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Introduction: EU Private Regulation and Enforcement – Mapping its Contextual, Conceptual, Constitutional and Citizens’ Dimensions

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Regulations are indispensable for the proper functioning of economies and the society. They create the ‘rules of the game’ for citizens, business, governments and civil society. They underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services. The objective of regulatory policy is to ensure that regulations and regulatory frameworks work effectively in the public interest.¹

1. Introduction

In the early 1990s, Majone described the EU as a ‘regulatory state’, underscoring thereby the importance of law and regulation as the mechanisms for realising the EU’s policy objectives. As other forms of economic and social intervention, including macroeconomic, budgetary and redistribution mechanisms, were not available to the EU in its original form, the law, and regulation in a wider sense, could indeed develop as a prominent steering mechanism from the beginning of the European integration process.² The role of law and regulation gained a further impetus within the framework of the internal market programme and, later on, from the various Treaty amendments which brought more policy areas within the


sphere of influence of the EU. Regulation of markets, industries and services thus occurs in many EU policy domains as well as at multiple levels, these increasingly being not only of a public but also of a private nature. In the EU context, the regulatory potential of private actors increasingly emerges in areas such as product safety and sustainability, food hygiene, advertising, e-commerce, internet and media services, financial markets, social policy and environmental protection. These private regimes range from codes of conduct to voluntary commitments and also include industry and contractual agreements, framework agreements, autonomous agreements, standards, guidelines, guides, charters, good practices, etc.\(^3\) As such, private regulation and enforcement have become part and parcel of the EU’s instrumental toolbox and are part of this vision of the EU as a regulatory state.\(^4\) However we prefer to conceive of it as a ‘regulatory space’, as this better expresses the fact that regulatory – and also enforcement – authority is not confined to the state but is also diffused and shared between public and private actors.

This book focuses on the incremental relevance of private regulation and enforcement within this regulatory space, both within the general EU policy context as well as in specific EU policy areas, by putting the following question centre stage:

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

By taking this question as its lead, the book seeks to identify and exemplify the public–private dynamics that are at play in various EU policy contexts and the different constitutional challenges that private regulation and enforcement raise for citizens affected by such regimes. Mapping, scoping and addressing the challenges for citizens’ interests involved in private regulation is especially relevant in an era where EU citizens feel already less represented in EU democratic processes,\(^5\) let alone their potential disconnect to private regulation that only rarely involves (indirect) representation of their interests. In fact one could perceive Article 11(1) of the Treaty on European Union (TEU) to already reflect this insight: ‘The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.’ Finding where citizens’ trust and best interests are at stake in private

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\(^3\) cf the (non-exhaustive) database on co- and self-regulation that the European Economic and Social Committee (EESC) has put into place, containing about 130 such regulatory regimes in a variety of policy fields, available at: www.eesc.europa.eu/?i=portal.en.smo-database.


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regulation and exploring ways for their improvement could strongly contribute to a citizens’ reconnect to (at least) private regulation.

This is in the best interest of EU society as a whole, as well as its market(s). To that end, this volume combines both perspectives. It does so by taking a twofold – ie horizontal and sectoral – approach, presenting first of all a number of horizontal studies as to the general boundaries that ensue from EU law for the use of private regulation and enforcement, and, secondly, a number of vertical case studies focusing on specific EU policy domains or issues. Such boundaries relate to those principles determining the existence and exercise of EU powers, fundamental rights, internal market law, competition law rules and general requirements ensuing from the rule of law, in particular democratic legitimacy.

In this introductory chapter, we will explain the central research focus in more depth and lay the analytical foundations for the other contributions in this volume. We will first discuss the drivers behind and proclaimed benefits of the use of private regulation and enforcement as well as considering the risks involved that warrant attention from a citizen’s perspective (section 2). Then we will establish the conceptual frame by discussing the key notions of ‘private’, ‘regulation’ and ‘enforcement’ (section 3). Next, we zoom in on the specific EU context and how private regulation and enforcement fits in with the EU’s Better Regulation policy and why the EU context deserves particular, stand-alone attention (section 4). The section after that will then explain the citizen’s perspective of the research focus in more detail, elaborating on the importance and meaning of trust in and credibility of private regulatory and enforcement regimes in order to be successful and meet the citizen’s expectations and also on the principles that come into play to contribute to this. These constitute important benchmarks for the assessment and possibly better future framing of private regulatory and enforcement regimes in the EU (section 5). The chapter will close with a more detailed explanation of the approach of the case studies (section 6).

2. Proclaimed Benefits and Potential Risks

Private regulation has been recognised as a social fact, with the capacity to perform important social functions and to solve certain collective problems. It is often seen as a crucial element of regulatory reform and policy design programmes and better/smart regulation policies, advocated for instance by the OECD but also by

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the EU institutions, as we will see in section 4. This warrants a closer consideration of why this is the case and of what the actual justifications are for the use of private regulation and enforcement, as well as the proclaimed benefits of such use:

- private actors are considered as being well placed to provide fast and effective solutions to certain problems by bringing knowledge, expertise and information into the regulatory process;
- they allow not only for decision-making that is better fitted to practical realities, local circumstances and own business values and ethics, but also for a faster response and upgrading, especially in areas of high technological innovation;
- they are involved in the norm-setting process of the parties which are to apply the set rules and possibly also those for whom protection is devised, thus enhancing the level of responsiveness and potential to enhance compliance and therewith overall effectiveness;
- they can provide in a transnational context for a certain – higher – level of protection (such as consumer, health and safety, environmental, social and data protection), which traditional international and national public law arrangements appear incapable of providing;
- they can enhance consumer confidence and rights and improve the image of business;
- they bring resources to and impose costs of regulation on private actors/industry themselves and are thereby more cost-efficient for governments;
- they incentivise better and cheaper means to tackle the risks involved with these regulatory regimes.

Private actors can thus potentially make important contributions to the realisation of socioeconomic goals by engaging in private regulation and enforcement. Private regulatory and enforcement regimes, however, not only create challenges as to how to actually ensure their effectiveness but they also bear other important risks. Such risks arise in particular from the perspective of their (democratic)

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10 Cafaggi (n 6) 8.
13 ibid.
14 OECD (n 8, 1997) 38 and OECD (n 12) 6.
15 Chalmers (n 7).
17 McHarg (n 6).
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legitimacy and accountability because of the possibly binding effects which such regimes may have for third parties, the lack of an electoral mandate supporting such regimes and of self-interests that may prevail over public interests in their design.\textsuperscript{18} Factors inducing or contributing to the prevalence of self-interest and to the failure of private regimes have been recognised to be:

- the risk of regulatory capture by the regime members, especially in monopolistic markets where there is little regulatory competition;\textsuperscript{19}
- favouritism, an insufficient sense of responsibility and a lack of integrity on the part of the actors involved, which can fail to ensure the interests of those not represented in the norm-setting process;\textsuperscript{20}
- a lack of transparency and accessibility and information asymmetries between stakeholders;
- a lack of inclusiveness and of participation by relevant stakeholders;
- a lack of other mechanisms for ensuring checks and balances;
- a lack of effective monitoring and enforcement mechanisms so as to ensure compliance with the set rules,\textsuperscript{21} ineffectiveness in achieving compliance creates distrust, and a loss of public confidence in the self-regulatory entities and in self-regulation itself;\textsuperscript{22}
- the – lack of – strength of instruments and level of market coverage;\textsuperscript{23}
- the problem of free riders and of costs of the regime.\textsuperscript{24}

