Conclusions: Drawing the Lines Together of Regulatory Choice, Public–Private Dynamics and Citizens’ Trust in Private Regulation and Enforcement in the EU

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1. Introduction

Throughout this volume we have seen ample evidence of private actors stepping in to take responsibilities that traditionally belonged to the public legislature, in cases where the EU institutions and the EU Member States have become less able to adequately address the complex reality of transnational social, economic and technology driven challenges with top-down regulation. Despite the availability of (administrative) sanctions in many cases, in practice there is often a lack of public enforcement capacity, leaving citizens more vulnerable to risks.1 At the same time, citizens have increasingly come to depend on private actors acting on a transnational scale, such as online digital platforms, energy companies and financial institutions. Both globalisation and rapid technological innovation have therefore been fuelling the need for more trust in private actors in regulating and enforcing significant aspects of people’s daily lives: from environmental and social protection to the areas of product safety and sustainability, consumer protection, food safety, e-commerce, internet, media, advertisement and financial markets.2 In this volume we have investigated the regulatory and enforcement role of private actors in the context of the EU from the perspective of the trust that citizens can vest in them to exercise this role appropriately. In brief, can private actors live up to citizens’ expectations or should more be done to safeguard the interests of citizens

1 See also the chapter by Scott in this volume.
2 See F Six and K Verhoest (eds), Trust in Regulatory Regimes (Cheltenham, Edward Elgar, 2017).
in this context? To that end we took as a point of departure these two central questions:

- What role do private actors play in the regulation and enforcement of EU-wide problems?
- How, from a citizen’s perspective, can the protection of public interests be best ensured in European private regulation and enforcement?

The volume has intentionally taken a bottom-up approach, putting the perspective of citizens centrally in the analysis and assessment of private regulation and enforcement in the EU. This citizens’ focus has first required gaining more comprehensive and comparative insights into the drivers for, and use and legal-institutional framing of, private regulation and enforcement in various EU policy domains. This focus has also required specific consideration of how such use and framing of private regulation and enforcement fits in, not only with the foundational – constitutional – principles of EU law, but also with other elements, principles and norms that impact on the level of trust which citizens may have in private regulatory and enforcement regimes as discussed in Chapter 1.5. It has also been a particular aim of this volume to offer reflections on the future positioning and shaping of private regulation and enforcement in the specific EU law context from the citizens’ perspective. The fundamental challenge considered in this volume has been how, within the EU regulatory space, the potential of private actors to contribute to the resolution of EU-wide policy issues and goals can be put to its best possible use. In essence, private regulation and enforcement regimes in the EU context will need to be effective, reflect the EU’s core values and protect public interests as well as incorporating the citizens’ perspective, because only then will those regimes become credible and gain the trust of and acceptance by those affected by them.

In this concluding chapter, we will draw together the most important lines from the sectoral studies and the horizontal studies, so as to see what picture emerges; what may be strong and what may be weak features of the phenomenon of private regulation and enforcement in the EU and what action may be warranted so as to enhance the position of citizens in this context. First, this chapter will present the diversity of roles of private actors in dealing with problems in the EU context, including regulation and enforcement. In doing so, there will not only be a particular focus on who actually are the private actors involved (section 2), but also what the dynamics and intensity of the interaction with the public regulator/enforcer are. In particular, how can this interaction be typified in terms of the different forms of co-regulation as identified in the introductory chapter, and what are explanatory factors for this (section 3)?

Second, this chapter considers the legal framing of private regulation and enforcement in the EU context and the EU–national relationship. It concludes with the general approach and limits which EU law and policy entail for private regulation and enforcement and on what common elements emerge from the
sectoral studies when it comes to the legal framing, principles, conditions, and limits of private regulatory and enforcement regimes. This enquiry will also allow us to consider the extent to which the EU’s legal and policy approach towards private regulation and enforcement demonstrates coherency and consistency (section 4).

Third, this chapter will analyse how private regulation and enforcement, in its established interaction with public regulatory and enforcement regimes, impacts on citizens, considered from the perspective of the protection of public interests and from the perspective of the principles and norms that have been found relevant to private regulation and enforcement (section 5). Issues considered here are:

- to what extent do private regulatory and enforcement regimes in the EU context reveal a deep need for ensuring their trustworthiness?
- what tensions have emerged between various interests in the various policy domains; what possible threats of private regulation to citizens’ interests/rights can be discerned from the sectoral studies?
- have these tensions/threats been addressed in any way in shaping, designing, further developing the regime? And/or what suggestions have emerged from the sectoral studies in this regard?

The last part of this chapter considers how the general boundaries and limits as identified in the horizontal studies can contribute to the protection of citizens’ rights and interests. It will look into the lessons learnt as well as some important points to avoid (section 6).

2. The Actors in and Drivers of EU Private Regulation and Enforcement

The sectoral studies in this volume reveal the involvement of a multitude of actors in private regulatory and enforcement regimes both in the EU and at state level. These range from employers’ organisations and trade unions (Pennings), industry and industry associations (De Cock Buning, Blok, Gray, Simonato and Nicolosi, Marsden), financial institutions (Minto) audit companies (Van Erp, Minto) credit rating agencies (Van Erp) consumer organisations, civil society and NGOs (Kingston and Alblas, Simonato and Nicolosi, Hondius and Schagen, Van Erp), to technical standardisation organisations and other standards-setting authorities (Hiemstra and Senden, Van Erp), consumers, data subjects (Blok), and citizens’ inspection networks (Van Erp).

\[3\] See Chapter 1, section 5.
What drives the involvement of such a very diverse group of private actors in regulation and/or enforcement? The sectoral studies in this volume have revealed a host of different drivers and incentives for the use and development of private regulatory and enforcement regimes, with different public/private interests underlying such action.

In their contribution, Kingston and Alblas have shown that an increasing role of private environmental regulation in the EU can be linked to broader shifts towards economic liberalism in the Union, reflected in an increased reliance on market forces in a variety of policy spheres. Another rationale for the involvement of private actors in this field is the fact that the time lag involved for tackling climate change problems is ill-suited from a long-term public policy-making perspective. The delegation of regulatory tasks to private actors may provide a possibility for a credible commitment that lasts beyond the average election cycle and may constitute a means of implementing long-term policies that might be deemed unpopular by the majority as private regulation does not depend on public votes. Other important rationales for the involvement of private actors in environmental regulation and enforcement are the special and complex nature of the natural environment and environmental systems. Given the level of uncertainty involved, it is extremely difficult to implement completely scientifically sound environmental policies. This issue of complexity might be partially mitigated through the expertise of private bodies that can, in the absence of electoral cycles, become more specialised over time.

Bridging the informational asymmetries between the regulated firms and the regulators that are tasked with minimising social costs of regulatory breaches also provides incentives to involve private actors in the financial sector, as seen in the contribution of Minto.

Transnationality is another relevant element for the involvement of private actors as seen in the contributions of Van Erp, De Cock Buning, Gray and Blok on, respectively, environmental harm and crime, online media, commercial communication and data protection. The fact that private regulatory initiatives may not necessarily be confined within the jurisdiction of a single state can make it easier to coordinate cross-border regulatory efforts. This factor may also apply to transnational coordination within the EU, for fields that are not subject to EU legislation, and also between the EU and third states. The involvement of private actors encourages transnational solutions. Common to the above rationale is the idea that traditional state regulators may simply lack the capacity effectively to regulate many of the most pressing modern challenges, whether due to the inherently cross-border nature of these challenges, their complexity, the potential lack of resources, political will, or adequate information or expertise to tackle them. As Marsden points out in his contribution on internet regulation, private enforcement can create a transnational internet law and shape the regulatory environment with the necessary flexibility. The case of technical standardisation provides another example of this (Hiemstra and Senden).
In social policy, private actors are strongly involved as a means of balancing different interests in relation to working conditions as a goal of collective bargaining. Generally it is considered that the state should not regulate all aspects of the labour market, and therefore private actors have a self-standing, regulatory role. The potential for the balancing of relevant, but different, interests is also considered as a reason for the involvement of private actors in consumer law, especially within the process of the drafting of regulations. Hondius and Schragen point out in their contribution that this involvement can amount to a win-win situation: the private actors will have their voices heard in the law-making process, contributing to a sense of moral obligation to follow the norms, whilst the arguments and facts of the specific consumer law field that is regulated provide an invaluable input to government and commission officials and a possibility to go much deeper into the specific needs of the trade or profession concerned. For similar reasons self-regulation is used in consumer law to transpose directives and regulations.

Gray has pointed out in his contribution that a pure commercial incentive for private actors can also create very strong engagement to create and uphold self-regulation in the best interests of citizens. Private actors such as companies focusing on business-to-consumer transactions want to build and maintain strong brands to ensure a high level of consumer trust. That will strongly motivate such companies to contribute to the protection of consumers against misleading advertising by self-regulation and self-enforcement. Similarly, it motivates companies to actually hold competitors accountable and contributes to – public and private – enforcement, thereby also protecting citizens’ interests. As private actors, both competitors and citizens themselves are well positioned to play a role in the concrete enforcement of public norms, for instance by the detection of and the whistleblowing about environmental crime and harm (Van Erp).

A negative motivation for the involvement of private actors in regulation can be the actual impossibility of enforcing important norms in practice without the help of private actors. For example, the food industry value chain consists of important private actors whose involvement is invaluable to ensuring that food law is enforced, since command and control top-down regulation by public authorities has been shown to be ineffective (see Simonato and Nicolosi). In the online domain, private actors are involved in an attempt to protect citizens’ interests by involving as many relevant private (online) platforms and media as possible in the fast-expanding value chain and by giving them their own share of responsibility to protect minors against sudden confrontation with harmful or shocking content (De Cock Buning).

As is shown in the contribution of Blok on data protection, as well as that of De Cock Buning, the effective protection of fundamental rights can drive a combination of top-down and private regulation. In short, involvement of private actors can be helpful to guide implementation of the law, create engagement in the rule-making process, balance interests involved, bridge the informational asymmetries and provide for more detailed but flexible rules, as well as strongly contribute to effective enforcement.
3. Public–Private Dynamics

It is not only the drivers for the inclusion of private actors in regulation and enforcement which show great diversity, the same is true for the specific dynamics between the public and private actors involved, where many different forms coexist. More generally, it has become apparent that public–private complementarity in regulatory and enforcement regimes adds to an effective instrumental smart mix with a view to the realisation of certain policy goals. The EU Better Regulation approach ties in with academic smart regulation approaches, which underscore the importance of designing policies that employ a mix of instruments, taking account of and responding to the specific context and features of the policy sector in question. It is not simply a choice between regulation and markets; smart regulation concerns a policy mix that considers the fullest range of possible instruments. Whenever possible, it also gives preference to less interventionist instruments, including co-regulation and self-regulation. In the smart regulation approach, the idea of the mix of instruments and its effectiveness in realising the set policy goal is put centre stage, the choice of the less interventionist instrument being functional to this aim.

However, such a proactive design policy has to take account of a number of contextual factors that will impact on and/or limit such a policy. While there is an acknowledgement in the literature that the effectiveness and legitimacy of instruments varies and that some instruments will be more effective in some policy contexts than in others, it is also submitted that instruments are rarely selected tailor-made on the basis of their implementability and effectiveness. Different policy fields tend to show preferences for their own ‘favourite’ types of policy instruments and use these repeatedly, regardless of their actual contribution to problem solving. In this section, we consider more closely which drivers and factors have played a role in the regulatory and enforcement choice at the ‘meso’ – sectoral policy – level. Bressers and O’Toole have argued that ‘in general, the more an instrument’s characteristics help to maintain the existing features of the network, the more likely it is to be selected during the policy formation process’ and that there is a process that results in instrument determination, rather than a particular actor who ‘chooses’.

