Chapter 8
European Regulatory Private Law: From Conflicts to Platforms

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Abstract The essay provides a reflection on European Regulatory Private Law (ERPL), as both a perspective on and a model of European legal integration. First, it outlines some of the problems familiar to legal and other scholars that give rise to ERPL as a perspective on legal integration, including the pluralisation of legal sources and institutions and the resulting legal fragmentation. This in turn produces the need to manage conflicts or collisions in law-application to concrete legal problems either by making choices from existing alternatives or by innovating. Secondly, it provides possible impulses that inform ERPL as a research agenda and a way of making headway on those familiar problems. The final—and more exploratory—step, is to envisage the shape that ERPL might take given those problems and impulses as a model of normative interaction in the EU context. One guiding intuition is that it might be limiting to speak of the resulting normative framework as one for merely managing conflicts between normative orders. An alternative conception might be that of integration, so that ERPL could be thought of as a platform (or platforms) aiming to integrate to the greatest extent possible the perspectives of the various relevant law producers and enforcers in the pursuit of various dimensions of the public interest. For that purpose, the essay will sketch out some possible platform models drawing on existing examples.

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8.1 Introduction

This essay provides a reflection on the concept of European Regulatory Private Law (ERPL)[1], offered from the perspective of someone who has come to it without being steeped into private law debates in Europe, either at national or at EU level. The essay seeks to outline some ideas about the meaning of ERPL and the impulses that motivate it as an approach to EU legal integration. It will also explore what kind of a model of interaction between normative orders ERPL could entail in the context of European legal integration.

To scholars or practitioners from different backgrounds and disciplinary traditions the ERPL coinage may be quite difficult to comprehend; it seems to contain concepts that are incommensurate, even total opposites to each other. For most national private lawyers such a coinage might be nonsensical, or at worst anathema. Such reactions might reflect both conceptual and practical considerations. The existence of a composite field such as ERPL confounds traditional ideas about the sources of private law, which would also mean that private law research and methods of analysis should be broader and more challenging for both practitioners and scholars. Similarly for many EU lawyers, the coinage could even be regarded as an oxymoron, as EU lawyers ordinarily are viewed and—perhaps more importantly—view themselves as public or even constitutional lawyers, principally interested in relationships between institutions and orders of competence[2]. The private party is ordinarily but a handmaiden in the evolution of EU law, useful principally for bringing to attention the large constitutional issues that require resolution, even if those issues oftentimes stem from her apparently small and mundane problems.

Even for American lawyers and legal scholars who take interest in developments on the other side of the Atlantic, the idea of ERPL might be puzzling. This reaction might be due to a scepticism either about the very idea of private law[3] or about the specific form that EU private law has taken thus far, as well as the direction in which it appears to be going.[4]

As a result, operating from within one of the above perspectives, it may be feasible to ignore some of the developments encompassed under this umbrella concept. Yet it is precisely when we ignore developments outside of our usual field of vision, either because they fall into a blind spot or because we do not have

[1] H-W Micklitz, 'The visible hand of European regulatory private law—The transformation of European private law from autonomy to functionalism in competition and regulation' (2009) 28 *Yearbook of European Law* 3.

[2] e.g. A von Bogdandy and J Bast, 'The Federal Order of Competences' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart, 2009).

[3] J Goldberg, 'Pragmatism and Private Law' (Introduction to the Symposium "The New Private Law") (2012) 125 *Harvard Law Review* 1640.

[4] D Caruso, 'The Baby and the Bath Water: The American Critique of European Contract Law' (2013) 61 *American Journal of Comparative Law* 479, 491.

analytical categories with which to deal with them,[5] that we tend to miss new emergent phenomena that require understanding and characterisation. Disagreement and confusion may suggest there is something worthy of further investigation.