Practice shows how things may go wrong, the banking sector illustrating the negative consequences that private regulation can have when public interests are not sufficiently taken into account. The lack of integrity, accountability, and checks and balances regarding private regulatory and enforcement regimes concerning financial reporting obligations and derivatives rules for banks, both at the global and European level, have all contributed to opaque, fragmented markets and market failure.\textsuperscript{25} This has contributed to severe financial crises, affecting the trust of stakeholders and citizens in the economic system as well as in the integrity of banks, financial institutions, governments and the EU. There are, however, other examples of specific private regulatory regimes that have shown themselves to be deficient, such as the Guidelines for Good Practice of Transmission System

\textsuperscript{18} Cafaggi (n 6).
\textsuperscript{19} cf Ogus (n 16) for a discussion of such and other criticism on the use of self-regulation.
\textsuperscript{20} OECD (n 12).
\textsuperscript{21} OECD (n 8, 1997).
\textsuperscript{23} OECD (n 12) 5–6.
\textsuperscript{24} Ibid.
Operators, defining minimum requirements for third-party access to the gas transmission networks in the EU. To compensate for non-compliance with these voluntary Guidelines, the Commission proposed to turn them into legislation.\textsuperscript{26}

However, the solution to such problems is not simply the replacement of private regimes by public ones. As will be seen in various contributions in this volume, public regulation and/or enforcement may not even be a viable option in many cases. The fundamental challenge is thus how, within this 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 citizen’s perspective, because only then will they be capable of building the credibility and trust of and acceptance by those affected by them. Before looking closer into the specific EU context and the citizen’s perspective, it is essential to first elucidate the key notions of this research.

3. The Conceptual Frame

3.1. Defining ‘Regulation’ and ‘Enforcement’

Only a few decades ago Selznick’s seminal definition of regulation still emphasised merely the state’s role in regulation, by considering that it concerned ‘the sustained and focused control exercised by a public authority over activities valued by the community’.\textsuperscript{27} Black’s definition does not refer to a specific source of authority, holding that regulation concerns ‘the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification’.\textsuperscript{28} This definition can thus be said to encompass both public and private sources of authority. A more recent definition presented by Lodge and Wegrich makes this yet more explicit and can therefore be taken as a lead for the purposes of this volume, as it states that regulation concerns ‘the intentional use of authority by state and non-state actors to affect a third party’.\textsuperscript{29} This also reflects the evolution of the concept in a relatively


\textsuperscript{28} J Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 Current Legal Problems 103–47, as referenced in Baldwin, Cave and Lodge (n 27) 12.

\textsuperscript{29} M Lodge and K Wegrich, Managing Regulation: Regulatory Analysis, Politics and Policy (London, Palgrave Macmillan 2012), 16.
short period of time, it no longer being limited to ‘dedicated “command” regimes that are designed to offer continuing and direct control over an area of economic life’.[30] Yet, the forms in which such use or exercise of authority come differ considerably. Public and private regulation thus distinguish themselves in terms of modes of governance and of how they impact on property rights and responses to externalities.[31] However, within private regulation such modes also vary and range from command and control, to market-based and responsive regulation,[32] as the contributions in this book will reveal.

While ‘enforcement’ is often considered to be implied in or captured by the notion of regulation, we deem it to be important to distinguish the two concepts, with a view as well to the public–private regulatory and enforcement continuum that we will present in the next subsection. Following the definition of the OECD, ‘enforcement’ can be understood as ‘all activities of state structures [or structures delegated by the state] aimed at promoting compliance and reaching regulations’ outcomes … These activities may include: information, guidance and prevention; data collection and analysis; inspections; enforcement actions in the narrower sense, ie warnings, improvement notices, fines, prosecutions, etc.[33] While this definition is useful, it also emphasises the role of the state in enforcement and does not seem to acknowledge the potential role of private actors in this regard. Scholarly definitions have left this more open, for example the one presented by Scholten that we adhere to here, who describes enforcement as ‘efforts including monitoring compliance, investigating an alleged violation and the sanctioning of a violation’ with a key goal being to ‘rectify non-compliance and promote the attainment of policy goals’.[34] It will be considered in this volume to what extent private actors in the EU context may be involved on this enforcement side as well. However, this induces a further preliminary conceptualisation of the ‘private’.

3.2. Defining the ‘Private’

Who or what, then, are these ‘private’ or ‘non-state’ actors, as referred to by Lodge and Wegrich? These have many faces and may range from industry, firms, economic operators more generally and civil society organisations to social partners, professional associations, standardisation bodies, NGOs and more.

[30] Baldwin, Cave and Lodge (n 27) 5.
What, then, may ‘the intentional use of authority’ by such private actors consist of and what interaction may this imply with state actors? We have deliberately put the notion of ‘private’ centre stage in this volume, so as to underscore that our main focus is on the role of private actors in regulation and enforcement processes and that we start our analysis from their position. Yet, it must be noted that in many cases their exercise of regulatory and/or enforcement authority occurs in interaction with state bodies and some hybrid form of public–private regulation and enforcement emerging from this. Concepts that are commonly used in this context are self-regulation and co-regulation, public involvement being the distinctive criterion between them. Empirical and theoretical findings allow for the establishment of a broad spectrum of manifestations of ‘the private’ in regulation and enforcement regimes, revealing different relationships with ‘the public’ that can be placed on a regulatory and enforcement continuum. As this continuum is helpful for better understanding the nature and intensity of the regulatory and enforcement dynamics between private actors and public bodies analysed in the various case studies in this volume, we will discuss and visualise this continuum here below in more detail.  

Figure 1  The regulatory continuum between the fully private and the fully public

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The continuum shown in Figure 1 provides a scale, based on the level of voluntariness or autonomy for market players versus the level of public interference: starting with a high level of discretion for market players on the far left, this decreases to the right, with full public regulation and enforcement shown on the far right. There may be almost full discretion for market players in the situation of ‘no regulation’ or where initiatives are taken by firms themselves in their own self-interest (I). Initiatives at the firm level only, such as corporate social responsibility (CSR) programmes, also fall into this category. In this volume, the focus will be on initiatives undertaken under the guise of self-regulation or private regulation and enforcement (II) and co- or private–public regulation and enforcement (III). These put particular emphasis on the role of private actors in regulation and enforcement matters. A literature review reveals a multitude of labels being put on the many different manifestations of public–private interaction.

Starting with category II, the concept of ‘self- or purely private regulation and enforcement’ encompasses all regimes by which individual organisations or groups of them regulate their own conduct. Rules are self-specified, self-monitored and self-enforced. Unlike regulation at the firm level, the development of such purely private regulation implies some form of collaboration between industry partners at various (sectoral, national, regional) levels and with various stakeholders (eg NGOs). So, their application also extends beyond the individual firm level. Three broad forms of private regulation can be distinguished, the first one being pure self-regulation in which the initiative to regulate rests with a group of stakeholders; this is also referred to as ‘free self-regulation’.36 Government treats the outcome neutrally, as long as it does not conflict with binding legislation.37 Cunningham and Rees’s ‘voluntary self-regulation’ also fits this type, as they note that rule-making and enforcement are both carried out privately by the firm or industry itself, independent of direct government involvement.38 The second form concerns civil regulation by NGOs or other actors: civil society actors actively participate in creating, monitoring and enforcing the rules. This form is often more politicised than pure self-regulation, as it usually emerges in response to social and environmental impacts of global firms and markets, especially in developing countries. NGOs tend to support civil regulations. This reflects a change in their strategies for interacting with businesses.39 The Forest Stewardship Council (FSC) certification standards, for example, emerged directly from

