized authorities with delegated powers, this research started to identify two paths: the increase of Implementing acts approved at EU level, and the rigidity of legal commands when addressed to the contractual relationships under investigation. By testing the self-sufficiency hypothesis in the EU energy market, this thesis has reached the conclusion that the theory of self-sufficiency is *partially* correct. It correctly draws attention to new modes of governance as an element that could provoke “intrusion and substitution”. Yet the theory needs to be adjusted slightly to capture the *key* feature that triggers “intrusion and substitution” as long as new modes of governance seem to be ancillary. This thesis claims that the theory of self-sufficiency still doesn’t capture the genuine reasons for “intrusion and substitution” because the theory still trying to explain a legal phenomenon without fully endorsing law from its Internal Point of View.

This conclusion is divided in two sections. The first section contrasts the features of self-standing European Private Law with those of self-sufficient European Private Law (1). The second section proposes a linguistic framework as a new set of criteria to assess the Harmonization of European private Law in the context of European Constitutional Pluralism (2).

### **1. From Self-sufficient to Self-Standing European Private Law**

Throughout this research, this author has tried to the best of her abilities to capture the private law dimension of EU Energy Law (or European Private Law) from the Internal Point View. Instead of developing doctrinal analyses of secondary legislation, descriptions of new governance modes, or legal doctrines of the CJEU, it describes the private law dimension of EU Energy Law from the point of view of market actors involved in transactions. How did a large firm in France behave when the 1<sup>st</sup> Electricity Directive granted it the right to purchase electricity in Germany? A simple change in the attitude of market actors already reveals the pieces of the Integration Project *through* Private Law. Imagine a German producer refused to supply energy to a French large firm. Could the French large firm bring a civil action for the violation of its non-discrimination rights in the Treaty? Legal questions about this type of

issue are at the core of the debate over European Private Law about whether EU law has vertical or horizontal effect (vertical v. horizontal doctrines). Further imagine a German producer did indeed make the *offer*, the French large firm manifest its *acceptance*, but a German TSO between German and French borders refused access to the network grid because of congestion capacity management. If a German Producer can bring a complaint to the German NRA against the TSO's refusal through the B2B ADR enforcement mechanism, which was created by EU Law, can one still sustain the lack of horizontal effect of EU Law, or deny the private dimension of EU Energy Law?

The starting point of this thesis was the methodological choice of understanding the private law dimension of EU Energy Law by tracking the impact of EU Law on key private transactions over three decades of integration. In doing so, contracts and contract law were chosen as the subject of investigation. Through literally *learning by doing*, this thesis implemented – (un) consciously – sociological contextualist methods to understand European Private Law. Throughout this continuous process of *learning by doing*, a missing aspect in the theory of self-sufficient European Private Law was noticed: the semantic aspect of EU legal norms and how they affect market behaviour and legal interpretation.<sup>4</sup> This was the point at which the investigation switched from its original aim, which was to test the hypothesis of “self-sufficient European Private Law” to the objective of building a comprehensive explanation of “self-standing European Private Law”. The term “self-standing” is used to draw a line between the arguments developed in this thesis and the original theory that motivated it.

The distinguishing feature that sustains self-sufficient European Private Law lies on the semantic dimension of primary rules (or substantive obligations). Self-standing European Private Law takes shape when the EU normative system stiffens the semantic dimension of legal obligations imposed on private relationships. This proposition brings this thesis back to the first lines of its introduction. The impact of EU Law on private law could be understood differently if one observer tries to explain a legal phenomenon by looking at duty-imposing rules of non-discrimination in the Treaty and Directives, while other observer tries to explain the same legal phenomenon by looking at EU sector-regulation and the vats list of

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<sup>4</sup> It is important to acknowledge the relevance of interviews and workshops organized by ERPL and FSR and others attended by this candidate as a means to unlock this thesis from the perceptiveness side (I don't understand what you mean by “unlock” or “perceptiveness.”) , where representatives from ACER, NRAs, Customers/Consumers Associations, Energy Industries, and scholars discussed legal and non-legal issues regarding energy markets.