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4 This section also draws on earlier research, as presented in LAJ Senden, ‘Smart Public–Private Complementarities in the Transnational Regulatory and Enforcement Space’ in J van Erp, M Faure, A Nollkaemper and N Philipsen (eds), Smart Mixes for Transboundary Environmental Harm (Cambridge, Cambridge University Press, 2019) 25–48.
5 ibid.
8 ibid, 220.
However, at the sectoral level, ‘micro’ level as well as ‘macro’ level issues come into play. Key elements in instrumental choice at the micro level are individual perceptions and subjective values, which interact with organisational and systemic factors. Behavioural aspects put emphasis on how actors inside and outside governments view instruments, who is involved in making choices about them, and what criteria they use to judge the suitability of instruments. Do decision-makers tend to choose the same instruments regardless of the problem at issue, or do they select different instruments to match the given situation? As Linder and Peters argue, favouring the same instruments across problem contexts suggests a strong link to the decision-makers’ attributes and settings while, ‘conversely, if choice varies systematically by problem situation, the setting then would exert its influence on choice not through how instruments are viewed but by the way problems are structured’.

At the same time, the preservation of the balance of power has been emphasised in the literature as a relevant choice-determining factor for the regulatory public–private mix, arguing that instruments that could change this balance would probably not be selected to begin with and using them in the implementation process would also only occur insofar as the balance of power allows for this. The selected instruments should never as such pose a serious threat to the existing balance of power.

The macro level refers to the relevance of context at a higher, general level beyond the individual realm and the specific policy domain, concerning factors which determine societal structures, processes and problems, and their interrelationships. Time and place are examples of such key factors in determining what are the core values of a state or other type of community at a given point in time. There may thus be a different perception or assessment of certain values and the legitimacy of certain instruments, given differences in cultural norms and institutional, political and legal arrangements in different locations and regions of the world. Effectiveness and legitimacy may be differently balanced because of such differences. Preferences of decision-makers and the nature of the framework and constraints within which they operate are thus important determinants for the choice of instruments as well. This also includes political calculations, ranging from electoral concerns and advantages to ideological preferences of state and societal actors. The EU itself constitutes such a relevant macro-level context, its

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11 ibid.
12 G Majone, ‘Choice among Policy Instruments for Pollution Control’ (1976) 2 Policy Analysis 589–613, as cited in Bressers and O’Toole (n 7) 221.
13 Howlett (n 6) 5–6.
14 ibid, with reference to Bressers and O’Toole (n 7).
15 Howlett (n 6) 15.
political, institutional and legal framework impacting on the choice and shaping of regulatory and enforcement instruments in the policy domains it covers.

This volume has shown many different forms of involvement of private actors, from cooperation to collaboration, coordination, coercion, competition, cognitive and/or complementary interaction. How can these interaction dynamics be qualified and what are the explanatory factors for these arrangements? What kind of instrumental public–private mix is used and why?

Minto’s contribution showed, for instance, that financial regulation is very much based on cooperative modes of interaction between public and private actors, pointing out that in this sector it is essential to cooperate with private actors to be able to cope with the dynamism of extremely complex modern financial intermediation with innovative but high-risk financial products such as credit default swaps, residential mortgage-backed securities and collateralised debt obligations. Cooperation is, according to Minto, an absolute necessity since all of these complex instruments cause an ever-greater informational asymmetry between (regulatory) actors and the sector. On top of that, they can also cause more sophisticated market failures.

The contribution of Pennings on social policy revealed foremost a complementary interaction between the public and the private domain motivated by the fact that employers’ organisations will hardly ever be motivated to reopen negotiations for new legislation implementing their labour agreements, to avoid their compromises being affected. However, the EU also conditions self-regulation by testing the representativeness of the negotiating organisations, taking the content of the agreement into account: does the agreement affect parties that should have been involved in the negotiations? If so, the EU can intervene. This can be seen as compensation for the lack of democratic involvement by the European Parliament in social agreements. The legal implementation of agreements by social partners that can lead to binding EU law ensures that the relevant organisations are both committed and bound.

Hondius and Schragen showed in their contribution on consumer law that, apart from complementary interaction between public and private actors in developing norms and standards and by the enforcement thereof, there is also some form of competition between private and public regulation in consumer law. When state courts, for instance, pride themselves on handling consumer complaints in less than six months, private consumer complaints boards will not like to lag behind. Competition between EU and national law and self-regulation may also become apparent. Some competition between the EU representative action and successful Dutch collective claims has also proved to be a possibility, for instance in retail and financial services.

In his contribution on internet law, Marsden points out that although, according to him, an imperfect, self-regulatory solution is better than no solution at all, it

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16 For further reference, see figure 1.2, Chapter 1.3.2.
17 B van Hattum, De afwikkeling van zorgplichtclaims. Een onderzoek naar het adequater oplossen van affaires rondom retail producten en dienstverlening op de financiële markten (The Hague, BJU, 2018).
is in fact co-regulatory audit – eg for the removal of terrorist speech – that potentially provides the best balance of fundamental rights and responsive regulation. This is especially true since the existing internet self-regulation has proved to be increasingly challenged by the current growth and evolution of the internet, with emerging monopolies causing substantial competition problems. As an example, Marsden points to a recent form of co-regulatory audit, namely the regular evaluation by the European Commission of the results of the self-regulatory Code of Practice on disinformation, but warns against self-censorship effects should the public audit be too stringent. In the internet-specific domain of online audiovisual media, De Cock Buning showed that, for the protection of minors, private actors work with public institutions in both a coordination role – with respect to the stimulation of EU-wide codes of conduct – and by forms of coercion in a co-regulatory system with clear regulatory backstop powers. In this sector EU-wide conditioned self-regulation with explicit and detailed quality requirements was laid down in the European Audiovisual Media Service Directive 2018. This conditioning can be seen both in the early stages of development of the self-regulation through these quality requirements as well as in the form of a regulatory backstop at a later stage should implementation, monitoring and/or enforcement turn out to be inadequate and leave citizens unprotected.

In the field of data protection, Blok’s contribution showed that the interaction with private actors is mostly one of coercion to guarantee the protection of the fundamental right of privacy. Blok also points to forms of conditioned self-regulation at early stages through codes of conduct and with the aid of privately installed privacy officers. Due to the magnitude and complexity of often transnational cases in data protection, self-regulatory systems have proved to have relatively weak enforcement possibilities should privacy breaches occur. In an attempt to create a larger involvement by the sector, as the prior involvement of private actors in formulating interpretative guidelines by EU public Regulatory Authorities was rather limited, the design of the more recent General Data Protection Regulation (GDPR) includes more explicit involvement by private actors.

Looking at another very internationally oriented subject – international environmental damage and harm – Van Erp points to the mostly complementary interaction of private actors with public actors by, for example, certification rankings and codes of conducts. Van Erp also shows that civil society and citizens are substantially participating in enforcement in a primary cooperative way; through whistleblowing and bell-ringing, online reporting and disclosure of corporate harmful behaviour as well as naming and shaming campaigns. This is furthered by the initiation of liability cases in civil courts, mixed with a role for public institutions, to ensure breaches of both public and private standards are duly notified and can actually be enforced by either public or private authorities to avoid pure symbolic scrutiny. This concerns both tacitly supported self-regulation without legal mandate – citizens participating in enforcement – and mandated self-regulation embedded in a system of public enforcement. A good example of this, pointed out by Van Erp, is the EU Forest Law Enforcement, Governance and
Trade (FLEGT) action plan that eliminates imports of illegally produced timber into the EU by requiring the private licensing of wood products before they are allowed to be imported into the Union.

Many of the EU’s flagship market- and network-based regulatory techniques are hybrid regulatory instruments, relying on legal frameworks that are themselves hierarchical in nature in the sense that they are created and enforced by the EU and/or Member States. The contribution of Kingston and Alblas showed that, partly as a result of a variety of regulatory preferences across Member States, with some trusting self- and co-regulation more than others, the EU has generally refrained from setting a mandatorily harmonised approach to the appropriate regulatory mix in environmental law, and has relied largely on soft law to guide Member States where appropriate. The European Commission has encouraged the use of environmental agreements and has formally recognised particular voluntary agreements on a number of occasions, normally by adopting a Recommendation confirming the content of the industry’s engagement, or simply acknowledging the environmental agreement by exchange of letters. The Commission has stressed that it by no means forgoes its right of initiative and that it can still propose legislation in the fields where such environmental agreements exist. This cautious approach reflects the fact that while such voluntary agreements may serve as an effective tool for laying down environmental commitments without prior legislative action – thus avoiding possibly costly and lengthy legislative implementation phases – environmental agreements have been criticised for not always being very credible or transparent. In particular, clear problems of legitimacy and effectiveness may arise where a regulator decides not to act as a result of voluntary corporate green initiatives, in circumstances where it is the corporations and not the national or EU legislature that decide the level and means of environmental protection and monitoring they consider to be appropriate.

In an attempt to further safeguard EU environmental sustainability, on top of the system of voluntary agreements another mechanism is in place involving a specific group of private actors: citizens. As the contribution of Van Erp on international environmental crime and harm showed, in general environmental protection regulatory systems citizens are also better positioned to protect citizens’ interests. A striking example of this is the network-based environmental regulation in the EU that includes direct influence by citizens in the decentralised and privatised environmental regulation as reflected in the principles of access to information, participation and access to justice in environmental matters provided for in the Aarhus Convention of 1998. The essence is to enable non-governmental civil society – both individuals and organisations – to get involved in environmental protection. Such techniques involving citizens have started to be an important part of the regulatory toolkit for improving environmental protection within the EU and Europe more broadly. Key to this approach is the idea that, by enabling citizens to access information on their environment, to participate in environmental decision-making, and to challenge environmental decisions before courts
and tribunals, this will contribute to achieving a higher level of environmental protection.

In the domain of EU food law we see even more diverse forms of institutionalised hybrid public–private regulatory instruments. In their contribution Simonato and Nicolosi unravel an extremely complex relationship between public and private actors. In a multilayered approach, public actors acknowledge private regulatory initiatives including certification by independent – both from government and from industry – certification bodies. Such initiatives are not only taken in the early stages of rule-making but also on application, and these can be recognised by the EU legislature. In these arrangements the legislature only intervenes at a late stage, especially to protect citizens’ trust in food regulation, and can also include (private) enforcement of public standards. On the other side of the regulatory spectrum there is a top-down approach where public actors explicitly assign regulatory and enforcement tasks to private actors. Since the food industry is considered to have more expertise than public regulators at producing detailed and tailor-made rules, it is required to formulate and enforce its own programmes ensuring an adequate level of hygiene. It is, however, required that such programmes are based on the principles set down in Regulation 852/2004 and are certified by independent certification authorities to provide an extra layer of protection. In between the bottom-up and top-down approach to private–public food regulation, there is a whole spectrum of forms of involvement of private actors.

Gray’s contribution draws attention to a long-standing practice of self-regulation in the domain of commercial communication. He has pointed out that an intricate, multilayered and interconnected approach to private regulation, ranging from company to sector, to product or service, has proved to work very well in the domain of commercial communication. Private regulation in commercial communication has secured a good balance between a general legal framework and more detailed self-regulation. The fact that the advertising industry has shown that it has a strong incentive to comply with self-regulation to protect its reputation and build consumer trust has been decisive for the successes in this field. More recently, however, serious tensions have occurred in respect of online advertising, with new actors in the ever-expanding ecosystem that seem to be less incentivised. The regulatory mix for commercial communications will have to be thoroughly reconsidered to find ways in which private and public regulation should interact in a modern EU.