37 P Eijlander and W Voermans, Wetgevingsector (Deventer, Schoordijk Instituut – Centrum voor wetgevingsvraagstukken, 1999) 71.
the inability of NGOs to persuade governments to enact an effective international forestry treaty.\footnote{ibid, 267.} A ‘residual’ category of other forms of multistakeholder regulation involves a variety of stakeholders, including non-profit groups and industry, which negotiate and develop standards and decision-making frameworks as well as processes for implementing these standards and/or frameworks, e.g. corporate codes developed by NGOs and presented to companies for adoption.\footnote{V Hauffler, ‘New Forms of Governance: Certification Regimes as Social Regulations of the Global Market’ in E Meidinger, Ch Elliott and G Oesten (eds), Social and Political Dimensions of Forest Certification (Remagen-Oberwinter, Forstbuch, 2003) 238.}

In practice, however, purely private forms of regulation and enforcement are rarely found.\footnote{I Bartle and P Vass, Self-Regulation and the Regulatory State – A Survey of Policy and Practice (Bath, Centre for the Study of Regulated Industries, 2005).} One is more likely to come across various hybrid forms of private–public regulation or co-regulation, this being defined as a ‘whole spectrum of regulatory set-ups between the two extremes of pure self-regulation and pure state regulation’.\footnote{T Heremans, Professional Services in the EU Internal Market – Quality Regulation and Self-Regulation, (Oxford, Hart Publishing, 2012) 81–82. See also WJ Maxwell, ‘Global Privacy Governance: A Comparison of Regulatory Models in the US and Europe, and the Emergence of Accountability as a Global Norm’ in C Dartiguepeyrou (ed), Cahier de prospective: The Futures of Privacy (Paris, Fondation Télécom, Institut Mines-Télécom, 2014) 63.} On the basis of a broad literature review, it has been found that within category III types of private–public regulation or co-regulation there is a huge variety in regimes, which can be traced back to three variables, as also envisaged in Figure 2:\footnote{For more detail, see Senden et al (n 35).}

1. stages within the policy cycle (the horizontal axis), which refers to the respective stage within which public involvement can be located, namely rule-making, implementation, monitoring and enforcement;
2. the nature of the public involvement (the vertical axis), which may range from explicit delegation of authority by official authorities – mandated self-regulation – to non-mandated self-regulation that may be confirmed or approved by public authorities in a formal (by statutory backing) or informal way (by explicit or tacit expressions of political approval, support or oversight);\footnote{I Bartle and P Vass, ‘Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?’ (2007) 85(4) Public Administration 885–905.}
3. the intensity of the public involvement (reflected in the dots): the scope of public involvement may vary from strong (e.g. the legislator setting out a detailed legal framework and conditions for the delegated rule-making or the public sanctioning of non-compliance) to only light involvement (e.g. fairly unconditional delegation or mandate, tacit support for industry-created standards).
The black labels (market and state) in the bottom left and top right corners show that regulatory regimes can be further arranged according to the key interests involved in the establishment of the respective regimes. While market interests – and to some extent also consumer preferences or social pressure – are likely to serve as the key driving force for the establishment of non-mandated forms of self-regulation, safeguarding public interests by an explicitly attributed role of the state remains a constitutive element for mandated self-regulatory regimes.

On the basis of these variables, one can distinguish first of all non-mandated self-regulation, with public involvement at the early stage of rule-making. The role left for the state is implicit, yet may be influential such as offering political support.\(^{47}\) There may also be state involvement through informal discussions and negotiations with private actors, by recognising and approving the self-regulatory process or by recognition of the self-regulatory body. Terms used in the literature to describe such forms include tacitly supported, acknowledged, discussed, approved and recognised self-regulation.\(^{48}\) While labelled 'self-regulation', they clearly carry a certain public–private hybridity and entrustment of the attainment of public

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\(^{46}\) Senden et al (n 35).

\(^{47}\) Bartle and Vass (n 45) 895.

interest objectives to private actors. Non-mandated forms of self-regulation with public involvement at the subsequent stages of implementation, monitoring and/or enforcement have been referred to as substitute self-regulation. This leaves the initiative on the side of the private actors, but government watches the process in order to safeguard the public interests that may be at stake.⁴⁹

Then there is mandated self-regulation with public involvement at the rule-making stage, the state encouraging private parties to create their own norms by setting out conditions under which this process is to take place. Within such conditioned self-regulation, however, the level of public influence can vary. The state can limit itself to setting general goals and leave the establishment of substantive standards or norms to be done at the 'shop-floor level',⁵⁰ but it may also set out the organisational and procedural conditions for rule-making.⁵¹ The legislator may even establish the framework criteria under which the private rule-making process may take place, for example by appointing the institutions to be used and/or by issuing guidelines for the content of the norms.⁵² Governments may also hold a residual yet prominent role in controlling the end result of conditioned self-regulation,⁵³ either by ensuring that public authorities keep a close eye on the process, or by leaving the monitoring and enforcement role to a public agency,⁵⁴ or, in certain cases, incorporating the end result of private rule-making into binding laws.⁵⁵ Besides being labelled as conditioned self-regulation,⁵⁶ these forms are also being referred to as sponsored,⁵⁷ consensual⁵⁸ and regulated self-regulation.⁵⁹ Mandated self-regulation with public involvement at the later stages of implementation, monitoring and enforcement, called ‘enforced self-regulation’ by Ayres and Braithwaite,⁶⁰ refers to a form of subcontracting of regulatory functions (legislative, executive or judicial) to private actors. Retaining public enforcement (detection and punishment) of private standards is also likely to be an important element in private self-enforcement.⁶¹

⁴⁹ Eijlander (n 36).
⁵⁰ Ogus (n 16).
⁵² Ibid.
⁵⁴ Ogus (n 16).
⁵⁵ Huyse and Parmentier (n 51) 258–60.
⁵⁶ Geelhoed (n 53) 49.
⁵⁷ Huyse and Parmentier (n 51) 258–60.
⁵⁸ Ogus (n 16).
⁵⁹ The term ‘regulated self-regulation’ (regulierte Selbstregulierung) was introduced into the German scientific debate by Wolfgang Hoffmann-Riem, ‘Multimedia-Politik vor neuen Herausforderungen’ (1995) Rundfunk und Fernsehen 125–38.
⁶¹ Bartle and Vass (n 45).
This brief survey reveals first of all that private regulation in the sense of co-regulation is a very heterogeneous phenomenon with many different manifestations and a multitude of denominations. Secondly, this means that context matters significantly for the assessment of a private regulatory and enforcement regime: the nature and intensity of public involvement in such a regime at various stage(s) of the policy cycle will thus also have a bearing on the level of trust and credibility generated with citizens (see further on this in section 5). Before zooming in on this perspective, we will first address the specific context of the EU within which the use of private regulation and enforcement is developed.

4. The Specific EU Context

The first part of the central question of this volume – what role do private actors play in the regulation and enforcement of EU-wide problems? – also requires a further explanation of why the EU context requires a stand-alone analysis and assessment and what can be considered to be the added value of this volume from an academic viewpoint. This requires first of all a closer look at how the use of private regulation and enforcement is approached from a policy perspective and how it is conceptualised in this particular context.