Regulations and Implementing acts. The EU secondary legislations in regulated markets have addressed a wide list of mandatory rules imposed to individuals while doing transactions private transactions, which go far beyond the vague obligation about non-discrimination. Irrespective of whether the substantive content of legal norms is supplemented by pieces of secondary legislation approved by the EU Parliament or Commission, or adjudications of the CJEU, Commission, or ACER, the key element that triggers the phenomenon of “intrusion and substitution” in regulated sectors is the rigid semantic content of legal norms. When EU Energy Law created rights to choose supplier by granting them precisely to large firms with annual consumption of more than 25 million cubic meters (chapter 6), it enhanced awareness of large industries about its right, awareness of suppliers and TSOs of duties to supply and give access to grids, and, above all, it shrank the possibility of divergent implementation by Member States, as well as divergent interpretations of what could mean “large firm” or “high consumption”.

Yet the proposition that self-standing European Private Law is better placed to explain the phenomenon of “intrusion and substitution” does not categorically reject the hypothesis of self-sufficient European Private Law. It does suggest that new modes of governance and the technicality in regulated markets are ancillary features to the phenomenon, not its constitutive element. Therefore, it is the role of this thesis to explain why these features are best understood as ancillary to “intrusion and substitution”.

The theory of self-sufficiency is valid in relationship to the Energy Market when it points to new governance modes as causality of “intrusion and substitution”. European private law is no longer only composed of secondary legislation approved by the European Parliament and Council, but it goes further. It is also a wide set of legal norms approved through a complex governance system of law-making involving the European Commission, ACER, and ENTSO-e (e.g. Network Codes in chapter 4). European private law is also no longer solely supplemented by speech acts of Courts. Adjudicating powers has been allocated to a multi-level governance system of law-enforcement relying on private enforcement (e.g. B2B ADRs in chapter 4) and out-of-court public enforcement (e.g. Commitment-decisions in chapter 6). As such, the private enforcement of rights enshrined in a Directive against another individual has taken place with no reasoning concerning *vertical v. horizontal* effect of EU Law. New modes of law making and law-enforcement are important *means* to create this normative system of rules with semantically rigid determination of rights and duties. Moreover, these new enforcement mechanisms are important in assuring the *effectiveness* of

EU Law. They facilitate the access of individuals to Dispute Resolution Bodies with delegated powers<sup>5</sup> that complement the public enforcement of EU energy law

Yet, if one takes new modes of Governance as an element constitutive of “intrusion and substitution”, they would have trouble to explain rigid rules already enacted or adjudicated by old modes of governance. In chapter 6, this thesis showed that either the right to choose suppliers for buyers in gas supply contracts, as well as the prohibition to interrupt supply in the case of an emergency, are rules written in Gas Directives and SoS Regulation respectively. Furthermore, the *three* CJEU judgements dealing with the (non)conformity of Italian, French, and Polish national laws regulating the price (or referential price) of gas supply contracts with consumers denounce the essential role of traditional enforcement mechanism of EU Law.<sup>6</sup> In the *Fidereutility case*, the Court unlocked the old impasse about the liberalization of energy prices for consumers by determining three more precise criteria to assess the (non)conformity of regulated or referential prices in gas markets. Therefore, new modes of Governance are an essential element for the effectiveness of the phenomenon of “intrusion and substitutions”, but this thesis could not conclude that they are constitutive elements. This argument is strengthened by NEON (National Energy Ombudsman Network) reports and content presented by its member at a workshop held in Florence. Representatives of national Ombudsmen still prioritize active dialogue with national parliaments and the Commission to change national and EU Law. Moreover, the solutions in these reports are still based on a quantitative comparison rather than an analysis of legal content. The awareness of the function of ADRs as an adjudicating authority with power to *make law* is still in its infancy.<sup>7</sup>

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<sup>5</sup> For Denis Gilligan, Legal Consciousness and Access to Enforcement Mechanism (Should “mechanism” be plural?) are basic elements of the effectiveness of law in modern societies. Galligan, Denis, ed. *Law in Modern Society*. Oxford: Oxford University Press, 2016.

<sup>6</sup> In these cases, the Court unlocked the old political impasse between States resisting the liberalization of energy prices for consumers, and those claiming liberalization of prices is *sine qua non* for competition. Reflection on this impasse is still finding in ambiguous measures of the 3<sup>rd</sup> Gas Directive: at the same time Article 37(c) grants consumers “rights to be eligible customers” (i.e. rights to choose suppliers), Annex I 1(g) grants “rights to reasonable prices”. The CJEU was fundamental in setting out the political impasse and opened the way for EU Lawmakers to propose the Energy Union (or 4<sup>th</sup> Package), which revokes the provision on “rights(?) to reasonable price” and established new measures on “rights’ to competitive prices”.