We have seen in the different policy domains that most of the public–private mixes are hybrid forms of cooperation, often with some regulatory backstop as a means of coercion to avoid forms of window-dressing by private actors and to ensure compliance. Looking at all of these examples of involvement of private actors in the regulatory process, we therefore conclude that public–private complementarity does not eliminate, but rather transforms, the public–private distinction. The various contributions in this volume have also
revealed how, in the regulatory mix, the distinction between public and private instruments may even become rather blurred. While private standards and rule-making, at least on paper, subscribe to a voluntary approach similar to soft law,\(^{18}\) meaning that in principle they lack legally binding force in and of themselves, they can certainly acquire legal effects, as can be seen, for instance, in consumer law (Hondius and Schragen), social policy law (Pennings) and technical standardisation (Hiemstra and Senden), depending on their relationship with and embedding in public law frameworks. It is merely the public or private nature of the adopting organisation that may thus determine the distinction between a public and private norm, rather than the substance and legal effect of the norm itself. The dividing line between a public and a private norm becomes fluid, whenever the public regulator decides to delegate rule-making power to a private body or to mandate the adoption of a private norm, refers, confirms or endorses it in its legislation, uses it as a yardstick in auditing and compliance procedures or in administrative approval procedures and so on. This may raise the question as to whether such private regulation actually qualifies as law or not, as the contribution of Hiemstra and Senden on technical standardisation demonstrates. Yet, in other policy areas the mutual public and private regulatory impact has been seen to be more limited, being a source of inspiration or of voluntary referencing or being merely a form of cooperation in setting standards.

4. Legal Conditioning of Private Regulation and the EU–National Relationship

Both from the perspective of the EU and of the Member States, we have seen in this volume that the exercise of authority through private regulation is different from that of public regulation in the sense that its authority is not (directly) derived from the state or from a democratically chosen government. In any of its forms, the private regulation we have studied is to some extent detached from the traditional mechanisms of government control. We have noted that the development towards regulatory involvement of private actors raises multiple questions regarding its relationship with legitimacy and more specifically concerning accountability and legitimacy as seen, for instance, in Scott’s contribution. In the situation where a public actor is the regulator, the legitimacy of regulation is principally derived from the electoral politics preceding a democratically chosen government.\(^{19}\) In the case of private regulation, rule-making power is (partially) transferred to the


private domain where there is no similar constitutional attachment to a notion of democracy or accountability.

In the different policy domains in this volume we have seen many different levels of EU institutionalisation as well as different legal conditions and boundaries for each of the cases. Pennings’s contribution shows that, in the social policy domain, there is a high level of institutionalisation because of a foundation in primary EU law. It aims at negotiations between employers and trade unions regarding improvement in employment conditions and offers an escape from competition law without the applicability of a proportionality test.

In the field of online protection of minors against harmful content we have seen a substantial level of institutionalisation through EU harmonisation in the form of an EU Directive that is partially founded on fundamental rights, including primary EU law. As a legal condition for private regulation in the domain of online protection of minors, a regulatory backstop is explicitly laid down in the recent Audiovisual Media Service Directive 2018: as a safeguard for the effectiveness of self-regulation, hard regulation will kick in in case of non-compliance. Member States are to encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. This Directive furthermore contains explicit and detailed requirements for future private regulation. Those future codes must be such that they are broadly accepted by the main stakeholders in the Member States concerned; clearly and unambiguously set out their objectives; provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at; and provide for effective enforcement including effective and proportionate sanctions. Gray also refers to these four explicit criteria in his elaboration on the EU legal foundations of successful self-regulation in commercial communication, as these criteria obviously also apply to forms of self-regulation for commercial communication in audiovisual media content. He points out that it was in fact not a coincidence that the EU Community of Practice on effective self- and co-regulation (EUCoP) that lies at the basis of these criteria was inspired by the European Advertising Standards Alliance (EASA) Charter as EASA was a key participant at the founding meetings of the EUCoP. In many other domains EU institutionalisation of self-regulation in commercial communication takes the form of explicit encouragements of self-regulation, for instance in the Misleading and Comparative Advertising Directive and the Unfair Commercial Practice Directive. These encouragements have led to successful self-regulation, partially also due to the fact that these are furthered by the several advertising roundtables on how law and self-regulation should interact in practice, organised by the European Commission, thereby increasing the mutual trust between civil society, business and regulators.

21 ibid, recital 12.
Marsden voices a critical note in his contribution on internet governance, pointing to some of the current forms of self-regulation of the online domain. His case study on the removal of (illegal) content on the internet through artificial intelligence shows, according to him, that self-regulation can not only be ineffective but can even amount to the breaching of fundamental rights, such as the freedom to receive information. To be effective, self-regulation should not only avoid forms of window-dressing by private actors but should also avoid overreaction leading to self-censorship which is detrimental to the fundamental rights enshrined in EU law.

In this volume we saw a particularly strong EU institutionalisation for the involvement of private actors in the domain of data protection because of its foundation in primary EU law with specific instruments set out in the GDPR for the involvement of private actors. These instruments include rules for codes of conduct as well as validation mechanisms, conditions and requirements for stakeholder commitment to codes of conduct, together with private supervision record-keeping of all data processing by data controllers, data protection impact assessments, certification mechanisms and data breach notifications.

Hiemstra and Senden have shown in their contribution on EU standardisation, the primary objective of which is the definition of voluntary technical or quality specifications with which products, production processes or services may comply, a particularly strong connection with the internal market. This comes to the fore in the legal basis of Regulation 1025/2012/EU that introduces the new legislative framework on EU standardisation, in Article 114 TFEU, concerning measures to be taken with a view to the realisation of the internal market. The Regulation furthermore provides for the adoption of the 'European standardisation deliverables', namely any technical specification other than an EU standard, adopted by an European Standard Organisation for repeated and continuous application, with which compliance is not compulsory mandated by the European Commission.

In the domain of food law, however, there is a much weaker EU institutionalisation as was shown by Simonato and Nicolosi. Nevertheless, in some situations the EU can set standards for controls, supervise enforcers and ensure coordination enforcement activities in order to guarantee public health in the complex system of the interacting regulation of a private and public nature. Under exceptional circumstances the European Commission can adopt certain proper enforcement measures regarding safeguarding, such as the suspension of the placing on the market of certain food stuffs.

The EU institutionalisation of private consumer law is also relatively limited; co-regulation and self-regulation are actively encouraged. A consistent, principled approach to or a clear framework for the involvement of private actors in the development of EU consumer law was not found in the research conducted for this volume, at either the national or EU level. Hondius and Schragen elaborate on this by giving some examples – unfair commercial practices, unfair contract terms and consumer credit – to show that these largely harmonised fields
would leave room for the involvement of private actors, but do not provide well-developed foundations to that end. They point, for instance, to the example of Article 6 of Directive 2005/29 on unfair commercial practices that explicitly refers to self-regulation motivated by the fact that traders are well suited to indicate what levels of professional diligence are customary, whereas consumers should, according to this Directive, be involved in the drafting of codes of conduct to help ensure a high level of protection but without developing this further. Notwithstanding this lack of a clear framework, several EU-wide guidance documents have resulted from multistakeholder dialogues in this field, for example with regard to fair environmental claims and comparison websites. As is the case with consumer protection, the EU institutionalisation of business-to-consumer commercial communication is confined to some rather abstractly formulated norms in EU Directives that are mostly voluntarily furthered in more detail in several self-regulatory systems, usually on a national level.

The EU financial regulatory framework has a more solid basis in EU law as it extends to a wide array of regulatory tools which encompass – both national and EU – regulation, recommendations and guidelines as well as self-regulation. The regulatory landscape for the financial sector is a composite legal order consisting of many sets of rules at different levels and many different actors engaged in their creation, with hard law often explicitly relying on soft law. The landscape is dominated by state-based regulators alongside international bodies and standards-setters such as the Bank for International Settlements, the International Organization of Securities Commissions, the International Monetary Fund and the Financial Stability Board, and private financial services industries and national competent authorities.

The case of corporate international environmental crime and harm has shown no strong EU institutionalisation up to now, but a largely national legal approach, this includes whistleblowing protection laws that enable citizens to hold companies accountable. A new proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of EU law aims, however, at harmonising the whistleblowing that can, with the aid of citizens, strongly contribute to the enforcement of norms against international environmental crime and harm. Although the national criminal and private liability regimes are neither vested in EU law nor harmonised, in practice they have contributed to companies being held responsible for transnational environmental crimes and harm; however, it is mostly fear of reputational harm that seems to be most effective. For this, the EU institutionalisation of whistleblowing protection laws may prove to be a strong instrument in the fight against environmental corporate crime and harm.

Klinger has shown in his chapter, by unveiling the relevance of the three foundational principles of the EU’s competence order enshrined in Article 5 TEU for co- and self-regulation, that the principles of subsidiarity and proportionality are founding a constitutional environment that not only enables but also encourages the proliferation of private regulatory instruments. It has been shown in this volume, however, that this is often different for the principle of conferral, the first foundational constitutional principle laid down in Article 5 TEU. In practice, EU primary law, even when explicitly referring to co- and self-regulation as instruments, has proved to be often rather unclear on the delegation of regulatory competences to actors other than the Commission, let alone providing a clear framework for such private regulation. This arguably clashes with the legality aspirations of the principle of conferral which functions as a legality principle in that it requires an explicit enabling provision in the primary law that authorises EU institutions to (partially) allocate regulatory powers to private actors. As will be further discussed in section 6, the answering of important questions on the relationship between private regulatory outcomes and the fundamental rights of citizens or more general societal interests becomes ever more imperative when private regulation is increasingly used as a governance method within the EU.

5. Building Citizens’ Trust

5.1. Tensions between Interests Involved

In this volume, almost all case studies have shown that tensions have emerged between the various interests that are involved in the respective domains, both in the pre-regulatory stage, during the regulatory stage and during the enforcement stage. For instance, large global companies have been shown to have strong interests, for reputational reasons, in setting their own private standards in, for example, the fields of commercial communications, the protection of privacy, the online protection of minors, the food sector or environmental protection. Faithfully upholding their own private standards has, however, turned out to be quite a challenge for some private actors in some sectors. Recent examples such as the Volkswagen diesel fraud and the Facebook/Cambridge Analytica case provide powerful examples of the potential for failure of private regulatory arrangements and that is – understandably – detrimental to citizens’ trust.

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23 See the chapter by Klinger in this volume.
5.1.1. Possible Threats of Private Regulation to Citizens’ Interests

Looking at what possible threats of private regulation to citizens’ interests can be discerned from the policy studies in this volume, we see a large spectrum of possible threats. In the social policy area Pennings’s contribution shows that threats, process-wise, can be discerned at the level of ensuring equal representation or democratic representation; for instance the right of citizens to be involved in the setting of their own labour standards. Substance-wise, threats may lie in the equal-treatment restriction and that it is not necessarily a high level of protection as such that is being aimed at in collective bargaining. In the area of technical standardisation, there are still threats of regulatory capture by industry in the standardisation process and ensuring a balanced representation of all public interests remains a challenge. This is also the case because the representation of some interests is privileged by Regulation 1025/2012, these being environmental, social and SME interests and consumer protection. The accessibility of the decision-making process on standards is thus still problematic, as is also the outcome thereof, to the extent that EU harmonised standards are generally only available upon payment while increasingly carrying binding effects.

In the online domain De Cock Buning’s contribution reveals threats concerning informational freedoms on the one hand and unexpected confrontation of minors with shocking harmful audiovisual content on the other. These risks are furthered by the fact that, due to rapid innovation and globalisation, there is a constant expansion of stakeholders in the value chain. Effective protection of citizens requires in this field that all stakeholders must be taken on board in private regulation, since citizens access online content through many different outlets and on many different devices. Should a stakeholder refuse or drop out of the system, citizens are directly exposed. Stakeholder commitment is equally essential for the effective protection of citizens’ online privacy. In his contribution Blok, however, points to the very obvious risks of large-scale breaches of citizens’ informational privacy, should only one or two stakeholders not commit faithfully to the system. This is especially true in the online domain with its global scale where, in practice, regulation is not upheld effectively by either private or public law enforcement, with the Facebook/Cambridge Analytica case as the most notorious example.