4.1. The EU’s Policy Preference for Private Regulation and Enforcement

Private regulation – usually under the designations of self- and co-regulation – has been and still is propagated very much as part of the EU’s Better Regulation policy and has been recognised as playing a potentially important role in the development and realisation of the objectives of the EU and in improving EU legislation. The White Paper on European Governance set the tone for this in 2001, stipulating that the Community Method should be revitalised by ‘following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments’. The Commission submitted that promoting a greater use of policy tools, including co-regulatory mechanisms, could lead to improvements in the quality of legislation, speed of the legislative progress and the level of flexibility in the way the rules are implemented on the ground. According to the Commission, effective decision-making involved ‘combining policy instruments for better results’, which depends on seven factors, two of which relate directly to self- and co-regulation. Firstly, legislation is part of a broader solution that combines formal rules with other non-binding tools, such as recommendations, guidelines, or even

self-regulation within a commonly agreed framework. Secondly, ‘under certain conditions, implementing measures may be prepared within the framework of co-regulation’. The combination of legislative and non-binding solutions, including self- and co-regulation, was thus explicitly considered as a way to improve European regulation and to remove unnecessary bureaucracy at EU level.

Subsequently, in 2003, the Commission, Council and European Parliament adopted the Interinstitutional Agreement on Better Law-Making (IIA), underscoring that, because of the principles of subsidiarity and proportionality, the EU is under an obligation to legislate only where necessary and that the institutions should recognise the need to use, ‘in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulatory mechanisms’. These alternative mechanisms include self-regulation and co-regulation, which are explicitly defined in the IIA, where the conditions attaching to these alternative mechanisms are also fully set out.65 Ever since then, self- and co-regulation have been often referred to and their use advocated in other key Commission documents related to Better Regulation (BR),66 and later Smart Regulation, the Regulatory Fitness and Performance Programme (REFIT) and its Impact Assessment (IA) guidelines. It was also recommended that a database on self- and co-regulatory initiatives should be set up, which would ‘increase awareness and contribute to a more favourable environment for the use of alternative regulatory instruments’.67 This database was set up under the auspices of the European Economic and Social Committee.68 The 2009 IA guidelines specified that policy options must be ranked in a transparent and understandable manner in order to enable political decision-makers to make a balanced appraisal so as to maximise opportunities for a ‘win–win’ outcome.69 Self-regulation was also to be preferred over legislative proposals ‘where voluntary agreements already exist and are sufficient to achieve the objectives set out in the Treaty and do not create competition problems’.70 The guidelines also emphasised that the Commission can suggest, by way of a recommendation, that voluntary agreements can be ‘concluded by the parties concerned to avoid having to use legislation, without ruling out

63 Interinstitutional Agreement on better law-making [2003] OJ C321/1, point 16.
64 To be further explained in the next subsection.
65 In its points 17–23. See further section 5 below.
70 ibid, 24.
the possibility of legislating if the agreement[s] prove insufficient or inefficient.\textsuperscript{71} Legislation thus seemed to be considered as a ‘safety net’ for when self-regulation fails. Co-regulation is regarded to be a ‘best of both worlds’ mechanism, which combines the advantages of binding legislation with a flexible, self-regulatory approach. However, the annexes to the guidelines also mentioned the drawback of co-regulation, namely the need to set up monitoring arrangements.\textsuperscript{72}

This policy commitment to the use of private regulation was confirmed with the instalment of the new Commission in 2014, which even appointed a specific EU Commissioner for Better Regulation who presented a new BR Strategy on 19 May 2015. This strategy comprised five key documents: the Communication ‘Better Regulation for Better Results – An EU Agenda’; the Better Regulation Guidelines; the Better Regulation Toolbox; the state of play and outlook REFIT; and a new IIA. The Communication presents the general starting point that: ‘When considering policy solutions, we will consider both regulatory and well-designed non-regulatory means as well as improvements in the implementation and enforcement of existing legislation.’\textsuperscript{73} The Guidelines put repeated emphasis on the need to consider alternative policy options, both in terms of contents and instruments, including, for example, ‘non-regulatory alternatives; self- or co-regulation; market-based solutions, regulatory alternatives; international standards, and their mix.’\textsuperscript{74} However, an important change is to be noted in the EU’s approach to the extent that there is no longer any explicit interinstitutional commitment made by the three legislative institutions in the revised Inter-Institutional Agreement on Better Law-Making adopted in 2016, as it no longer makes any reference to the use of self- and co-regulation, but only to the ‘need to consider alternative solutions within the framework of impact assessments’ and to ‘harmonisation and mutual recognition’ as a means to reduce legislative pressure.\textsuperscript{75} At the same time, however, the Commission’s commitment seems to have been further strengthened, as the Toolbox contains a rather elaborate section on the conditioned use of co- and self-regulation (see further on this, sections 4.2 and 5.4).

As a result, the EU’s policy approach as it currently stands is rather ambiguous, at least when it comes to the position of the Council and European Parliament as the main decision-making bodies in the legislative process. It is unclear why the provisions on self- and co-regulation were removed from the IIA and what the commitment of these institutions to their use actually is now.

\textsuperscript{71}ibid, 24.
\textsuperscript{72}ibid, 27.
\textsuperscript{73}COM(2015) 215 final, 6.
\textsuperscript{74}SWD(2017) 350, 22.
4.2. The EU Conceptualisation of Self- and Co-regulation

Importantly, the old IIA set out a definition as well as the procedures for the notification and conditions for the use of self- and co-regulation. It defined self-regulation ‘as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)’ (point 22). The IIA further indicated that voluntary initiatives under self-regulation do not imply that the institutions adopt any particular stance, including the initiatives undertaken in areas not covered by the Treaties or in areas in which the EU had not hitherto legislated. However, it did state that the Commission will scrutinise self-regulation practices to verify that they comply with provisions of the EC Treaty. It emphasised that the Commission must notify the European Parliament and the Council of self-regulatory practices which it regarded to be either contributing to the attainment of the EC Treaty objectives and as being compatible with its provisions and/or as being satisfactory in terms of the representativeness of the parties concerned, sectoral and geographical cover and the added value of the commitments given. Furthermore, the IIA stated that the Commission must consider the possibility of putting forward a proposal for a legislative act, in particular at the request of the competent legislative authority or in the event of a failure to observe the above practices. The EU definition of self-regulation thus fits, to a certain extent, the label of ‘substitute self-regulation’, as the initiative seems to be left to private actors while the Commission keeps a close watch on whether the self-regulatory practices comply with the EU Treaties.

Co-regulation was defined as ‘the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).’ Tool #18 of the Commission’s BR Toolbox of 2015 reaffirmed this definition. The IIA required co-regulation to be used on the basis of five criteria defined in the legislative act,
so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and drawing on the experience of the parties concerned. The basic legislative act must set out the framework under which the parties affected by that act may conclude voluntary agreements for the purpose of determining practical arrangements. The Commission was to take on an important role in the process of co-regulation: it had to explain its reasons for proposing the use of co-regulation and verify whether draft voluntary agreements by parties complied with EU law. In certain cases, at the request of the Parliament and the Council, the legislative act may contain a two-month period to allow the institutions to suggest amendments to the draft agreement if that agreement does not meet the objective set out by the legislative authority, or to object to the entry into force of that agreement and, possibly, to ask the Commission to submit a proposal for a legislative act. These criteria indicate that the EU approach conceived of co-regulation as requiring strong legislative involvement in setting out the criteria under which co-regulatory agreements may actually be formed, with a prominent EU influence on the end result.