<sup>7</sup> Neither NEON, nor National Energy Ombudsmen have advanced a system for publicizing solutions on a qualitative basis, despite the explicit encouragement to do so in the ADR Directive. All representatives but one are still assessing its function in society through quantitative references to solutions. This empirical claim, associated with data collected in the meeting held in Florence on 20 February 2015, was relevant for this conclusion. Only the General Director of the French ADR, *Médiateur National de l’Énergie*, one out of seven B2C ADRs presenting in the event, included the digital platform where the relevant disputes were publicized in

The second feature of self-sufficient Private Law points to *knowledge* and/or *technology barriers* as elements of law in regulated markets that lead to “intrusion and substitution”. To provide a counterargument to the claim that knowledge/technology is indeed the key feature, there is a need to distinguish between two different intellectual developments concerning the impact of technology on law. One refers to sector-specific expertise as a *knowledge barrier* to the interference of national systems of private law on the private dimension of EU energy law. Network codes are the most prominent examples in EU Energy Law (chapter 4).

Network codes are EU Regulations written *by* and *for* engineers about what TSOs ought to do or ought not do. If regulatory theorists read regulatory frameworks through three channels (setting standards, monitoring standards, and correcting non-compliance), private lawyers must see them through codes of legality or illegality, of mandatory or default rules. Network codes establish terms and conditions imposed on entire transmission services, in which a “*take-or-sell-it*” obligation refers to one of the mandatory rules. Chapter 4 of this thesis undermines the claim that *knowledge barriers* are reasons for “intrusion and substitution”. Notwithstanding the fact that Network codes are the most sensitive regulatory frameworks for technology, provisions are *not* as technical as some scholarship would hold.<sup>8</sup> Mandatory rules established in Network codes, like *take-or-sell-it* obligations, are no more complex than any other customary clauses discussed in chapter 5. Therefore, knowledge barriers do not seem to play a *key* role in the phenomenon of “intrusion and substitution”. On the contrary, they confirm the supremacy of EU Law and EU utilitarian values over Dutch Private Law and the autonomy (moral) values of its national legal system (*VEMW case*, chapter 4). It also proves the role of semantically rigid rules since the *mass production* of Network Codes.<sup>9</sup> The second intellectual development the role of technology in law refers to *Techno-Law* Theory. Roger Brownsword identifies techno-law as “normative and non-normative techno-regulation”.<sup>10</sup> Network codes are normative techno-regulation as long as

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his presentation. Interestingly, the General Director named these cases “case-law”. This could trigger a question about whether there has been an on-going increase of unawareness about the adjudicative role of ADRs, but *that is another story*.

<sup>8</sup> Kennedy, Duncan. “The Political Stakes in ‘Merely Technical’ Issues of Contract Law.” *European Review of Private Law* 1 (2001): 7–28.

<sup>9</sup> Particularly in Energy Markets, the limited interference of national legal systems is also justified by the lack of awareness that relationships between TSOs and undertakings are no longer public relationships. Since Network Codes are Regulations, the lack of awareness of private rights as such hampers private enforcement through private remedies in National Courts.

<sup>10</sup> Brownsword, Roger. “Lost in Translation: Legality, Regularity Margins and Technological Management.” *Berkeley Technology Law Journal* 26, no. 3 (2011).

they are politically approved, but prudential methods and compliance rely nevertheless on technology. If one asks whether Network codes reduce EU Law to an authoritative cover of rules defined previously by technological limits, the positive answer cannot be applied to Network codes without further consideration. Given that EU lawmakers left some regulatory choices to be decided by Member States (like the choice of opting for overbooking or buy-back, intra-day or day-ahead, and second market in the regulation of wholesale markets), these opting-in or opting-out choices denounce that regulatory frameworks are full of political choices even in an environment where technology plays an important role.

Having clarified why new modes of Governance and knowledge barriers cannot fully explain “intrusion and substitution”, this thesis can advance and stand for self-standing European Private Law. The self-sufficient hypothesis is right in raising the proposition that EU Energy Law could impact private relationships through new modes of Governance: the institutional arrangement among the Commission, ACER, and ENTSO-e, NRAs, and NCAs. Moreover, EU Energy Law could regulate transactions whose terms and conditions reflect technological constraints to a great extent (chapter 4). Yet the constitutive element that consolidates the phenomenon of “intrusion and substitution” relies on the semantic rigidity of primary rules made and supplemented by new and old modes of Governance. The lack of open texture of EU Energy Law reduces the possibility of having divergent interpretations among market actors in private relationships, or among NRAs. This is what triggers a *high* degree of *intrusion* of rules *into* national legal systems with a *low* degree of *divergence within* and *between* national legal systems.