Large stakeholder commitment is also crucial in the domain of environmental protection. Both Van Erp and Kingston and Alblas have emphasised in their contributions on environmental law that there are currently both severe short- and long-term negative effects for citizens caused by environmental damage. Minto showed that the loss of citizens’ trust in the financial sector due to weak enforcement of (public or private) regulation can in fact have other, rather disastrous, consequences such as market failures and even economic crises with severe effects for citizens’ financial situations. In the domain of food safety, Simonato and Nicolosi showed that, should the complex system of (enforced) conditioned self-regulation and top-down control not function properly, this would form an immediate threat to citizens’ personal health. This is furthered by the risk of
regulatory capture should those interests of private actors, which are not aligned with the public interest, prevail. Notably, not only does the regulatory process of setting food standards lie in the hands of actors that have no electoral mandate, but so also does the monitoring of compliance and of enforcement. Conflicts of interest may, for instance, arise during third-party certification when auditors are paid by the industry that they have to certify. This has potential consequences for the auditors’ independence, competence and transparency. Although this is obviously a high-risk domain for citizens, within the EU large-scale food fraud has been confined to instances of mixing horse meat and beef. These scams can be bad for general consumer trust but – at least up until now – they have not led to large-scale health issues for consumers. The commercial benefits of a strong food safety reputation towards consumers could incentivise positive behaviour in this sector especially by an EU-based large-scale food industry.

Building trust is also what incentivises companies in the domain of commercial communication, as Gray showed. Consumers are very likely to lose their trust in brands for products and services when being misled in commercial communication, both individually and generally. In recent years, however, tensions in the average citizen’s trust in commercial communication have substantially increased due to an ever-expanding ecosystem of online advertising with new players having little or no experience or interest in self-regulation.

In consumer law as well, it is exactly the building of consumer confidence that strongly motivates a role for private actors in both the development and the enforcement of consumer law, as was shown by Hondius and Schragen. These authors, however, also clearly indicate that private enforcement should be complemented by collective and public enforcement so as to guarantee justified consumer trust. For the same reason, the cooperation and exchange of information between public and private enforcement is also an absolute necessity to avoid risk.

5.1.2. Addressing Tensions and Threats

We have seen in this volume that these tensions or threats have been addressed in different ways by shaping, designing and further developing the private regulatory and enforcement regimes. In the social policy domain Pennings suggested following a social dialogue type of approach to achieve regulation in other areas as well with a view to ensuring (more) trust in private agreements, thereby balancing public and private interests and contributing to legitimacy. Hondius and Schragen show that the public interest of compliance with consumer protection laws and the promotion of cross-border trade also strongly benefits if most, if not all, relevant stakeholders – consumers, traders and possible experts – are sufficiently involved and invested in the process of regulation and enforcement. They have also shown that it is furthermore extremely relevant to the resolution of the potentially negative effects of tensions between separate and diverse interests in the process of regulation and enforcement to create some form of public supervision of the drafting process so as to prevent private actors imposing one-sided rules on third
Conclusions

parties, thus avoiding one-sided regulation primarily reflecting the interests of one group. In areas with one-sided self-regulation the assumption that privately developed rules will enhance compliance should be considered very critically. It is, according to Hondius and Schragen, exactly for this reason that the development of self-regulation at the European level has proved particularly challenging: there are many more parties that should be included in the process than on a national level, and agreement may become more difficult once they are included. They indicate that although mandatory rules in, for example, the Directive 2005/29 on unfair commercial practices may in theory prevent traders from abusing codes of conduct, the attempts actually to oversee the development of codes have in practice been limited to recommendations to include consumer organisations. On top of that, the mere voluntary character of such codes has been affirmed by the CJEU. This means that even in areas where self-regulation is relatively well developed, the extent to which private actors can actually contribute to citizens’ interests still largely depends on state actors. Because of the difficulties of getting all stakeholders on board for the drafting and enforcement of private regulation, it is not surprising that self-regulation has developed primarily at the national level.

The fast expanding online stakeholder field, caused by innovation in the online digital domain, seems to bring an even larger challenge. For the online protection of minors De Cock Buning shows that the tension of non-compliance by a fast expanding online stakeholder field as well as a growing amount of online content that might shock and harm minors on sudden confrontation has been partially dealt with by an attempt to expand the scope of stakeholders that have to be part of a self- or co-regulatory arrangement whilst creating explicit criteria in the EU Directive for self- and co-regulation together with a backstop should the criteria not be met or the private regulation otherwise fail. Given the fact that the stakeholder field is expanding at the same speed as technical innovation, this approach will almost certainly lag behind reality, to the detriment of citizens who are minors who will most likely continue to face the risk of being confronted with harmful online content.

With regard to data protection, further involvement of the sector in formulating the interpretative guidelines by the EU regulators is an attempt to create more involvement by industry. At the same time we see more public enforcement of data protection norms by public authorities in an attempt to mitigate citizens’ risks, especially in the online domain. On the citizens’ side it was suggested by Blok that citizens should be empowered to start collective actions to make sure that privacy standards are properly upheld.

In addition to what was noted above concerning technical standardisation, it can be noted here that while important steps forward were made with the adoption of Regulation 1025/2012, when it comes to involving more – non-industry – stakeholders in the standardisation process, there are still significant limitations. As Hiemstra and Senden note, this not only takes notice of the fact that there are still only four organisations considered as privileged stakeholders in this process, but also the actual impact they may have on standards-setting. Furthermore, the revised Regulation did little to enhance the accessibility of standards, free of
charge, confining itself to mere recommendations in this regard. Besides that, it remained silent on the judicial reviewability of EU harmonised standards, while simultaneously reinforcing the monitoring and compliance arrangements to be carried out by the European Commission.

Van Erp points out that, in the protection against environmental crime and harm, the empowering of citizens to be able to safely whistleblow or bell-ring in the enforcement of both private and public regulation is considered an effective way to release the tension of different and opposing interests on behalf of citizens’ best interests for a sustainable environment. Fear of reputational harm has proved to be a very strong motivator for compliance for part of the sector. Marsden points out in his contribution on internet law that citizens can in fact greatly contribute to their own benefit and shape regulation by simply adopting (through nudging) new products and services online, such as new platforms, sharing data in new (consumer-friendly) ways or blocking adverts. At the same time co-regulatory systems should nudge private actors on the internet to allow websites to be more flexible in future listings and be interoperable so as to permit citizens a proper exit.

In food law, the contribution of Simonato and Nicolosi has shown that, after a period of increasing sense of distrust by citizens of the existing regulatory arrangements, an extended reform of the food safety systems in the EU was started, including the creation of official (public) controls of the products and processes themselves as well as in connection with the efficacy and quality of private control mechanisms such as certification providing multilayered systems of checks and balances. Given the important role for food certification by independent certification bodies, the EU is also setting standards for their recognition in, for example, Regulation 765/2008 with requirements for accreditation and an obligation for Member States to appoint a single accreditation body, all on the basis of harmonised standards for the whole territory of the EU. In addition, the European Commission is also adopting soft law instruments with voluntary guidance for certification schemes. Where private regulation is embraced by the legislature, thereby upgrading the nature of the regulation, Regulation 882/2004 on official controls provides for controls to be compliant with EU rules and internationally recognised standards such as those of the European Committee for Standardisation. Whilst the EU legal framework acknowledges the importance of enforced self-regulation and allows national authorities to calibrate their enforcement strategies on prior private regulatory design, it is furthermore made explicit that this system of controls should not be regarded as a method of self-regulation and should not replace official controls in the sense that it has binding effects on third parties only if controlled by public authorities.

We have seen that the tension that has substantially grown in recent years due to the gigantic expansion in the number of online stakeholders in the domain of commercial communication, is mitigated as much as possible by soft law instruments such as the further encouragement of self-regulation and multistakeholder involvement, dialogues providing advice and best practices within the legal framework, and support of compliance by enforcing self-regulation programmes.
It remains to be seen whether this will actually be enough to rebuild citizens’ trust. According to Gray, a regulatory backstop should only be used in the domain of commercial communication if all of these efforts prove to be ineffective, as the companies involved will otherwise lose their – normally strong – incentive to make self-regulation for advertisement into a success. He points to the fact that many self-regulatory schemes in this domain have been successful precisely because self-regulating actors have recognised that complying is in their best interest. Another less voluntary way, but certainly a strong incentive to faithfully sign up to self-regulation, is created in the domain of consumer law. Hondius and Schragen flag up the public regulatory measure in consumer law that sanctions an unjustified claim to be a signatory of a self-regulatory code of conduct. When the trader is claiming to be a signatory, but in fact is not, this will always constitute a misleading commercial practice under Directive 2005/29 on unfair commercial practices.

In the financial sector, it is mostly a more extensive interaction between the regulated financial industry and the supervisory authorities in a multilayered system of public–private regulation that aims at substantially diminishing informational discrepancies and making regulation more effective in order to protect citizens’ best interests by mitigating risks for market failure and eventually economic crises. Here it remains to be seen whether this will eventually be enough to rebuild citizens’ trust after the financial crises.

5.1.3. Ensuring Trustworthiness by Ensuring Input Legitimacy, Throughput Legitimacy and Output Legitimacy

We have seen that a very relevant element in respect of ‘internalisation’ of private regulation and enforcement is the extent to which private regulatory and enforcement regimes in the EU context are able to ensure their trustworthiness. Trustworthiness is an essential element, both for positive private actor engagement for citizens and for the actual effectiveness of private regulation. In this volume we have seen that elements to look for in the assessment of the trustworthiness of a regulatory and enforcement regime strongly relate to different features of its source, including: its competence or ability, expertise, goodwill or integrity, benevolence, predictability of its actions, its interaction in rule-making with the regulatee, procedures and possibilities of redress which it offers, and the understandability of its actions.25

Looking at it from a constitutional angle, we have also connected these elements to the need to ensure input legitimacy, throughput legitimacy and output legitimacy of private regulatory and enforcement regimes.26 More specifically, while private regulation can be seen as the expression of contractual freedom and

25 See also chapter 1.5.1.
26 See section 5 of the introductory chapter.
private autonomy, there is not only the risk that the self-interest of private actors may prevail in the regulatory, monitoring and enforcement process, but also that it may have de jure or de facto binding effects on third parties, without this relying on an electoral mandate or a decision-making process that ensures democratic legitimacy or accountability. This risk is even higher in a monopolistic market, where it is not possible for the parties concerned to follow other rules.

Creating trust by ensuring input legitimacy of such regimes, as strongly suggested by, for instance, Hondius and Schragen, puts a lot of emphasis on the qualities of all the actors involved as indicated above, since these regimes lack the democratic legitimacy which derives from an electoral mandate located in a system of representative democracy and which applies to ‘classic’ public regulation and enforcement. Because of this lack, private actors involved in such regimes will need to ‘earn’ their legitimacy to impose rules and regulations upon third actors on other grounds, especially where these rules and regulations impact heavily; competence, expertise, goodwill, true commitment, etc, come into play as yardsticks for this assessment. As Scott proposes, representative democracy could thus be complemented in the private regulatory and enforcement sphere with another approach towards ensuring democracy, namely by monitoring democracy. At each stage of the policy cycle the evidence of the emergence of novel ways of democratising both public and private nodes of regulatory governance could be evaluated. As he notes:

[W]hile it is possible to argue that the trend towards regulation through non-majoritarian institutions weakens democratic governance, there is an increasing recognition that, through establishing distinctive expertise and authority, independent regulators can be viewed as a mechanism of good governance, keeping government in check through scrutiny and action in respect of key aspects of social and economic decision-making. However, some of the contributions illustrate the risks involved in this regard. As Kingston and Alblas note:

At worst, however, voluntary environmental initiatives may be employed tactically by undertakings to avoid being regulated – and the concomitant costs of compliance, potential inefficiency, and loss of control over the applicable standard and regime – or to postpone it for as long as possible.