Given the Commission’s confirmation of the IIA definition, this formal EU policy approach towards co-regulation can still be considered to be a very top-down approach and, in light of the regulatory and enforcement continuum outlined in section 2.2, can be seen as a form of mandated self-regulation, with conditions, in the rule-making stage. Importantly, however, this principled ‘better regulation’ approach needs to be contrasted with the actual manifestations of private regulation and enforcement and their particular features in daily practice: what are the specific drivers for private regulation and/or enforcement in specific policy areas; what form do they take; what is the nature of the public–private interaction; and what conditions and safeguards have been put into place? Most interestingly, as the contributions in this volume show, one can identify ‘institutionalised’, ‘semi-institutionalised’ and ‘non-institutionalised’ forms of private regulation and enforcement in the EU across different policy fields, demonstrating different linkages with the EU public law framework. Therefore, EU policy practice demonstrates many other manifestations of public–private regulatory and enforcement regimes that do not fit in with the principled approach. The fact that the current formal policy framework does not reiterate the strict procedural conditions as outlined above, neither in the IIA nor in any of the other BR documents, might be seen as being more in line with this more diversified use of private regulation in practice and to leave more room for private actors to undertake the actual framing of the private regulation.

82 Interinstitutional agreement on better law-making (n 63) point 18.
83 Ibid, point 20.
85 See section 6 for a more detailed explanation of the policy/case study approach.
4.3. Academic Relevance and Added Value of the EU Focus

The EU principled approach to private regulation and enforcement as outlined above, as opposed to the diverse reality of private regulation and enforcement in practice, thus constitutes in itself more than enough reason for an analysis of particular cases in different EU policy domains. However, there are other pressing reasons for concentrating on the specific EU context and for doing so at this moment in time. This is so first and foremost because the EU is typified by its own unique legal system, encompassing rules, principles, rights and procedures which all need to be taken into account in the development, use and assessment of private regulation and enforcement regimes. This implies that both the principled policy approach and the different specific private regulatory and enforcement regimes must be evaluated and assessed in the light of other principled aspects of EU law that may imply conditions and set limits for the use of such regimes and impact on their institutional and legal design. In essence, this use and development needs to comply with the EU’s constitutional, internal market and competition law foundations. The fact that both the Treaty of Lisbon and the EU Charter of Fundamental Rights have reinforced the call for and protection of EU core values and fundamental rights, as well as putting emphasis on the relevance of good governance and of the protection of a wide variety of public interests in all the policy domains they cover, adds to the urgency of such an assessment. In this volume, we take principally a legal, regulatory and governance approach to the analysis of private regulation and enforcement within the particular EU context. This approach exemplifies how, within this particular legal framework, private regulation and enforcement gets and preferably should get shaped, while also taking into account its dynamics in relation to the national and international levels of regulation and enforcement.

As such, this volume connects to the main strands in the literature and seeks to add to the state of the art thereof. First of all, this concerns the better regulation and new governance field of study as this emerged in EU studies at the beginning of the twenty-first century. In legal and political science doctrine, the policy approach and preference as outlined above has thus been captured mostly under the headings of European governance, informal governance, new governance, decentred or decentring governance, modern governance, multilevel governance and combinations thereof. In such governance approaches, the central
idea is that traditional ‘command-and-control’, ‘top-down’ regulation has been replaced by or integrated with, to varying degrees, new forms of collaborative governance between public and private actors\(^91\) and characterised by a ‘process of mutual problem-solving among stakeholders from government and the private sector’.\(^92\) These theories can be seen as both descriptive and prescriptive, not only explaining the interaction between different levels of governance but generally also emphasising that such multilevel and collaborative interaction is a preferable mode of governance. However, new governance-related studies in the EU domain have been focusing mostly on the public dimension thereof\(^93\) rather than on fleshing out its private regulatory and enforcement features, which have only more recently begun to attract more attention.\(^94\) More generally, the focus in European and multilevel governance scholarship has remained predominantly on the role of private actors in EU policy areas that are given shape primarily by the Commission and EU agencies and the networks of actors resulting from this.\(^95\) As such, a more comprehensive focus on the role of private actors in the European context and on European private regulation and enforcement as a self-standing tool has so far remained marginal, and has generally been addressed more from a private law than a public law perspective.\(^96\)

Secondly, this volume connects to the fields of legislative and regulatory studies and, more recently, of transnational private regulation,\(^97\) which have so far

\(^{91}\) As underscored in the contribution of Minto in this volume.

\(^{92}\) Scott and Trubek (n 90).


\(^{96}\) Cafaggi (n 6).

developed more in the context of state regulation and in the global domain.\textsuperscript{98} With some noteworthy exceptions,\textsuperscript{99} most accounts of public–private regulation and enforcement thus concentrate on national or transnational, global domains,\textsuperscript{100} not on the particular ‘regional’ context of the EU. Self-regulation and co-regulation have been more extensively studied in regulatory governance and economic theory from the perspective of responsive regulation and in relation to how their use fits in most optimally with other steering instruments, and how a smart or optimal mix can be achieved.\textsuperscript{101} Such smart and optimal mix approaches focus very much on the effectiveness/efficiency dimension,\textsuperscript{102} the legitimacy/constitutional/legal dimension having received only scant attention within this framework.\textsuperscript{103} Furthermore, when explored in governance and legal theory, this has been done mostly from a general, not a system-specific or country-specific viewpoint.\textsuperscript{104}

The research on the public law and constitutional dimension of private regulation in the specific context of the EU has thus remained rather underdeveloped. The few studies touching upon this show a rather fragmented, sector-specific\textsuperscript{105}...
and also outdated picture, since they mostly date from before the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights.\textsuperscript{106} With the increased emphasis on fundamental rights within the EU context, there is also another ‘classic’ debate in EU law that is put higher up the agenda, namely the debate on the horizontal effect of the Treaty freedoms and of fundamental rights: to what extent can these also be considered to impose obligations of securing compliance with them for private actors? It is not only the increasing reliance on private regulation and enforcement in the current era of globalisation and digitalisation which introduces a new sense of urgency to this question for EU law scholars, but also the fact that, within the specific context of the EU, the principle of EU citizenship has evolved over time into a self-standing status of those who hold EU nationality. This has reinforced their position as the bearers of economic, social and political rights in connection with the Charter of Fundamental Rights as an increasingly important source for such rights, and also vis-à-vis private actors.\textsuperscript{107} The contributions of Emaus on fundamental rights and of Brouwer on the internal market clearly underscore the topicality and importance of this issue.

5. The Citizen’s Perspective

We now turn to the second aspect of the overarching research question, which concerns \textit{how, from a citizen’s perspective, can the protection of public interests and core values be best ensured in European private regulation and enforcement?} In brief, the question that has driven the research in this regard is how can European private regulation and enforcement be given shape in such a way that it enhances the trust in it and acceptance of it by citizens, so that it can actually live up to its expectations and provide for the proclaimed benefits as identified in section 2? What are the threats involved in the reliance on and use of private regimes from this perspective and what are the relevant principles and parameters for dealing with them? This first requires further explanation of who we understand by ‘the citizen’ and then of what ‘trust’ can be taken to imply.

5.1. The Different Capacities of ‘the Citizen’

The citizen’s perspective thus implies that, in the assessment, the potential benefits and drawbacks specifically for citizens that derive from private regulation


\textsuperscript{107} Cf most recently, Case C-569/16 Bauer, Judgment of the Court (Grand Chamber) of 6 November 2018, ECLI:EU:C:2018:871.
and enforcement in different policy areas are considered, as is also the extent to which the current EU legal framework provides safeguards and protection. For the purposes of this volume, we take ‘citizens’ to encompass stakeholders that are in one way or another affected by the ‘intentional use of regulatory and/or enforcement authority’ exercised by private actors; in other words, those that are actually the ‘recipients’ of the outcomes of private norms and/or enforcement regimes which are established. These may include consumers, employees and self-employed persons, but also ‘regular’ citizens with societal concerns, such as the environment, public safety, privacy protection, protection of minors and the like. Furthermore, we also understand companies to fall within this citizen’s perspective, especially small businesses, since they are also often at the receiving end and under an obligation to implement, apply or comply with private rules, without as such being part of the private rule-making and/or enforcement body. Hence, this concerns mostly the socioeconomic dimension of citizens.