If the phenomenon of “intrusion and substitution” is perceived as being the result of a normative system of semantically rigid rules, this conclusion can potentially contribute to the debate over approaches to Harmonization in Private Law.

## **2. From approaches to the Harmonization to Self-Standing European Private Law**

Understanding the phenomenon of *Integration through Private Law* by paying attention to legal interpretation is not novel. Since the mid 1990s, studies in comparative law investigating “divergence” as effects of EU Law on national systems of private law have

produced a massive and persuasive body of research. However, this thesis aims to move a step further. By paying attention to the semantic content of the primary rules of European Private Law, both vague and rigid rules are apparent. Most of the research about “divergence and/or convergence” investigates the impact of vague rules upon private law: non-discrimination duties or good faith. When rules are semantically vague (i.e. open-texture), legal argumentation can either converge or diverge.<sup>11</sup> By contrast, when claims in law brought to Courts are based on rigid rules, studies on comparative law do not yet have much to say: do they qualify as *intrusion and substitution*, or *conflict and resistance*?<sup>12</sup> To explain the relevance of doing research by paying attention to the semantic content of EU substantive law, this thesis draws attention to the linguistic framework of regulation as the key element in the process of Harmonization. It brings in the Internal Point View to shed light on the superficiality of Top-Down Economic Analyses of Law assessing Harmonization.

While drafting and approving new Treaties or Legislative acts, EU lawmakers, like lawmakers in other legal systems, have to deal with a broad field of decision-making that ultimately influences their choice to use language with more or less *open texture* i.e. more or less vague rules. Given that the most fundamental factors for legislative procedures – legal (e.g. Does EU have competence?),<sup>13</sup> political (e.g. Would it be approved?),<sup>14</sup> and economic (e.g. Is the EU the optimal regulator?)<sup>15</sup> – the approval of EU rules of law with vague legal content leaves open a range of possible interpretations, which provokes either less harmonization or market uncertainty. One of the reasons that certainly motivated the approval of vague rules, especially in the early years of the EU’s positive integration strategy, stands on the particular multi-level governance of plural legal orders (EU legal system plus 28 national legal system) that overlap in terms of competence when the regulation of Energy

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<sup>11</sup> Zimmermann, Reinhard, and Simon Whittaker. *Good Faith in European Contract Law*. Cambridge University Press, 2000.

<sup>12</sup> Hans Micklitz, *The visible Hand*, op. cit.

<sup>13</sup> The fact that EU lawmakers have gradually enacted more semantically rigid rules in Energy Markets can be observed if the substance of EU private law is compared to the 1<sup>st</sup> to the 3<sup>rd</sup> Packages (which is now moving to the 4<sup>th</sup> Package). Despite the fact that the phenomenon has been poorly investigated by legal scholarship, it has not gone unnoticed by political scientists. Some political scientists have dismissed the “intergovernmentalist” school of integration.

<sup>14</sup> Following political scientists in this regard, see Mark A. Pollack’s description of the Intergovernmentalist School of integration as a matter of intellectual and disciplinary history. Mark A. Pollack, *Realist, Intergovernmentalist, and Institutional Approaches*, in Erick Jones, Anead Menon, and Stephen Weatherill (ed.), *The Oxford Handbook of the European Union*, p. 9. For the Intergovernmentalist School of Thought, see Stanley Hoffman, “Obstinate or Absolute? The Fate of the Nation-State and the Case of Western Europe”, *Daedalus* 95, no. 3, Summer 1996, p. 862-915.

<sup>15</sup> See the guidelines on Impact Assessments (IAs) of the European Commission.

Markets is under scrutiny. The law-making authority of EU legislators – *the secondary rule of change* of EU legal system – relies on imbricate political negotiation to accommodate the interests of 28 Member States, which is ultimately balanced by rules on sharing competence, ironically based on the vague principle of subsidiarity.<sup>16</sup>

Given the multi-level governance of plural legal orders, EU Lawmakers have to make regulatory choices that can be observed from different layers of statutory acts: some choices being absolutely evident, while others not. Regulatory choices are obviously manifested when lawmakers approve or reject bills (yes-or-no decision). Once approved, regulatory choices are also manifested in the type of legal instrument (e.g. Directives or Regulations) approved by the Lawmaker. These are the two most obvious manifestations of a Lawmaker's regulatory choices, but not all. Ultimately regulatory choices are manifested in every single word of written duties and obligations. The EU lawmakers' choice of communicating duties using more or less vague language, more or less detailed measures, is one of the elements that indicate the degree of harmonization of Private Law.