Moreover, empirical economic research suggests that this may be an effective tactic. A well-known example within the EU was the choice of the EU car

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industry to enter into agreements on emissions standards, essentially in order to avoid being regulated. After unsatisfactory environmental performance, this ended in failure in 2010 when the EU lost patience, passing a Regulation on passenger car emissions.

**Throughput legitimacy** provides for procedural guarantees for the involvement of private actors in regulation, for instance with regard to self-regulatory codes. Blok makes clear in his contribution on data protection that even the inclusion of a framework for private regulation in EU law by means of a harmonised Regulation such as the GDPR is by no means a guarantee for its trustworthiness towards citizens. Summarising the experiences with codes of conduct, Blok shows that codes could have a positive effect from the perspective of the citizen, because the process of developing the codes contributes to awareness and compliance. He also emphasises, however, that encouraging codes of conduct has had only a limited effect. Codes of conduct are mainly achieved if the private actors are convinced that they themselves have an interest in self-regulation. Blok therefore suggests that an approval procedure can be valuable from the point of view of throughput legitimacy for citizens (data subjects), because the regulator verifies whether the code of conduct is in accordance with the law. That could contribute to the credibility of the instrument. However, evaluation studies demonstrate that the approval procedure deters data controllers, both because of practical objections and because of conflicts about the interpretation of the law. It is, according to Blok, therefore not realistic to expect that the procedure will be used by many data controllers. To the extent that it is used, it can even create a disincentive to amend the codes in the light of new developments. Such approval procedure, at least in data protection law, therefore potentially does not contribute to the flexibility of the codes and instruments and with that to their effectivity.

**Output legitimacy** puts the effectiveness of such regimes centre-stage and in earlier research on transnational private regulation the following assessment elements have been identified as being relevant so as to ensure that private regulation and enforcement can realise the policy goals striven for. These concern first of all the extent to which private and public actors can be said to be of one mind in relation to substance; do private interests align with public policy objectives and is there industry commitment and capacity to realise the set goals? Other elements concern mechanisms and procedures: what are the means used to render the regulation effective? Is there any form of government pressure and oversight? Are credible sanctioning policies or measures provided for? Anthony Ogus also noted in 1995 in relation to the resort to self-regulation in the UK, and especially in view

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of self-regulatory regimes based on consensual bargaining and self-regulatory regimes that are in competition with each other, that these may live up to their expectations and promises if some form of external constraint is provided.\textsuperscript{31}

Many contributions in this volume, such as those by Hondius and Schragen, Van Erp, Blok and De Cock Buning, have emphasised the need for redress, external oversight and sanctioning. An instrument will only attain its intended effects if private actors systematically use it and citizens witness that. In cases of complexity, high costs of participation in, for example, drawing up and (technically) implementing complex codes of conduct can outweigh the benefits in form of time, money and expertise. Trustworthiness and commitment can be strongly supported by making private actors’ contributions to regulation and enforcement compulsory and by imposing sanctions on non-compliance with their duties. We have seen that a bottom-up approach by a strongly motivated and incentivised sector that is the (co)author of private regulation can work well in terms of internalisation and trustworthiness. For instance, the Dutch system of voluntary content classification by the media sector to provide citizens with warnings about harmful content functions very well, as De Cock Buning showed. The same can be said for commercial communication in the pre-online era, as Gray has pointed out. For both the protection of minors and for commercial communications the task will now be to further these successes in the much more complex and multifaceted online domain. If designed very well, compliance with self-regulatory systems may become a strategy for smart enforcement since it enables public enforcement to distinguish between high-risk and low-risk industry and focus inspection efforts, as Simonato and Nicolosi pointed out in their contribution on food law. In these cases, however, it seems that it is often the presence of a regulatory backstop which provides the extra incentive that is needed for true effectivity in the interests of citizens.

Minto refines this for the financial sector by arguing in favour of a multidimensional approach. In the financial sector, a strong role for private actors in the regulatory process obviously brought to the fore questions relating to the legitimacy and accountability of the system. According to Minto, the main characteristics of the current public–private regulatory cooperation aim at addressing these by (i) strict retention of the public role in law-making and enforcement, (ii) active pursuit of private actors’ knowledge, primarily as a supplement, and (iii) a dynamic, flexible and dialogic law-making process including increased participation by private actors. This combination should result in a stronger involvement of private actors and furthermore build citizens’ trust.

In the cases of social agreements and technical standardisation, a legal framework has been put in place that seeks to enhance their effectiveness by way of public approval, as well as a strong public mandating and monitoring system in the case of technical standardisation.

De facto public exercise of authority

Trustworthiness is especially relevant when a private regulatory and/or enforcement regime is akin to a de facto public exercise of authority. One could argue that this would principally require similar guarantees to those put in place for public regulatory and enforcement regimes. This would imply that the identification of private regulation as being of constitutional significance is a matter of judgment that can only be made in context. We saw that this gives rise to another premise, namely that the actual need for trustworthiness of EU private regulation can be thought of as being on a sliding scale, depending in particular on whether the use of EU private regulation in fact involves (major) political choices or merely rather technical issues; whether it has only internal effects for the regime members or also external effects for third parties; how ‘severe’ such external effects potentially are in terms of affecting human rights or public interests; and whether there is a possibility to opt out of the regime. This depends on the nature of the market (monopolistic or oligopolistic) and whether the regime is purely voluntary or de facto applicable or even obligatory.  

We have seen in this volume at least with regards to, for example, health and safety in food law, employee protection in social law, as well as in financial law, consumer law and environmental protection law, that there are substantial effects for third parties coming from the private regulation. This requires extra diligence to provide for sufficient input, throughput and output legitimacy.

At the same time, Kingston and Alblas in their contribution on environmental law make clear that voluntary initiatives cannot be used to create de facto compulsory standards which are then used to exclude competitors. In the EU, competition rules as laid down in Articles 101 and 102 TFEU, and the equivalent provisions of national competition laws, are built to respond to that. The classic response to such concerns is that the benefit of such regulatory tools in terms of effectiveness is sufficient to outweigh any legitimacy concerns.

5.1.4. Compatibility with the EU’s Constitutional Democratic Principles and Fundamental Rights

According to Kingston and Alblas, even those elements of private regulation encouraged at EU level may, if not properly designed and overseen by public regulators, raise significant questions about their compatibility with the EU’s own constitutional democratic principles, as well as issues of trust, legitimacy and credibility from a citizen’s perspective more broadly. While the EU Treaties may, as

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33 In the EU, that is achieved by the competition rules laid down in Arts 101 and 102 TFEU. See S Kingston, Greening EU Competition Law and Policy (Cambridge, Cambridge University Press, 2012).
a matter of principle, therefore be described as agnostic towards the debate about public versus private environmental regulation, that is not to say that the public–private distinction is irrelevant to EU law. On the contrary, clearly, very different bodies of legal rules apply depending on whether the regulatory tool at hand is public or private in nature. Further, the overarching aims of the rules applicable to private environmental regulation (competition law, state aid law) are typically considered to be essentially economic in nature (eg increasing economic efficiency, and maintaining a level playing-field). This leaves little room for incorporating or even acknowledging important public interest aims such as ensuring citizens’ trust and participation in the private regulatory tool selected. The principal disadvantage lies in their very nature: they are not compulsory, and therefore inappropriate for use alone to deal with immediately serious environmental risks. Even where their use is in principle appropriate, their success in achieving environmental protection goals depends on how the specific initiative is constructed and functions in practice.

Regulatory flaws demonstrate well the dangers in relying on private and hybrid regulatory techniques that are not properly designed. Given the increasing consensus that climate change is a human rights issue that potentially affects all citizens, including future generations, this is no longer an abstract issue. Rather, in the words of the United Nations High Commissioner for Human Rights: ‘[H]uman rights are under threat from a force that challenges the foundations of all life on this planet we share.’ In these circumstances, it is apparent that the EU may justify reliance on private regulatory arrangements if and only if such mechanisms are in fact effective in achieving the EU’s climate goals for the benefit of its citizens and in conformity with their rights.

It must be noted that several other of the policy areas covered in this volume also relate to fundamental rights, as now protected explicitly in the Charter of Fundamental Rights, including data protection, environmental protection, consumer protection, social rights and protection of children. Emaus has shown that the effects of fundamental rights on the regulatory process are manifold, but could roughly be classified in between two extremes; at one extreme they act as a driver and at the other as a barrier to the use of private regulation and enforcement. In between these extremes, fundamental rights may be supportive of such regimes where they actually serve other policy goals or they may also set certain limits on the use of private regulation and enforcement. The effects at the two poles provide the clearest instructions. These instructions are either to involve private actors in the regulatory process when effective enjoyment of fundamental rights can only be achieved in this way, or to exclude private actors from the regulatory process when soft law is no option or when experience has shown that private actors fail to provide instruments for effective protection.

34 ibid.
Looking at a hybrid form of private regulation with clear instructions in its design in the domain of fundamental rights, we saw in this volume the protection of minors in the online world where at least two fundamental rights are at stake, namely freedom of information and children’s rights. In this domain, fundamental rights drive a form of co-regulation where private regulation is controlled by independent public oversight to guarantee effectiveness in the best interests of the most vulnerable citizens. De Cock Buning shows that active balancing of fundamental rights should be attributed to the independent public regulatory authority, thereby providing for advanced protection of fundamental rights. Meta supervision by independent regulatory authorities on the effectiveness of private regulation can balance forms of over- or under-protection that might be detrimental to fundamental rights.

5.1.5. Hybrid Systems

More generally, the embedding of private regulation in a co-regulatory system with backstop power can strongly contribute to effectiveness and trustworthiness, thereby better serving citizens’ best interests. By satisfying various interests and providing for serious checks and balances, co-regulation can result in more compliance and therefore in higher levels of citizen trust. Formulating explicit requirements in law can enhance the effectiveness of co-regulation as is aimed at in the recent European Audiovisual Media Service Directive, where the role of both audiovisual media services and video sharing platforms as private actors involved in the online protection of minors against confrontation with harmful content is conditioned in a co-regulatory arrangement with a strong legal embedding as well as very explicit legal requirements for its effectiveness. On top of this, the recent Directive is very explicit in its requirements for private regulation by defining specific goals and ambitions: the co-regulatory system involving private actors should be broadly accepted by the main stakeholders, clearly and unambiguously set out its objectives, provide for regular, transparent and independent monitoring and evaluation of its achievements, and also provide for effective enforcement including effective and proportionate sanctions.

This seems to be a promising approach, since functioning private and public supervisory authorities that have a consistent enforcement strategy can be crucial in guaranteeing the effective functioning of the system and thereby protecting the citizens’ best interest and trust. Effective sanctions should, however, be in place guaranteeing voluntary compliance under difficult circumstances as well. Public

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37 ibid, Art 4a(1).
backstop powers will further contribute to the effectiveness of the system. Should the public supervisory authority have to report that private regulation is failing, the legislature should be in a position to consider taking legislative action. The fact that legislative action can be considered in the case of non-compliance can work as a hidden persuader, thereby providing an incentive to remain compliant.\textsuperscript{38} However \textit{overdesign} and too much detailed involvement on the part of a public authority should also be avoided, since it will endanger the willingness of private parties to internalise and comply voluntarily, as Gray pointed out.

\subsection*{5.1.6. Principles for Better Self- and Co-Regulation}

As became clear from the contribution of Hondius and Schragen on consumer law, as well as from the EU Principles for Better Self- and Co-Regulation as elaborated on in the introduction to this volume, substantial stakeholder involvement is crucial to build trust amongst citizens as well as amongst the private actors involved: the regulatory process should represent as many as possible potential useful actors in the field concerned, notably those having the capacity to contribute to success. This is also a reason to take action to prevent only privileged access to law-making processes, especially access of frequent players rather than ‘weaker’ groups that may have fewer resources and less expertise. Although efforts to include more stakeholders may reduce the flexibility of self-regulation, one may doubt, however, whether it would reduce flexibility to such an extent that it is less flexible than state regulation. These efforts can take various forms, for example supervised drafting processes, mandatory law, or transparency obligations. Forms of monitoring, if more consistently approached and coordinated between EU and national actors, could well help private actors, through self-regulation and co-regulation, to pursue the public interest. Other relevant elements in this respect to build citizens’ trust with private regulation, as also mentioned in the EU Principles for Better Self- and Co-Regulation, are openness – envisaged actions should be prepared openly – as well as good faith.