Given the EU’s and Member States’ long-time and pressing concern with securing the democratic legitimacy of the EU’s decision-making and integration process and the ongoing contestation concerning it, the EU’s propagation of the use of private regulation and enforcement can be said to potentially also affect the political capacity of citizens, as European private regulation and enforcement regimes are often alleged to entail legitimacy concerns. This is because such regimes take regulation and enforcement out of the public realm and do not rely on an electoral democratic foundation, thereby putting emphasis on the citizen’s political capacity and involvement in rule-making. This imposes the important question as to what extent this really involves a – further – threat to democratic legitimacy and can be seen to affect political citizenship and how this may possibly be addressed. Scott’s contribution in this volume elaborates this issue in more detail. Within the particular EU context, however, the – supposed – threat to democratic legitimacy can also be seen as just one side of the coin, the other side being that the enhanced use of European private regulation and enforcement can actually be seen to better respect the national sovereignty of Member States. It is their desire that the EU, in the exercise of its powers, shows more respect for national identity and the principles of subsidiarity and proportionality, meaning that the EU does not legislate and interfere in domestic affairs more than is really necessary. As Klinger’s chapter in this volume demonstrates in more detail, leaving potentially more to be done and achieved by market actors themselves fits in very well with these principles. As such, private regulation and enforcement can thus also be seen as a potential contribution to the legitimacy of EU action, by inducing a more restrained use of EU legislation and by leaving Member States more room for tailoring regulation to the needs and peculiarities of their own markets, socioeconomic and legal systems and the actors involved. This also fits in with the desire to move from a rules-based legislative approach, which sets out detailed rules which firms and other stakeholders need to comply with, to a principles-based approach which is more concerned with setting out general objectives.
5.2. The Meaning of and Need for a Citizen’s Trust

A second issue that needs explanation here is what ‘trust’ implies in this context and what factors can be said to impact on the level of trust in private regulatory and enforcement regimes. On the basis of a wide and recent literature review covering different disciplines and empirical studies, Six and Verhoest have identified a number of key elements to the concept of trust that we have also taken as our starting point here. First of all, a distinction can be made between its understanding as an attitude or belief or as an action. A widely accepted definition considers trust to be ‘a psychological state comprising the intention to accept vulnerability based upon the positive expectations of the intentions or behavior of another’. This hints at two other important aspects of the notion of trust: first that it concerns a relational concept, namely between an actor trusting another actor with regard to its future behaviour; and, second, that there is uncertainty at the same time about what the future behaviour of the trustee will actually be. The key question thus to be considered is: ‘how well do I know the other so that I can trust the other to do what I need her to do?’ This implies a certain selectivity and determination of a tipping point between what can be considered to be trustworthy and not trustworthy and between what errors of judgement are acceptable and which are not. Trust can occur at the interpersonal level as well as at the organisational or system level, independently of specific individuals. ‘Trust in systems has been considered to be ‘not much more than an assumption that a system is functioning, and a willingness to place trust in that system without placing trust in people’. Yet, experts are considered to play quite an important role in this regard, either as controllers of the system to ensure its proper functioning, or as being considered to be ‘the representatives of the system at the “access points” where the trustor experiences the system’. Elements that are considered key in trustworthiness judgements concern first of all competence, which relates to the expectations which people hold regarding the abilities of organisations, and, secondly, goodwill, which concerns expectations as to integrity and the non-harmful behaviour of
the trustee. Organisational trust has also been defined as ‘an individual’s expectation that some organized system will act with predictability and goodwill;’ so that people may rely on an institutional source for their assessment as to whether a certain organisation is trustworthy. However, such a source may also be of an interactional nature in the case of interpersonal trust relations.

It is also important for the purposes of this volume that recent research has confirmed that trust and control are not necessarily substitutes for one another, the position from which Ayres and Braithwaite’s theory of responsive regulation can be said to start; control is connected to distrust, the understanding being that when you control, you do not trust. Yet, Six has posited that trust and control may actually also strengthen each other in regulatory relationships. This has been found to be the case, inter alia, when standards are set in dialogue between the regulator and the regulatee; when regulatees experience procedural and restorative justice; and when there is competence on the part of the regulatee to understand and comply with set regulations. At the same time, it has also been found that ‘compliance with rules is strongly socially constructed’ and that, to achieve this, individuals should be empowered and accountable and information should be shared and transparent. Emphasis has also been put in the literature on the fact that the decision of whether or not someone deserves to be trusted will generally depend on whether that person’s or organisation’s behaviour was ethical or not.

Elements to look for in the assessment of the trustworthiness of a regulatory and enforcement regime would thus very much relate to different features of its source, including: a 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 it offers, and understandability of its actions.

It might be argued that there would be less of a need for ensuring the trustworthiness and legitimacy of private regulatory and enforcement regimes for the following reasons. The first reason, as noted by Six and Verhoest, relates to an important difference between private and public regulation which matters from the perspective of trust: the compulsory nature of public regulation versus the voluntary nature of private regulation and regulated actors being in a position to select the regulator that they trust most. Since there would thus always be a possibility

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116 ibid, 5.
117 ibid, 5.
118 ibid, 8.
122 Six and Verhoest (n 108) 2.
for those affected to opt out of a private regime or simply not to comply with it, there would not be a problem of trust and legitimacy. The second reason relates to the viewpoint that as private regulation concerns an expression of contractual freedom and private autonomy, it is not necessarily axiomatic to assess private behaviour through the lens of legitimacy, let alone constitutionalism. For the idea of constitutionalism is geared towards the exercise of public authority, capturing the principle that the legitimacy of government and other state actors depends on this authority deriving from the people and being subjected to their control, while being limited by a body of fundamental law. The very purpose of this is a framing of the exercise of public authority so as to protect citizens against the abuse of power and to set conditions and limits to the exercise of authority, induced by fundamental rights and constitutional concerns. That being the case, why and to what extent should the use of authority by private actors meet constitutional demands at all?

As several contributions in this volume will show, it may not always be so easy, advisable or profitable to opt out of a private regime, and it may thus not be as voluntary as it seems at first sight (eg Hiemstra and Senden). Therefore, the proposition which underlies the approach in this volume is that, whenever a private regulatory and/or enforcement regime is akin to a de facto public exercise of authority, there need to be, in principle, similar guarantees to those put in place for public regulatory and enforcement regimes. This implies that ‘the identification of self-regulation as being of constitutional significance is a matter of judgment that can only be made in context’. This gives rise to another premise, namely that the constitutional significance of European private regulation and the actual need for its trustworthiness and legitimacy can be thought of as being on a sliding scale, depending in particular on:

- whether the use of European 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 (eg health and safety, employee protection); and

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123 Ziller (n 104).
124 Beyond the contributions referred to already here above (n 97, 104), cf for a different approach to the relationship with the public realm, H van der Voort, ‘Trust and Cooperation over the Public–Private Divide: An Empirical Study on Trust Evolving in Co-Regulation’ in Six and Verhoest (n 108) 181–204.
126 McHarg (n 6).
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. Such obligatoriness may result, for instance, from the contractual nature of the agreement, the monitoring and enforcement mechanisms that have been put in place, or public confirmation or codification.