Economists and Legal Scholars used to assess the harmonization of Private Law from two different perspectives: the first perspective proposes an Economic Analysis of Law based on the legislative choice of harmonization regime; the second moves forward by taking into account the degree of convergence or divergence of national systems of private law. This thesis claims the first approach used to understand harmonization is seriously problematic because it is mired in classic Formalism; while the second does not distinguish between the effects of semantically rigid rules in regulated markets, nor does it take into account individuals' behavior. Thus, to some extent, it is mired in Perspectivism. This thesis thus proposes a third avenue, which adds the Internal Point of View to the second approach to Harmonization.

### *2.1. Assessing Harmonization through Top-Down: Shortsighted IAs*

The first perspective assesses the Harmonization of Private Law by addressing the EU Legislator's choices with regard to legal instruments and their harmonization regimes (e.g. Directives with minimum or full harmonization, or Regulations and Decisions with general

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<sup>16</sup> MacCormick, Neil. "Beyond the Sovereign State." *The Modern Law Review* 56, no. 1 (January 1, 1993).

application). In the field of EU Energy Law, it is common to read works emphasizing that since the 1<sup>st</sup> Package, Gas and Electricity Directives have required minimum harmonization, while Gas and Electricity Regulations are *per se* immediately applicable and therefore fully harmonized. Regulations with general application are what Scholars call a “Top-Down Approach to Harmonization” and legal research applies Economic Analyses of Law to these regulations.<sup>17</sup> The Impact Assessments (IAs) of EU institutions are largely influenced by what the literature calls a Top-Down Approach to Harmonization. However, despite depicting an important aspect of the Harmonization of Private Law, it addresses only one side of the subject. What it overlooks is the intertwined aspect of law and language.

Impact Analyses based on the choice of legal regime depart from the assumption that Directives with minimum harmonization suggest *less harmonization* among national legal systems. While transposing Directives, States can introduce more protective measures for individuals, which leads to divergences between national legal systems. On the contrary, the approval of Regulations and Decisions suggests *harmonization* as rules have general application. The Economic Analysis of Law is usually applied to identify the optimal regime taking into account the limits of subsidiarity and proportionality to the achievement of EU policies (i.e. minimum, full or total harmonization?)

A regime’s choice matters as one of the various criteria to understand European Constitutional Pluralism, but conclusions about the effects of Harmonization based solely on a regime’s choice are certainly forgone conclusions. The European Commission’s Impact Analyses have no words on “words”. It does not take into account the factual claim that either a Directive or a Regulation comprises rules with different linguistic textures, which lead to different, or even opposite, outcomes. The IAs tend to perceive secondary legislation through the most classic version of Formalistic thinking of law (or the most unrealistic thinking of law). They assume that Member States, with undisputable multi-cultural diversity within and between national legal systems, share the same “metric system” and reach the same conclusions about “conformities and non-conformities”. Moreover, they ignore how the semantic content of law changes human behavior and legal interpretations. IAs endorsing the choice of legal regimes as the only criteria to measure optimal regimes are seriously

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<sup>17</sup> With regard to the contrast between the Top-down and Bottom-up approaches to Harmonization, see Chirico, Filomena, and Pierre Larouche. “Convergence and Divergence, in Law and Economics and Comparative Law.” In *National Legal Systems and Globalization*, edited by Pierre Larouche and Péter Cserne, 9–33. T. M. C. Asser Press, 2013. See also, Gomez, Fernando, and Juan Jose Ganuza. “The Economics of Harmonizing Private Law Through Optional Rules.” In *Pluralism and European Private Law*, edited by Leone Niglia. Oxford: Hart, 2013.

compromised by a misunderstanding of how legal systems work, and much worse, a lack of understanding of law as a social phenomenon.