To provide for sustainable trust amongst citizens and to keep the private actors engaged in the long term, systems need an \textit{evaluation} mechanism, leaving room for iterative improvements, to incorporate accountability and a process of ‘learning by doing’.\textsuperscript{39} This is especially relevant in sectors with rapidly moving technological innovation. As indicated in the Principles for Better Self- and Co-Regulation, this evaluation and monitoring should be conducted in such a way that it is sufficiently open and autonomous to command respect from all interested parties. It should include annual progress checks, in light of the chosen objectives and indicators and any available broader background data.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{39} In this sense the Better Principles of Self- and Co-regulation as set up by the Community of Practice on Self- and Co-regulation.
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The Principles for Better Self- and Co-Regulation require legal compliance, meaning that initiatives should be designed in compliance with applicable law and fundamental rights as enshrined in EU and national law. For this a clear, consistent legal framework for private actors should be developed both at the national and EU level. A consistent approach towards monitoring the development of privately developed rules should be considered, as private actors do not necessarily pursue the public interest at the expense of their own interest.

In this part of the conclusion we have seen that overall trust of both stakeholders and citizens is essential to future-proof protection of citizens’ interests in such regulatory arrangements. Trust strongly contributes to the acceptance of private regulation and is a first important step to internalisation. True internalisation, however, also requires serious stakeholder involvement from early on. Crucial elements to build and maintain trust are consistency, reliability, transparency, validity, legitimacy and accountability. Given the inherent risk of some private actors taking too little responsibility for the functioning and results of the system, all actors involved should be clearly accountable for their respective involvement, preferably as part of a hybrid system of public and private actors. In section 6 we will look into the constitutionalisation of private regulation and enforcement in the EU and structure the lessons learnt.

6. Constitutionalisation of Private Regulation and Enforcement in the EU: Lessons Learnt

A final, important question that presents itself in the light of the findings in this volume concerns what need there is for further constitutionalisation of private regulation and enforcement in the EU, with a view to better protecting citizens’ interests. Given the particularities of the EU context by which it distinguishes itself from other national and transnational private regulation and enforcement contexts, what role may there be for the law in the further framing and designing of the use of private regulation and enforcement in the EU context? In other words, how can the EU policy commitment to self- and co-regulation be embedded in the EU legal framework? This question first requires some further reflection on what is problematic about the current policy approach and legal framework and what need for change this implies and, next, what may be potential avenues for enhancing the legal framework.

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42 See J Black, ‘Constitutionalising Self-Regulation’ (1996) 59(1) MLR 24–55. Black was one of the first authors to phrase the issue in these terms, albeit focusing on the national context and the role of courts in particular.
6.1. A Limited and Ambiguous EU Smart Mix Policy Approach

It has been seen that within the framework of the EU Better Regulation programme, driven by concerns of subsidiarity and proportionality, there has been a progressive development of private regulation and enforcement in the EU, including in specific policy areas. However, it has also been seen that the last revision of the EU Better Regulation policy gives an ambiguous message, as the Commission on the one hand and the Council and the European Parliament on the other do not seem to be fully of the same mind when it comes to their commitment to the use of private regulation and enforcement. This may have to do with different political and institutional interests including balance-of-power concerns, for instance the European Parliament may be protective of its own role in the EU decision-making and legislative processes.\footnote{See also the European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of ‘soft law’ instruments (2007/2028(INI)).} There seems to be an institutional incongruity in the actual commitment to an instrumental use of private regulation and enforcement as a tool for realising certain policy goals. This may very well also be the reason behind the sudden silence on this topic in the renewed Inter-institutional Agreement on Better Lawmaking, in contrast to the Better Regulation programme as set out by the European Commission and in particular its Better Regulation ‘Toolbox’. The difference in terminology – law-making versus regulation – in these two instruments is also noteworthy and can be seen to reflect a difference in substantive focus and institutional commitment.

The EU Better Regulation policy has also been framed in terms of smart regulation and puts the emphasis on the need for a smart mix approach.\footnote{See eg the Commission’s Communication on Regulatory Fitness, COM(2012) 746 final and the Commission’s Press Release, ‘Smart Regulation: Ensuring that European Laws Benefit People and Businesses’ (8 October 2010) IP/10/1296, available at: https://europa.eu/rapid/press-release_IP-10-1296_en.htm?locale=en.} Smart mix approaches are very much goal-oriented and geared towards effective problem-solving and therewith to ensuring output legitimacy. Generally, the academic literature on instrumental choice and smart mixes has paid little attention to the role of the law in ensuring smart mixes,\footnote{For more detail, see Senden (n 4).} except for pointing to the instrumental function of the law, namely seeing the law primarily as a tool to steer towards certain goals. But importantly, smart mix approaches often fail to take into account limits to instrumental choice that may ensue from the – equally important – guarantee function of the law. This function concerns the realisation and protection of values and principles that underpin the legal system at issue.

Within the context of the EU, this means that such values and principles entail conditions and limits concerning the protection of fundamental and human rights,
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compliance with internal market and competition law rules, as well as respect for key elements of democratic and good governance. These key elements include inter alia a solid legal foundation of EU action, a participatory basis of the decision-making process, a high level of accountability and transparency in this process, monitoring and enforcement mechanisms, as well as consistency and coherence so as to ensure legal certainty as far as possible and the availability of legal remedies. Thus, it is important to impregnate smart mix approaches – and for the purposes of this volume the EU smart mix approach – with relevant legal rules, principles and procedures, so as to manifest and live up to its underlying values. In this way, the EU smart mix approach will actively contribute not only to enhancing the effectiveness and output legitimacy, but also the input and throughput legitimacy of private regulatory and enforcement regimes that may be part of such a smart mix. Interestingly, the old Inter-Institutional Agreement on Better Lawmaking stipulated legal limits to the use of self- and co-regulation, as mentioned in the introductory chapter and in the contribution of Klinger and Emaus, for example on the basis of the EU competence order and fundamental rights, but these have disappeared in the new Inter-Institutional Agreement. The Better Regulation guidelines refer to certain principles that the use of self- and co-regulation needs to respect, but these are not clearly linked to the EU legal framework and the guidelines are not established in a legally binding document. This has left us with the situation that a comprehensively legal framework is lacking and that we can only establish and assess the applicable legal framework and rules, principles and procedures concerning private regulation and enforcement in the EU context on the basis of an independent enquiry, as conducted in this volume.

6.2. Horizontal Incoherence and Incongruity

The picture that has emerged from this enquiry, regarding both the sectoral studies and the horizontal studies, has revealed that a consistent and coherent EU law approach towards the phenomenon of private regulation and enforcement is lacking as well. From an instrumental legal perspective, it has thus been seen that whilst there is a solid, explicit legal basis in primary EU law for one form of private regulation – in the area of social policy as analysed by Pennings – other formalised forms of private regulation mandated by EU institutions are less well-founded as the secondary legislation in which their use is framed finds only a rather weak or indirect legal basis in the EU Treaties. This has been found to be the case in particular for technical standardisation in the contribution of Hiemstra and Senden,

but also goes for other private regulatory and enforcement regimes, such as in the area of environmental policy and financial markets. The main problem here is that the use of private regulation and enforcement mechanisms may be delegated or mandated on the basis of EU legislation, which itself is based on a Treaty provision that is focused primarily on substantive harmonisation of national laws and regulations. However, increasingly, such legal bases are also being used to shape different institutional phenomena, including the increasing use of private regulatory and enforcement mechanisms.

This is the case because the EU’s primary framework does not formally provide for the possibility of delegating regulatory authority to private actors, nor does it formally acknowledge the exercise of such delegated regulatory authority by private actors, be it in the form of ‘technical standards,’ ‘codes of conduct’ or any other private acts. The new hierarchy of norms that was introduced by the Treaty of Lisbon in 2009 is silent on this. This leads Klinger in this volume to conclude that ‘this “constitutional neglect” of delegated private regulatory authority within the EU primary law framework is … at odds with the strict legality aspirations that stem from the principle of conferral,’ according to which the EU can only exercise those powers that the Member States have conferred upon it. He also concludes that the horizontal division of powers between the EU institutions, as it ensues from the principle of conferral, entails a ‘presumption against the delegation of powers to private actors.’ While the CJEU has condoned the delegation of powers to actors not explicitly provided for by the Treaties, including private actors, and thus has formally ‘smoothed away’ this presumption, the CJEU’s approach entails constitutional tensions of its own.

The ‘Treaties’ constitutional neglect of private regulatory and enforcement authority and the difficult fit with the principle of conferral do not square well with the two other leading EU legal principles that govern the exercise of EU powers, namely subsidiarity and proportionality. These strive after the realisation of policy goals at the lowest level of intervention possible and the use of the least interventionist types of instruments, making use of EU legal instruments only when this is found to be necessary. Therewith, the application of these principles is actually an important driver for delegating regulatory and enforcement powers to private actors, as also confirmed in the Better Regulation policy approach. Thus these principles pull in different directions: the principle of conferral pointing foremost towards a denial of private regulatory and enforcement authority – at least as long as a strong legal foundation for this is lacking – while subsidiarity and proportionality point towards the most extended use of private regulatory and enforcement

47 This also concerns EU agencies, which has been disputed before the CJEU: see Case C-217/04 ENISA ECLI:EU:C:2006:279 and Case C-270/12 ESMA ECLI:EU:C:2014:18.

48 See also LAJ Senden, ‘The Constitutional Fit of European Standardization Put to the Test’ (2017) 44(4) Legal Issues of Economic Integration 337–52.
authority possible. The EU guiding principles on the very existence and scope of EU powers and regarding the exercise of EU powers are thus not congruent with the phenomenon of private regulation and enforcement.

The exercise of private regulatory and enforcement authority is also challenging from the perspective of legal guarantees which other foundational doctrines of EU law seek to secure, including in particular internal market law, competition law, fundamental rights law and democratic and sound rule-making.\textsuperscript{49} While it has become clear that these set important limits to and conditions for private actors exercising regulatory and enforcement authority, the interpretation, application and scope of these limits are not yet crystallised and in many respects also not congruent. Brouwer has thus concluded that where private regulatory conduct impedes the freedoms of other market actors and citizens, the call for accountability and (judicial) control arises and internal market law provides in fact one of the controlling mechanisms in this regard. The CJEU has taken up on this possibility, by actively responding to the changing public–private divide by extending the scope of application of free movement law to horizontal disputes, based on an \textit{effet utile} reasoning. However, this development has not been uniform. To protect some zone of private autonomy, it has thus refrained from extending horizontal direct effect to the free movement of goods provisions and seems to apply different thresholds for the free movement of workers and services. Concurrently, the Court has refused to expand the list of justifications and consistently held that there is nothing to preclude individuals from relying upon the (public) justification grounds. Thereby it has denied the dissimilar interests of public and private actors. Brouwer has thus concluded that this has resulted in a fragmented and ambiguous approach towards the horizontality of free movement law, as a consequence of which its value as an effective controlling mechanism for private regulatory conduct has decreased: ‘This is notably visible in the scenario where competing interests such as private autonomy, fundamental rights protection, free movement and public interests need to “fit” within the traditional rule/exception approach of free movement law.’

Clearly, as Emaus remarks, ‘fundamental rights are key to the protection of citizen’s interests’. She has noted that fundamental rights effects of private regulation and enforcement may range from

an obligation to draft regulations with the involvement of private actors for the purpose of guaranteeing a particular right (fundamental rights as a driver or ground for co-regulation) to prohibiting co-regulation as it would constitute a breach of a particular right (fundamental rights as a barrier precluding co-regulation).