5.3. ‘Trust’ and the Constitutional Challenges Involved

Elaborating on the trustworthiness of private regimes from a constitutional perspective, the starting point is that private authority that is generating similar – obligatory – effects as those that apply to public regimes is to be exercised on behalf of the people (ensuring input legitimacy), for the people (ensuring output legitimacy) and with the people (ensuring throughput legitimacy). Input legitimacy relates primarily to the source of rule-making and the actors involved.128 This input legitimacy is under pressure in the case of private regimes having de jure or de facto binding effects on third parties and which are difficult to opt out of, without these regimes relying on an electoral mandate. This poses challenges to the state-centric conceptions of democratic rule-making, according to which citizens should be bound only by laws that build on democratic procedures.129 The fact that private regulatory and enforcement regimes are most often presented by top-level bureaucrats, policy or technical experts, industry representatives and/or societal organisations, means that a remaining challenge is to determine which actors can and should be involved in the decision-making processes of these regimes,130 so as to ensure the level of competence and goodwill that will in its turn ensure a trustworthiness judgement by those affected. The levels of expertise, representativeness and reputation of those actors and experts, for instance, come into play in this regard.

The level of trust in and acceptance of private authority will also depend on the output legitimacy of such regulatory and enforcement regimes, that is to say on the results which they manage to produce: are they effective in realising the policy goals striven after and in meeting the demands of those concerned and also in protecting their interests, so avoiding the risk of regulatory capture

129 Of in general Scott in this volume and in relation to specific areas, eg Schepel (n 94); B Dorbeck-Jung, ‘Challenges to the Legitimacy of International Regulation: The Case of Pharmaceuticals Standardisation’ in A Follesdal and R Wessel (eds), Multilevel Regulation and the EU (Leiden, Martin Nijhoff, 2008) 51–71; E Kica Ibraimi, ‘The Legitimacy of Transnational Private Governance Arrangements Related to Nanotechnologies: The Case of International Organization for Standardisation’ (doctoral dissertation, University of Twente, 2015) 91.
and failure?\textsuperscript{131} Furthermore, it must also be understood that acceptance of authority and the results which a private regime produces are mutually dependent on one another; the more acceptance there is of the regime, the more effective it may be but, conversely, the more effective a regime appears to be, the more acceptance it can gain.

On top of that, throughput legitimacy of private regimes must be secured as well. This concerns the procedures that have been put in place to set and access the standards and regulations and to ensure their compliance and enforcement, as well as resolving (liability) disputes on their interpretation and applicability. What procedures have they put in place to steer and condition the exercise of authority that impacts on a citizen’s acceptance of them and the trust they put in them?\textsuperscript{132} For instance, how is participation organised, how is the transparency and accessibility of standards ensured for those that have to comply with them, what conflict resolution mechanisms have been provided for, etc? Importantly, this also shows that private regulation and enforcement is not necessarily and certainly not only legitimised by action and involvement on behalf of public actors, but that it is just one factor among others. The contribution of Scott exemplifies this.

5.4. Operationalising a Citizen’s Trust in the EU Context

In the Commission’s BR Toolbox, it is stated that: ‘The success of self- and co-regulation depends in essence on several key factors which include: representativeness, transparency, legal compliance and effective implementation and monitoring.’\textsuperscript{133} Such factors can be seen as relevant for developing a governance design that allows for a better use of private regulation in the EU. The OECD has also explicitly stated that ‘the risks of self-regulation and voluntary approaches – undue influence by private interests, barriers to competition, and lack of transparency and accountability – need to be rigorously managed by programme design and application of competition policies.’\textsuperscript{134} Importantly, several EU bodies have not only underscored the need for better regulation principles geared towards EU legislation, but also for better co- and self-regulation.\textsuperscript{135} In the literature, the need for some form of ‘meta-regulation’ of – transnational – private regulation

\textsuperscript{131} Cafaggi (n 6).
\textsuperscript{132} Schmid (n 130).
\textsuperscript{134} OECD (n 8) 28.
\textsuperscript{135} See section 4.
has also been acknowledged. Such ‘meta-regulation’ concerns the applicability of a set of principles and rules that conditions the use of private regulation and enforcement. However, a comprehensive picture of what set of principles currently steers private regulation and enforcement in the EU context seems to be lacking so far. Here we will first zoom in on the different sources that need to be taken into consideration for the identification of relevant principles and then on principles that are already being considered as of particular relevance to the use of private regulation and enforcement. Some principles and norms may be of more direct relevance than others for creating trust and credibility in citizens, as charted in the previous section.

The sources that come into play on the general – primary – EU law level, for embodying the core values, constitutional and fundamental rights foundations of the EU, are:

- the EU Treaty and the Treaty on the Functioning of the EU (TFEU);
- the Charter of Fundamental Rights;
- the European Convention on Human Rights;
- their interpretation in the case law of the Court of Justice of the EU (CJEU)

These sources need further analysis as to the core values, principles, public interests and parameters they contain when determining possible boundaries for the use of private–public regulation in the context of the EU. The horizontal studies in this volume of Klinger, Emaus, Brouwer and Mulder provide such general EU law analysis.

Within the framework of the EU’s Better Regulation policy, various policy instruments are relevant, for establishing norms, principles and conditions that apply specifically to private regulation and enforcement:

- the 2016 Inter-Institutional Agreement on Better Lawmaking, replacing the Agreement of 2003;
- the Better Regulation Toolbox, in particular its Tool #18 which refers to the Community of Practice principles (see below on these);
- the Principles for Better Co- and Self-regulation of DG Connect;
- the opinion of the European Economic and Social Committee;
- OECD principles.

Apart from that, where private regulation originates in or is very much connected to public regulation, such as is the case with the social dialogue and technical standardisation, primary and secondary law instruments upon which their use is based are also very important as regards the conditioning of their use. General principles and rights as contained in EU primary law or policy instruments as mentioned above may have thus been concretely operationalised and applied to

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136 eg Cafaggi (n 6); Scott, Cafaggi and Senden (n 97); J Bomhoff and A Meuwese, ‘The Meta-Regulation of Transnational Private Regulation’ (2011) 38(1) Journal of Law and Society 138–62.
such particular cases of private regulation. Interestingly, as from 1 January 2013, a new regulation on European standardisation took effect, aiming specifically to enhance the inclusiveness, speed, responsiveness, transparency, flexibility and scope of the standardisation system\(^\text{137}\) (see the contribution of Hiemstra and Senden). In the exceptional case of the social dialogue, there is even a particular procedure in the TFEU itself for the adoption of European collective agreements (see the contribution of Pennings).

The Inter-Institutional Agreement on Better Law-Making 2003 specified that the use of co- and self-regulation must be transparent, ensure representativeness of the parties involved, represent added value for the general interest, respect the principles of competition and the unity of the internal market and that it will not be applicable where ‘fundamental rights are at stake or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States’.\(^\text{138}\) In particular, the fundamental rights limitation thus posited triggered a number of questions regarding its interpretation and scope, since private regulation may precisely be triggered because of such concerns, e.g. to enhance consumer, employee or environmental protection. It must be noted that the current IIA does not contain these conditions nor are they reiterated as such in the Commission’s BR Principles and Toolbox. However, the Toolbox explicitly expresses commitment to the set of best-practice principles which the Commission services established and which ‘should be reflected in all self- and co-regulation initiatives’\(^\text{139}\).

This set of best-practice principles can be traced back to the establishment by the Commission’s DG Connect in 2013 of a Community of Practice for Better Co- and Self-Regulation. Because of the lack of clear standards, it developed the Principles for Better Co- and Self-Regulation. This Community of Practice (CoP) aimed to own, promote and enhance the principles and the exchange of good practices within its framework.\(^\text{140}\) In 2017, the CoP was dissolved. However, its principles are of continued relevance within the framework of the Commission’s BR Toolbox.