## 2.2. *Assessing Harmonization through Bottom-up: Managing Divergence*

The second approach to assess Harmonization of Private Law takes law seriously. It assumes the Integration Project impacts national systems of Private Law differently, leading either to divergence or convergence. Roger Brownsword, in his contribution to the ERPL Project series, was precise in synthesizing the legal questions raised by private lawyers: “*Convergence: What, Why, and Why not?*”.<sup>18</sup>

Private Lawyers have long investigated the impact of the European Integration Project on national private law. Their reports were fundamental in enhancing awareness of the phenomenon of divergence from the Positive Integration Project, instead of Harmonization or convergence as expected. In 1998, Gunther Teubner’s writings<sup>19</sup> drew attention to divergences in the implementation of the Directive of Unfair Commercial Terms. Teubner refers to the fact that English Courts have interpreted the principle of *good faith* in a very different way from the original German concept. His work motivated others, such as Zimmermann’s in-depth analyses of divergences in legal interpretations of the principle of *good faith*,<sup>20</sup> Thomas Wilhelmsson on how cultural multiplicity hampered Harmonization,<sup>21</sup> and Hans-W. Micklitz and Norbert Reich on the missed opportunity of enhancing moral values of private law in national legal systems and the awakening kiss given by the Court.<sup>22</sup> Thereon, there have been several descriptive and normative projects aimed at describing and solving the issue of divergence. In particular, Van Gerven has pleaded for more emphasis on

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<sup>18</sup> Roger Brownsword, *Convergence? What, Why, and Why not?*, in Hans Micklitz and Yane Svetiev, *A self-sufficient European Private Law – A visible Concept*, EUI Working Paper Law 2012/31, 77-82.

<sup>19</sup> Teubner, Gunther. “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies.” *The Modern Law Review* 61, no. 1 (January 1, 1998): 11–32.

<sup>20</sup> Zimmermann, Reinhard, and Simon Whittaker. *Good Faith in European Contract Law*. Cambridge University Press, 2000.

<sup>21</sup> Wilhelmsson, Thomas. “Varieties of Welfarism in European Contract Law.” *European Law Journal* 10, no. 6 (November 2004): 712–33; Wilhelmsson, Thomas. “Introduction: Harmonization and National Cultures.” In *Private Law and the Many Cultures of Europe*, edited by Thomas Wilhelmsson, Elina Paunio, and Annika Pohjolainen. Kluwer Law International; Sold and distributed in North, Central, and South America by Aspen Publishers, 2007.

<sup>22</sup> Micklitz, Hans-W., and Norbert Reich. “The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD).” *Common Market Law Review* 51, no. 3 (61/01 2014): 771–808.

“bottom-up” convergences through his *Ius Commune* Project. In it, he argues that voluntary mechanisms of coordination like OMCs would firmly root European law in national legal systems, rather than solely “top-down” harmonization.<sup>23</sup> The European University Institute has played an important role in boosting bottom-up convergence by promoting collaboration and exchange of knowledge through the Center for Judicial Co-operation.<sup>24</sup> By seeking convergence, European Legal Scholarship has partially shifted to policy-oriented research and normative approaches for proposing new modes of Governance,<sup>25</sup> OMCs, or Platforms,<sup>26</sup> based on a hybrid system of soft-law and law, collaboration and coercion (Chapter 4).

This thesis addressed the dilemma of divergence and convergence in chapter 4. New modes of Governance were described in the bold move from OMCs (Madrid, Florence, and London Forum, CEER, and ENTSO) to mandatory associations with *semi*-lawmaking powers (ENTSO-e and Network codes). At the same time, this thesis confirms that Directives could lead to divergence, which has indeed hampered market integration in energy markets, but it also denounced the failure of OMCs when Member States lack political and economic motivation to collaborate: the *Prisoners Dilemma*.

Besides EU governance, chapter 4 contextualizes divergence and convergence in substantive law. In so doing, this thesis proves that changes in the regulatory framework have been combined with the stiffening of open-texture of legal norms, and also acknowledges that this has not been extended to all systems of rules in EU Energy Law. If EU lawmakers still enact Directives and Regulations with vague measures, national Courts could still diverge in their interpretation. Moreover, Regulations make explicit concessions for Member States to approve more “detailed measures”, and leave open possible alternatives even when rules are

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<sup>23</sup> Van Gerven, Walter. “Bringing (Private) Law Closer to Each Other at the European Level.” In *The Institutional Framework of European Private Law*, edited by Fabrizio Cafaggi, Vol. XV/1. The Collected Courses of the Academy of European Law. Oxford: Oxford University Press, 2007.

<sup>24</sup> The Centre for Judicial Cooperation was created in 2011 as a joint Project between RSCAS and Law Department. See also Micklitz, Hans-W. *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith*. Cambridge University Press, 2005.