Different actors also bear different responsibilities for protecting fundamental rights in the EU context: the EU institutions, the Member States, the private actors involved in the rule-making process and the ‘rights-holders’, which are said to

\textsuperscript{49} See Brouwers, Mulder and Emaus in this volume.
refer to citizens, including stakeholders, companies, consumers, employees and the general public alike. Importantly, no explicit obligations follow from the EU Charter of Fundamental Rights, since Article 51, which refers to its field of application, does not mention private actors as duty-bearers. Yet, the CJEU recently made clear in Bauer that it cannot be concluded from this provision that the Charter categorically excludes direct horizontal effect of its provisions. Rights in the EU Charter may thus have direct horizontal effect in cases where the rights are ‘both mandatory and unconditional in nature’ and are sufficient in themselves to confer rights on citizens.\(^5\) However, in internal market law, Emaus has signalled a similar problem regarding the horizontal applicability of fundamental rights to private actors, in the sense that while the CJEU has now accepted the horizontal effect of fundamental rights contained in the Charter of Fundamental Rights, the extent of this effect remains unclear. It thus still remains to be seen which provisions have direct horizontal effect and what duties, if any, the EU Charter imposes on private actors.

Such a problem of horizontality does not occur in the realm of competition law, since by its very nature it applies to relations between private actors, ie companies. In his contribution Mulder has observed that there is an ‘inherent scepticism’ towards private regulation within EU competition law, based on the understanding that private economic actors gravitate foremost towards their own self-interests and cannot be trusted to pursue public interest objectives. Yet, he also states that, when taking a wider citizens’ perspective, there might be reason to apply EU competition law differently in certain cases since it may be argued that this perspective is wider than that of consumer interest to which EU competition law exceptions are limited, and specifically to allow more room for the pursuit of objectives that shape aims of a wider social nature, such as sustainability. He has identified two ‘escape routes’ within the EU competition rules for self- or co-regulation leading to restrictions of competition. The first escape route concerns the supply side of the market where self-regulation takes place in such a way that the input legitimacy of agreements is strengthened and private actors are sufficiently restricted in regulating in a self-serving manner, for instance by the instalment of public law oversight mechanisms and procedural guarantees which induce private rule-makers to exclusively serve public interests. The second escape route concerns the demand side of the market, which could be sufficiently compensated for the restrictions of competition if there is an increase in consumer welfare. Mulder argues that:

The first option allows for a balancing of competing societal objectives on the basis of democratic legitimacy and the shaping of society’s preferences and would be more in line with a citizen-based approach to competition law. The second escape route is solely concerned with choice and competitive prices, serving the interest of the consumer.

\(^5\) Cases C-569/16 and C-570/16 Bauer ECLI:EU:C:2018:871, para 85.
Importantly, in dealing with these escape routes we can again demonstrate some institutional incongruity, since the European Commission focuses predominantly on the demand side of markets and consumer interest, while the case-law of the CJEU reveals different options to limit the scope of competition law where there is sufficient input legitimacy, that is the responsiveness to citizens’ concerns as a result of participation by and inclusion of relevant stakeholders. Moreover, Mulder has also concluded that there is a problem of incoherence, as

[o]ne of the difficulties at present is that the case law may present too many pathways to justify sustainability initiatives, but without having any internal coherence among the options available, rendering the task of states and competition authorities tricky. Rationalising these multiple pathways would require the CJEU guidance. Some Member States may choose to provide for public goods through state regulation, others may prefer affording space for self-regulation. EU law should be sufficiently supple to allow both of these variations and also assess them under a convergent standard.

Interestingly, on the basis of the effet utile principle, the CJEU case-law also puts limits on Member States’ use of legislation as a tool to exclude the application of EU competition law with respect to competition-restrictive private regulatory schemes. In particular, Mulder concludes that it amounts to an infringement of the duty of ‘faithful cooperation’ where ‘a Member State requires, favours or reinforces an anti-competitive agreement or abandons its own regulatory powers and delegates them to private operators, which then, enabled by the law, infringe the competition rules’.

Given the almost complete silence of the Treaties on the existence of private regulation and enforcement authority and the concomitant lack of clarity in the general EU legal framework applying to the exercise of private regulatory and enforcement authority as outlined above, it is not surprising that there appear to be huge differences between private regimes in the policy areas considered, depending on the extent to which they are shaped, if at all, on the basis of EU primary law or secondary legislation. So, the requirements as to transparency and openness, participation, compliance, sanctioning, etc, may vary considerably from one area and regime to another, as already demonstrated in the previous sections of this chapter.

6.3. The Need for Change

How problematic is the signalled incongruity and incoherence and is there a need for further institutionalisation and constitutionalisation of private regulation and enforcement in EU law? As Selznick says: ‘[T]o institutionalize is to infuse with value beyond the technical requirements of the task at hand. Institutionalization is the emergence of orderly, stable, social integrating patterns out of unstable, loosely organized or narrowly technical activities.’ At the same time, he acknowledged that: ‘[I]nstitutionalization constrains conduct in two main ways; by bringing it
within a normative order, and by making it hostage to its own history. Yet, as Klinger has also observed in his contribution, a firm(er) embedding of private regulation and enforcement into the normative framework of the EU could have a substantial positive impact on the safeguarding of the interest of citizens. The fundamental issue to consider here is thus whether the development of private regulation and enforcement in the EU has reached the point where such ‘infusion’ cannot be merely left to develop in a rather case-by-case pragmatic way as it has done so far, or that it has crystallised already to the extent that a certain formal institutionalisation would be required. In our view, it can be argued that in cases of delegation of powers by the EU institutions to private actors, a certain level of institutionalised commitment and control of the exercise of this power is called for.

Our position is that such institutionalisation would be beneficial with a view to bringing more coherence to the current fragmented approach and legitimacy to such private regulation and enforcement in line with the core values and principles which underlie the EU law- and policy-making system; taking these seriously means that they need a more well-thought-out application to private regulation and enforcement in the EU context as well. The following three core arguments underlie this position.

The first argument concerns the repeated assertion in various contributions to this volume that the exercise of rule-making power that is akin to public exercise of power, with wide effects going beyond the parties involved in a transaction and potentially with political relevance, requires (democratic) legitimacy and accountability; that this is also the case because traditionally the setting of rules is a power held by government, legitimised by a democratic decision-making process; and that the asymmetry of power involved in the exercise of rule-making by private actors and citizens demands certain limits. ‘Outsourcing’ rule-making and/or enforcement actions should thus be subject to similar requirements and guarantees as those to which the public regulator and/or enforcer is subjected.

The second argument is related to the fact that, more generally, the Treaty of Lisbon has reinforced the constitutional and normative foundations of the EU. This is primarily evidenced by the already mentioned enhanced commitment to fundamental rights, as the Treaty of Lisbon accorded the Charter the status of primary EU law. The fact that the EU institutions, Member States and private actors are thus under a stronger legal obligation to respect and promote fundamental rights protection, as confirmed in the CJEU’s case-law, should also translate in an explicit and clear policy and legal framing of law- and rule-making processes, including private regulation. It is also important that the Treaty of Lisbon has reinforced the duty for the EU institutions to comply with good governance requirements,

\footnote{In WR Scott, \textit{Institutions and Organizations. Ideas, Interests and Identities}, 4th rev edn (Thousand Oaks, CA, Sage, 2013) 146.}
including ensuring the coherence, consistency, transparency, consultation, participation and openness of their actions.

The third argument relates to the fact that, as Scott observes, there is an increasing trend of delegation from the legislature to the executive branch, including both the European Commission and regulatory agencies. The Treaty of Lisbon responded, at least in part, to this, by reinforcing specifically the normative framework for the delegation of powers by the EU legislature to the Commission as an executive and rule-making body under Articles 290 and 291 TFEU. The new hierarchy of norms has thus been said to entail a ‘carefully crafted’ normative framework for the interinstitutional delegation of powers. Logically, to the extent that (sub)delegation to private actors is akin to such delegation of power, it would require similar procedural and legitimacy safeguards as contained in those provisions. As Klinger concludes, the CJEU’s current rather generous stance on the delegation of powers not formally recognised under primary law arguably runs counter to the very philosophy and system introduced by the Lisbon Treaty and may fall short in the long run in counterbalancing the ‘constitutional neglect’ of private regulation and in providing an appropriate framework for its future-proof use. Calls for the introduction of an appropriate constitutional foundation for private regulation within the Treaties, such as have been articulated by the European Economic and Social Committee, might therefore certainly grow louder, as they currently do already both for the delegation of powers to regulatory agencies, and also for the delegation of governmental power to private parties.

An argument against institutionalisation would obviously be that the use of private regulation and enforcement is a highly contextual matter, depending very much on the policy area at issue, and that its legal foundation and framing should be so as well. Such an argument might seem to tie in with a liberal approach, emphasising private autonomy and the right of property and the right to conduct personal business over other matters, such as fundamental rights concerns of affected third parties. Yet, we consider that truly futureproof solutions that build the essential trust of citizens imply not only accommodating the specific sector needs and features, but also doing justice to the core principles, values, doctrines and procedures of the EU law system of which they are part. Considering specifically the asymmetry of powers that may also be involved in the case of private regulation and enforcement, setting some general standards and conditions

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53 Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework (own-initiative opinion), INT/754 Self-regulation and co-regulation, 22 April 2015.
regarding the delegation of regulatory and enforcement powers to private actors should be considered.

6.4. From ‘Constitutional Neglect’ Towards a Holistic and Monitory Democracy Approach

Clearly, the challenge involved would be not to cast the future development and use of private regulation and enforcement in stone but to ensure a certain flexibility to it, while at the same time strengthening the constitutional core with a view to the proper protection of citizens. More particularly, what framing or design thereof would contribute to properly build citizens’ trust? We start from the premise here that a distinction needs to be made between what is necessary in the short term to face urgent threats involved in private regulation and enforcement and what is needed in the long term to create a constitutionally sound and sustainable system with a view to building citizens’ trust by securing effective protection of their interests. Any system to be designed should therefore leave room to deal with ad hoc challenges, but at the same time limit the risk of such challenges emerging. Focusing on the long-term approach, we make two key propositions based on the findings in this volume regarding the direction this approach would need to take in our view and which deserve further exploration in the future.

6.4.1. Holistic Approach

Our first proposition is that a more holistic approach towards private regulation and enforcement needs to be developed, which implies considering the ‘fit’ of this phenomenon from the perspective of the overall system of EU law, connecting and adjusting the different legal approaches to it with a view to enhancing this fit. This applies first of all to the substantive law framework, which has revealed not only incoherence within separate legal domains but also in between these domains. A more congruent approach should thus be developed, for which the contributions of Brouwer and Mulder give interesting clues. Brouwer has suggested that working towards a framework of assessment that recognises the equal ranking of the competing claims on free movement on the one hand, and private autonomy, fundamental rights and public interest protection on the other, would make free-movement law better equipped to function as a legitimate and effective control mechanism for private regulation. The holistic internal market test which he proposes aims at developing a framework of analysis for assessing the validity and force of the competing interests, balancing these against each other by considering the extent to which one interest is impeded for the benefit of another. It also entails a strong focus on proportionality with a view to structurally ensuring protection of the citizen’s fundamental rights and the private actor’s private autonomy as well as the effective functioning of free movement. On a more fundamental level, however,
Brouwer has also acknowledged that while the proposed approach may prove to be instrumental for a more inclusive assessment of private regulatory and enforcement conduct under free-movement law, such balancing is not a true panacea to the extent that the traditional public–private divide is changing. As the case study of Facebook’s advertisement policy revealed, especially in the digital environment, private powers increasingly become akin to public powers, even bearing political relevance. This being the case, the very roots of the public–private dichotomy in the substantive internal market law may be worth revisiting.