The Principles for Better Self- and Co-Regulation are evidence-based, best-practice principles which govern both the inception and implementation of self- and co-regulation. The following principles are related to the inception of self- and co-regulation:\(^\text{141}\)

- participants, who ‘should represent as many as possible of potential useful actors in the field concerned, notably those having capacity to contribute to success’;

\(^{137}\) See in particular the preamble of the Regulation 1025/2012 [2012] OJ L316/12.

\(^{138}\) Interinstitutional Agreement on better law-making (n 63) point 17.

\(^{139}\) Tool #18 (n 133) 111.


\(^{141}\) Ibid.
openness, as ‘envisaged actions should be prepared openly and involve all interested parties’;

• good faith, meaning that ‘different capabilities of participants should be taken into account, activities outside the action’s scope should be coherent with the aim of the action and participants are expected to commit real effort to success’.

• legal compliance, meaning that ‘initiatives should be designed in compliance with applicable law and fundamental rights as enshrined in EU and national law’.

For the implementation of self- and co-regulation, the following principles are set out:

• iterative improvements – the action should incorporate accountability and a process of ‘learning by doing’. It should include annual progress checks, in light of the chosen objectives and indicators and any available broader background data;\textsuperscript{142}

• monitoring, conducted ‘in a way that is sufficiently open and autonomous to command respect from all interested parties’;

• evaluation, which will allow ‘participants to assess whether the action may be concluded, improved or replaced’;

• timely resolving of disagreements, possibly through a confidential procedure and ‘non-compliance should be subject to a graduated scale of sanctions’.

• financing – ‘participants will provide the means necessary to fulfil the commitments, and participation of civil society organisations may be supported by public funders or others’.

In the run-up to the adoption of the new Inter-Institutional Agreement on Better Law-Making, the European Economic and Social Committee (EESC) adopted in 2015 also a critical opinion on the use of European co- and self-regulation in which it pleaded for the introduction of constitutional safeguards. In particular, it held that in order for co- and self-regulation to be a valid, recognised regulatory instrument in any legal system, their configuration and ambit must be defined by specific precepts that are legally binding and enforceable, whether at national or Community level, respecting at the same time the nature of these instruments, especially the voluntary agreement of the participants. The parameters for recognising these regulatory instruments must be quite clear, as must the principles governing them and their limits as an accessory regulatory instrument in the legal system concerned.\textsuperscript{143}

It next emphasised many of the principles already established by the CoP. Quite interestingly, the position the EESC took in this opinion marks a considerable shift

\textsuperscript{142} ibid.
\textsuperscript{143} Own initiative opinion INT/754-EESC-2015, Self-Regulation and Co-Regulation in the Community Legislative Framework, 22 April 2015.
from its previous one on the topic, dating from 2005, in which it underscored some limits to its use relating mostly to effective monitoring and sanctions and compatibility with existing legal rules, but considered foremost that ‘greater emphasis should now be given to regulatory freedom’.  

On a final note, attention should be drawn to factors which the OECD identified as being relevant for contributing to the success of private regulation, especially when it comes to industry self-regulation in the consumer area. Most importantly for our purposes here is the emphasis it placed in this regard on the following features which such private regimes need to demonstrate:

- clarity and strength of objectives;
- conformity of schemes with government policies;
- legal basis;
- leadership;
- leveraging industry knowledge in rule setting;
- monitoring, transparency and public accountability;
- enforcement and sanctions;
- dispute resolution and redress;
- stakeholder participation;
- public awareness.

6. The Book’s Approach

As already mentioned, the sectoral contributions cover various policy areas, so as to lay bare and compare the diversity in private regulatory and enforcement regimes that has emerged and to analyse such diversity from the perspective of the public–private relationship, the level of institutionalisation involved and also from the European vis-à-vis the national and international levels of regulation and enforcement. These are important variables to consider in carrying out the case studies. However, the case studies are also particularly important with a view to identifying, fleshing out and comparing in various policy contexts the rules, procedures and practices that may exist to enhance a citizen’s trust in and acceptance of the private regimes concerned. The policy areas have been selected first of all on the basis of the existence of specific issues of public interest in the domains of the protection of consumers, employees and citizens more widely and focus on how private actors are involved in this variety of European policy fields. Secondly, the selection has also taken into account the various levels of institutionalisation,

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145 OECD (n 14).
so as to allow comparison between private regulation and enforcement that have a formal basis in primary EU law, a basis in secondary EU legislation and types of private regulation and enforcement ensuing simply from bottom-up practices. The case studies thus cover the areas of data protection, advertising, environmental protection, financial markets, social policy, technical standardisation, media, consumer protection and food.

To allow for such analysis and assessment, the case studies have been carried out on the basis of the following questionnaire:

- What role has been exactly assigned to or been taken up by what private actors in the regulation and/or enforcement of what issue or problem?
- What are the reasons or incentives underlying this role and in particular why is there a preference for private regulation or enforcement over public law arrangements or for involving private actors in such arrangements?
- What goals do such private or public/private regulation and/or enforcement arrangements strive after and how realistic/achievable are these?
- How ambitious can such arrangements be; what can and what cannot be realistically expected from private actors?
- In case of hybrid arrangements, what is the exact nature of the private/public relation?
- Do the self- and co-regulatory arrangements in the researched policy field have a legal foundation and are specific legal constraints or conditions to be respected?
- How could private or public/private arrangements be (better) organized and/or regulated with a view to ensuring:
  - more/sufficient trust and credibility with citizens and with stakeholders and with preventing capture;
  - ‘internalization’ of the set rules and therewith support and compliance;
  - flexibility and evaluation so as also to ensure long-term benefits of self- and co-regulation over public regulation?
- What balancing or trade-offs between public–private interests, also vis-à-vis effectiveness concerns, would such organisation or regulation as described above imply?
- What role does the interaction between the European and national dimension play in relation to the aforementioned issues?

This specific policy area and case study approach has been combined with a ‘horizontal’ approach, which entails the consideration of fundamental cross-cutting issues that determine the scope which EU law leaves for the further development of private regulation and enforcement as an instrumental tool to realise EU objectives. These cross-cutting issues concern the EU’s constitutional principles determining its competence authority, fundamental rights, internal market and competition law and, on a more reflective level, also the democratic legitimacy
dimension in relation to effectiveness concerns. Hence, these horizontal chapters
deal with questions such as how private regulation and enforcement fit in more
specifically with the EU’s institutional and constitutional structure and principles.
More specifically, this includes consideration of the principles of conferred powers,
subsidiarity and proportionality, and the leeway, legal constraints or conditions
that EU law contains in shaping the use of private regulation and enforcement
from the perspective of internal market law, competition law and fundamental
rights such as contained in the EU’s Charter of Fundamental Rights and in the
ECHR. What obligations may these legal sources impose on private actors to
protect fundamental rights, not only in their daily activities but especially also
when they engage in regulatory and enforcement activities? What positive duties
to protect do private actors have and what negative duties do they have to abstain
from certain behaviour? It is also important to consider to what extent the overall
picture emerging from this study demonstrates coherency and consistency in the
EU’s legal approach towards and assessment of private regulation and enforcement.

In the final chapter, the insights drawn from the case studies will be compared,
so as to see what core similarities and differences between policy areas can actually
be established and what general conclusions can be drawn with a view to answering
the overarching question of the book. This will also allow us to identify some good
practices from the most advanced or established practices of private regulation
and enforcement, as well as some important points to avoid. As such, we believe
this book will add to the state of the art in EU legal studies, not only offering
more comprehensive insights into the current choice for and use and framing of
private regulation and enforcement under EU law, but also offering reflections on
its future development and design and potential positioning in the EU law context.