<sup>25</sup> De Búrca, Grainne, and Joanne Scott. “Narrowing the Gap: Law and New Approaches to Governance in the European Union.” *Columbia Journal of European Law* 13 (2007); Walker, Neil, and Grainne De Búrca. “Recoceiving Law and New Governance.” *Columbia Journal of European Law* 13 (2007). See also the contributions in De Búrca, G., and Joanne Scott, eds. *Law and New Governance in the EU and the US*. Oxford; Portland, Or: Hart, 2006.

<sup>26</sup> Sabel, Charles F., and Jonathan Zeitlin. “Learning from Difference: The New Architecture of Experimentalist Governance in the EU.” *European Law Journal*, 14, no. 3 (May 2008): 217–327. Sabel, Charles F., and Jonathan Zeitlin. “Learning From Difference: The New Architecture of Experimentalist Governance in the EU.” In *Experimentalist Governance in the European Union*. Oxford: Oxford University Press, 2010.

rigid. This was the case of the regulatory choice of implementing congestion management mechanisms as *day-ahead* or *intra-day markets*, and duty to supply in times of emergency (chapter 5). Therefore, this thesis does *not* claim that “divergence and convergence” would no longer be a legal issue, nor would “conflict and resistance”.

Throughout prescriptive and normative studies on “divergence and convergence”, European Legal Scholars have left a legacy for legal scholarship worldwide. This scholarship represents a precious collection of legal thinking about the emergence of Private Law in Global Order and Law in Modern Societies. It has also contributed significantly to the field of comparative Law.<sup>27</sup> Nevertheless, in the Internal Market, comparative law studies on “divergence and convergence” have mostly focused on Courts: how Courts interpret provisions of EU Law in different legal systems. If a comparative investigation focuses narrowly on National or European Courts’ decisions and, even more narrowly on a set of Courts decision, this research inevitably begins with a bias that puts in question the validity of general conclusions about “divergence or convergence” of whole normative systems.

The reason why investigations about “convergence and divergence” in EU law, where the subject of research are Court’s decisions, have a *bias* can be intuitively answered from the Internal Point View. Most private disputes brought to Court are consequences of the ambiguity and vagueness of rules in legal systems, or negotiated clauses in contracts. These are genuine disagreements about propositions of law, in which two private parties both claim to be right. Investigations into “Incomplete Contracts” study the impact of transaction costs and uncertainty in contract relations and are best understood as a valuable source of economic insights on how to design contract. Some investigations also include mandatory and default rules determined by Law.<sup>28</sup> In the EU Legal System, the degree of complexity is higher as long as ambiguity and vagueness is considered in overlapping legal systems. Not only can normative systems be ambiguous, vague, and conflict, but so can national Legal Systems diverge in terms of how to solve vagueness and ambiguity.

The Economic Theory of Contracts thus confirms that litigation is often the consequence of ambiguity and vagueness in both negotiated clauses and Contract Law.

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<sup>27</sup> Some of the greatest contribution can be seen in the contribution of Reimann, Mathias, and Reinhard Zimmermann, eds. *The Oxford Handbook of Comparative Law*. 1st ed. Oxford University Press, 2006

<sup>28</sup> Schwartz, Alan, and Robert E. Scott. “Contract Theory and the Limits of Contract Law.” *Yale Law Journal* 113 (2003). See also Baker, Scott, and Kimberly D Krawiec. “Incomplete Contracts in a Complete Contract World.” *Florida State University Law Review*, no. 33 (2006): 725–55.

Therefore, disputes that pursue litigation in Courts, and which are burdened by the high cost of litigation (e.g. *VEMW case*), are most likely motivated by vagueness or ambiguity. When primary rules are precise and rigid, providing *ex ante* information about obligations (e.g. the right to be an eligible customer if annual consumption up to 25 mcm), undertakings are less certain about rights and duties. In cases of complaints regarding violations of EU Law, disputes are less likely to reach Courts and parties are more likely to settle disputes outside of Courts. If so, Legal Scholars developing investigations on “convergence and divergence” by looking at Courts could face the *Chicken or the Egg dilemma*: one only sees divergence because divergences lead to genuine disagreement about propositions of Law, which lead to disputes in national Courts, which eventually lead to a reference to CJEU. Causality between “divergence” and Courts’ decisions – national and European – cannot ground inferences about European Private Law as a whole normative system of rules. The diagnosis of “divergence” could already be contaminated by its sample: case law from Courts. Hence, this thesis claims that studies on comparative law focusing on Courts’ decisions miss two crucial aspects of European Private Law, particularly in regulated markets. The first is EU substantive Law made by adjudicating authorities outside Courts. The second missing aspect is EU substantive Law that is not questioned in Courts because of its preciseness, although it is still impacting individuals’ behavior in the market and in society in everyday transactions. Comparative Law based on Court judgments applied to European Private Law does not capture the two features of self-standing European Private Law. Expanding the scope of investigation on harmonization requires to incorporate the *Internal Point of View*.