It can also be argued that a more holistic approach is needed between internal market law and competition law, given the restraint in the latter domain to protect public interests other than consumer welfare. The balancing exercise that competition law allows for is thus considerably more limited than in the area of internal market law and therewith also the scope that is allowed for private regulation and enforcement. Interestingly, Mulder proposes that more convergence in this regard could be realised if the CJEU would construct its reasoning more cohesively around a framework that considers both the input and output legitimacy of measures that restrict competition. He argues that:

This could be part of an overarching internal market test … The input legitimacy part would, based on the state action doctrine and the free movement model of justifications, consider the extent to which a public law framework sufficiently enables and embeds private actors to pursue objectives in the public interest. Concomitantly, it would be considered whether the private actors concerned pursue the objectives in a coherent and systematic fashion. As part of the output legitimacy test the CJEU could then consider whether the restrictions on competition are proportionate and necessary to achieve the objectives concerned. In doing so the CJEU would be able to normatively influence and contribute to experimentalist governance … and set the basic conditions for input and output legitimacy within new governance processes. Such an approach could potentially enable instead of hamper the introduction of innovative non-state structures of governance that are committed to standards of transparency, accountability and reasoned decision-making processes. On this basis EU competition law can serve both consumer and wider citizen interests by ensuring that sufficient accountability mechanisms are set up as part of self- and co-regulatory contexts.

In order to build sustainable consumer trust, beyond these substantive law issues a more holistic approach is also required from the perspective of ensuring actually effective judicial protection, monitoring and enforcement. This matters from the perspective of ensuring both the effectiveness and legitimacy of private regulation and enforcement. In this regard, we consider that there is in fact a need for the elaboration of a multidimensional or multilayered monitoring and enforcement system, which starts from private enforcement but is ‘topped up’ with compliance mechanisms and a – public – supervision authority in a hybrid regulatory system.

The establishment of compliance and supervision mechanisms is highly important, since reliance on private enforcement can bear some serious limitations and risks. First of all, while the public–private divide is fading in practice in certain areas, the formal public–private divide impacts heavily on the effective
protection of citizens’ rights because of the still rather obscure, limited and fragmented horizontal application of internal market law and fundamental rights law and because judicial review of – formally – private norms may be problematic in practice as can be seen in the area of technical standardisation analysed by Hiemstra and Senden. The issue of the horizontal effect of internal market law and human rights law thus also requires more fundamental reconsideration from this perspective. Emaus has noted that there are other important reasons why it is difficult to hold private actors to account, on the basis of private non-contractual liability law, for any wrongful regulatory action. Firstly, because there is no general legal basis for this in EU law and it is thus the national private laws that could and should be used to hold private actors accountable. Yet, secondly, most systems require that the unlawful act or negligent behaviour must have caused damage if compensation is to be made for the loss, which only upon a broad interpretation covers non-pecuniary loss that results from fundamental rights violations. Thirdly, fundamental rights enshrined in the EU Charter protect both interests of individuals and also public interests, but public interest litigation is not well integrated in all legal systems. A rights-holder is also not always directly affected by acts or omissions that constitute fundamental rights breaches. Fourthly, the citizen is not under a legal obligation to enforce his or her rights and is thus not a duty-bearer like the other actors. Furthermore, initiating legal proceedings has high thresholds for the rights-holder, even if by doing so he or she may not only serve his or her personal interest, but also, under certain circumstances, a general interest.

The contributions of Emaus and Klinger provide food for thought as to the desirability of developing a concept of EU responsibility for private regulation and enforcement. Emaus has referred in particular to the state responsibility doctrine developed by the European Court of Human Rights (ECtHR). The approach which the ECtHR has developed is that states cannot do away with their public responsibility to protect fundamental rights, by delegating or ‘outsourcing’ rule-making/enforcement tasks and powers to private actors. The ECtHR has developed this concept on the basis of the effects that the exercise of the delegated powers to private actors may have on fundamental rights and freedoms. In the ECtHR’s view, the exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility regardless of the form in which these powers are exercised, for instance by a body whose activities are regulated by private law. Convention rights have still to be secured in that case. Under EU law, such a doctrine of positive obligations or responsibility for infringements of fundamental rights by private actors has not (yet) been accepted as such, but it might be worthwhile exploring this option further. Interestingly, it may be observed that the delegation doctrine as developed by the CJEU, and as discussed in Klinger’s contribution, contains some elements of such an EU responsibility type of approach, since the CJEU identified clear limits to the delegation of discretionary powers to bodies outside the legal framework of the EU because of this upsetting of the balance of powers in between EU institutions. However, the
system of delegation of powers as enshrined in Articles 290–91 TFEU does not elaborate on this.

A more explicit recognition of such a concept or doctrine of state/EU responsibility by the CJEU, by the Treaty drafters, potentially within the context of Articles 290–91 TFEU, or by the European legislature would not only do justice to EU key principles such as of conferred powers and fundamental rights, but could also be a driver for the establishment of public monitoring, compliance, supervision and enforcement structures and mechanisms so as to ensure such responsibility is lived up to. In section 5 above such structures and mechanisms have already been seen to be essential to making private regulation effective and building citizens’ trust. Kingston has noted explicitly that:

Privatised environmental regulation has worked best when closely supervised by State authorities and when they have proven that they are ready to step in to regulate where privatization has failed. Further, encouragement of private enforcement is a striking feature of EU environmental policy at present, with the express aim of encouraging greater environmental democracy. However the jury remains out on the extent to which this will in fact result in improved environmental outcomes.

In a similar but more general vein, Scott has noted that: ‘The democratic challenge around private enforcement is arguably somewhat greater than for public enforcement since it frequently operates under a fiction of contractual choice and does not benefit from a publicly set public interest objective.’ In practice, however, there may be a lack of choice, where there are third-party effects and subjection to private regulation and contract theory thus does not provide an appropriate basis for the legitimisation of private regulatory and/or enforcement power. He thus holds that a fresh account, rooted in democratic practice, is required, to which we now turn.

6.4.2. Monitory Democracy Approach

As Scott argues, both the trend of increasing executive government, specifically agencies, and of private regulation, challenges the claims of representative democracy as a principal focal point of democratic governance, private regulation being far removed from electoral politics. While this could be seen as a weakening of democratic governance, his claim is that there is not only ‘an increasing recognition that, through establishing distinctive expertise and authority, independent regulators can be viewed as a mechanism of good governance, keeping government in check through scrutiny and action in respect of key aspects of social and economic decision-making,’ but also an ‘increasing recognition that representative models of democracy are far from perfect in their claims to legitimacy. In particular, the scale and complexity of modern primary and secondary legislation means that many legislative rules (often emanating from the EU legislative process) do not receive the scrutiny which is implied by the democratic model and, even where such scrutiny occurs, there may be insufficient expertise to understand well what is being legislated for.’ As such, he considers that the model of democratic legislation is also ‘significantly
diluted’, as legislators may even adopt both the definition of the problem and the legislative solution proposed by powerful interest groups, and democratic governance may actually become a vehicle for market and community actors to advance their interests or causes. Recognising these limits of democracy in public governance and that the state and the institutions of representative democratic governance are no longer the monolithic centre of legitimate authority and governance capacity enables us to identify other nodes of governance that can provide democratic legitimacy, supplementing traditional democratic institutions. As Scott puts it:

This decentring of governance power can contribute to an elaboration of post-representative democratic theory by suggesting that both public and private regulators contribute to the wide range of mechanisms which monitor and scrutinise government and also private regulatory power, within an emergent theory of monitory democracy.

Our second proposition then is to further develop this monitory democracy approach within the EU context of private regulation and enforcement. The model of monitory democracy provides us with a network or nodal view of regulatory governance in which regulatory power is decentred alongside public institutions, decentring then referring to the recognition of the range of other actors that is relevant to making, implementing, scrutinising and otherwise participating in regulatory policy. Monitory democracy tends to emphasise the scrutinising or monitoring role of private actors, including industry, NGOs, media and other civil society actors. But as Scott also notes: ‘[T]he recognition of the fragmentation of authority and power to act, whether as a performer originating activities, or as a scrutineer or regulator over the performance of others, raises important normative questions about sources of legitimacy for nodal power.’ Or: what claims to democracy can such ‘nodes’ actually make themselves?

Central to the idea here is that a demos can be created around a node when securing access and participation, putting into place processes and structures which draw in key stakeholders and their capacity and knowledge. The building up and assessment of democratic legitimacy claims will depend then on the nature of the access and participation rights provided for therein. Participation rights may vary between the more superficial (or thin) and the more stringent (thick) proceduralisation. As Scott states, ‘[t]o the extent the private rule makers claim, through their processes, a degree of democratization, they provide … a source of democratic alternatives to the solutions and processes of representative democracy’, key questions for the management of the legitimacy of these, public and private, plural nodes of governance being ‘how they engage with others, who

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57 ibid, 56–57, as referenced by Scott.
participates in their processes, how their norms are made and how transparent they are not only about what they do but also what their impact is. Beyond that, the democratic governance of norms can also be said to encompass ensuring compliance with rule of law and good governance principles and with them being congruent with policy objectives. The striving for legitimacy of private regulation is also driven by the need to maintain credibility in the marketplace, which is in itself characterised by a complex range of regulatory actors being present with both competing and hierarchical relationships.\textsuperscript{59}

While we have seen in this volume many examples of the progressive proceduralisation or constitutionalisation of private regulation across a wide variety of regimes in different policy areas, there is a growing awareness of the relevance of access to and participation in private regulatory and enforcement processes. However, it has also become clear that there is still much room for improvement in many regimes currently put in place in the EU context. Kingston, for instance, has observed explicitly that:

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In certain instances, such novel regulatory initiatives have been designed purely with a view to effectiveness and without regard to citizen trust and participation (for instance, market-based instruments such as the EU ETS). In other instances, private regulatory techniques have involved only certain market actors to the exclusion of private citizens (for instance, CSR and voluntary corporate agreements).

We support the suggestion made by Scott to expand the monitory democracy model

\begin{itemize}
  \item to see governance nodes in relationships of mutual interdependence, with the challenge being to develop processes which make them open to participation and engagement, not only in setting agendas and making rules, but also in monitoring and enforcement and reviewing and revising regulatory regimes.
\end{itemize}

This model also connects to a reflexive regulation approach, which in the words of Yeung ‘ascribe[s] a critical role to deliberative, participatory procedures as a means for securing regulatory objectives’.\textsuperscript{60} Such an approach would ideally encourage institutions and organisations to make their own problem assessments, but in deliberation with stakeholders so as to stimulate consensus, including on the ways and means of solving them best. This may encourage ‘ownership’ of both the problem and the solutions devised as well as mutual learning within and between organisations, and thus add to putting into place regulatory and enforcement regimes that live up to the goals set.

More concretely, combining the holistic approach described above with an expansion of the monitory democracy model, we suggest that, as a first step, the EU approach, as reflected in the interinstitutional agreement on better law-making,

\textsuperscript{59} J Black, ’Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 Regulation & Governance 137, as referenced by Scott.

is amended so as to adapt it more to the reality of current processes of – public and private – regulation and enforcement in the EU and to elucidate the EU legal and normative framework applying to it. The rule of law and good governance principles, as well as fundamental rights set out in the Treaty of Lisbon regarding the functioning of the EU institutions, should thus also have a bearing on the functioning of the bodies to which they outsource or delegate rule-making and/or enforcement tasks, in line with the recognition advocated above of an EU responsibility doctrine. The principles for better self- and co-regulation as developed by the Community of Practice on Self- and Co-regulation, and endorsed in the Commission’s Better Regulation Guidelines, could for instance be embedded in the Inter-Institutional Agreement. For a more ambitious, longer-term and future-proof perspective for building valuable citizens’ trust, consideration should be given as to how to enhance the protection of these principles at the Treaty level, especially in the EU institutions’ delegated and executive rule-making framework.