### *2.3. Assessing Harmonization through the Internal Point of View: a Self-standing Model*

Understanding the phenomenon of law through sharpening the perception of words is what J.L. Austin defines as “linguistic phenomenology”. Emphasizing the application of linguistic studies to the field of Law as “linguistic phenomenology” is a matter of drawing attention to the fact that “words” out of context have no meaning to Law, that only words considered in social contexts can govern human behavior. This is crucial to understand the phenomenon of “intrusion and substitution” in regulated markets in European Constitutional Pluralism. In EU Energy Law, the phenomenon is evident when “words”, applied to private transactions, are contextualized over three decades of Market Integration.

By trying to understand the causalities of “intrusion and substitution”, this thesis claims to have found a new approach to assess the Harmonization of Private Law. In so far as investigating how national legal systems diverge through looking at Courts *per se* creates a bias, it suggests an expansion of the scope of comparative law based on an understanding of the Legal System from the Internal Point view. Neither investigation with the aim to understand the legal reasoning of Courts, nor researches with mere textual interpretation of legislative acts, would be sufficient to understand legal systems through the eyes of market players. How has a trader in one of the OTM Markets in Europe reacted to the REMT Regulation, which created an additional set of rules about Insider Trading? If a trader in one of the regions is punished for wrongful conduct by an Administrative body, on which legal reasoning is the decision grounded? Since Wholesale Markets are divided into regions, does the information about crime and punishment reach traders in different Wholesale Markets? Does it provoke changes in their behavior?

By understanding the system of rules through the Internal Point of View, this thesis revealed the private law dimension of EU Energy Law. It found that it refers to a normative system of semantically rigid rules, far more rigid than principles of *good faith*. Self-standing European Private Law is understood as a phenomenon in which individuals involved in private relationships use shared rules of recognition to identify duties and rights. Particularly in business-to-business relationships in Energy Markets, where undertakings are large firms likely with legal advisors, in which a lack of awareness of obligations and rights is not stake. Chapter 4 sheds light on the phenomenon of EU lawmakers tending to replace semantically vague rules by more rigid rules to shape market behavior towards Union values. Chapter 5, on the other hand, demonstrated that EU Lawmakers have used a strategy of rigid rules since the 1<sup>st</sup> Package to grant rights and to boost competition, though with few obligations. Whereas sector-regulation was less intrusive, chapter 6 revealed a black list of prohibited clauses established through commitment-decisions.

Not all rules of EU Energy Law applied to private transactions are semantically rigid, but the investigations throughout chapters 4, 5 and 6 led this thesis to conclude that there is a trend towards shrinking the “open-texture” of legal norms. Therefore, this thesis concludes by suggesting that the cause of the phenomenon of “intrusion and substitution” is the creation of rigid rules, which is the constitutive element of self-standing European Private Law. Given these conclusions, what contribution does it make to the tools used to assess Harmonization?

Assessing Harmonization through the Internal Point of View is then an invitation to understand European Private Law as if one were a market actor, a promisor or a promisee recognizing rules, reasons for actions in everyday business, where legality and illegality is not dyed in black-and-white, and adjudication is no longer within Court room. Yet, since this thesis argues that self-standing European Private Law consists in the “intrusion and substitution” of semantically rigid rules into national systems of private law, there is a need to clarify what self-standing European Private Law does *not* suggest.

Self-standing European Private Law does not suggest that the normative system of rigid rules locks in National Legal Systems and individuals in a sort of surrealist nightmare of a low-level bureaucrat pictured by Terry Gilliam in his 1985 film (ironically) called “Brazil”. Therefore, it is important to clarify that this thesis does not have any normative assertion about *textualist* approaches to legal interpretation. A linguistic framework of norms *is not* and *should not* be the “final arbiter”. EU Law, European Private Law, and EU Energy Law, like any other Laws, are means and ends to promote social change according to the values of the society in which they exist. If the values of EU and European Private Law deviate from the values of society in a technocratic mode of hallucination, history can tell us more about how legal systems collapsed over centuries. But that's... another story.

Though cliché, no words could summarize this thesis better than those of J.L. Austin: “we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomen(on)” of European Private Law.



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