Legal scholars, and not only those, have often written about the influence of perspective on the way in which we approach phenomena or problems.[6] By perspective in this context we typically mean viewpoint or approach. Both from within and from without the field, law seems to be regarded as a discipline where perspective is important: role plays are an important pedagogic tool for law students from many different national backgrounds. Those—even beyond the legal field—who emphasize the importance of perspective, often refer to various literary and artistic works that examine different stories told by storytellers reconstructing the same events from the perspective of a different legal role.[7]

A particular perspective may typically be seen to be associated with a particular rationality. I use this in a rather loose way to indicate specialisation of focus, which need not involve a complete and coherent view of the world. Instead, it might simply involve the narrowing of the objects and objectives of analysis, as well as the instruments with which to transform the objects so as to achieve selected objectives. The ascription of rationalities in this sense is observed within some relevant subfields of law (private law: autonomy and justice/code and common law), regulatory law (public interest/statutes and regulations), EU law (internal market/EU treaties and legislation). Note however, that such rationalities (in the sense of combinations of objectives and instruments) may often be ascribed *ex post facto* so as to provide coherence to specialised (sub-)disciplines, regardless of whether they have truly informed or emanate from or fully explain them. Yet, even if they are imagined or *ex post* rationalisations, they have real effects as they condition the training and the viewpoint of those who operate from within such (sub-)specialties and therefore also their normative worldview.

Returning to the ERPL concept, to get some traction on its content and meaning for a legal scholar—particularly one trained in the German tradition—a useful departure point might be a definition. Note, however, that a more heterodox sceptic would be quite wary of a definition of the object of argument found in the introduction. Despite giving an appearance of formality and discipline in argumentation, the sceptic knows that the introduction is ordinarily written after the argument has

[5] In the context of the firm, see CM Christensen, *The Innovator's Dilemma* (Boston, Harper, 2003); CM Christensen, EA Roth and SD Anthony, *Seeing What's Next* (Boston, Harvard Business Review Press, 2004).

[6] To pick a random example, H-W Micklitz, 'Rethinking the public/private divide' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge, Cambridge University Press, forthcoming).

[7] E Fox, 'Chairman Miller, the Federal Trade Commission, Economics and *Rashomon*' (1987) 50 *Law and Contemporary Problems* 33; cf J Mintz, A Auerbach, L Luborsky and M Johnson, 'Patient's, Therapist's and observer's views of psychotherapy: a 'Rashomon' experience or a reasonable consensus?' (1973) 46 *British Journal of Medical Psychology* 83.

been completed, and so she might suspect that the definition has been tailored and narrowed to fit the argument presented rather than the other way around. A more realist-minded scholar, who has absorbed post-modern lessons about law, might be unfazed by the absence of a definition and might even applaud the blurring of traditional boundaries that ERPL appears to entail, but at the same time be concerned about the continued use of old categories that have typically obscured the real political, social or economic drivers behind the law, both in its making and its application.

The pragmatist scholar might avoid getting bogged down into concepts and *a priori* definitions in order to get down "to the brass tacks;" to "push past the surface" and to get to "what is 'really' at stake"[8]. Note that this question might elicit different responses even from different kinds of pragmatists[9], but for present purposes, and for stimulating debate principally among scholars from diverse backgrounds and perspectives, one departure point is to identify the problem or set of problems that might give rise to the need for this apparently hybrid concept. Recounting the set of problems might give some idea (i) about the reasons for which we have to think beyond existing categories (or the impulses behind ERPL) and (ii) about the possible shape or shapes that the resulting "law" might take.

This is the path I propose to follow in the remainder of this contribution. First, I propose to set out some of the problems that give rise to the need for ERPL as a concept. These are familiar to legal scholars—both from a more practical and more theoretical bent—and include the pluralisation of legal sources and institutions and the resulting fragmentation(s) of law, creating in turn the need to manage conflicts or collisions in law-application to concrete legal problems either by making choices from existing alternatives or by innovating and introducing new ones. The second step is to identify a set of possible reasons or impulses behind the ERPL perspective to EU legal integration as a way of making progress on those familiar problems. Here I am stepping into others' shoes and, to mix metaphors, may be out of my depth, but that is no reason not to try.

The final step, which is more exploratory, is to envisage what shape ERPL might take given those problems and impulses. Here we might distinguish between the more practically minded and more scholarly-minded lawyer. A more practically minded response could be that the problem is more imagined than real: law will always find a solution even in the absence of first (or any other) principles that account for it, since a judicial or other dispute resolution body presented with a legal problem will ordinarily have to find a solution, which will become final at least as between the parties. Judges, just like lawyers, have no choice but to deal with the case before them.[10] But the scholarly task is different,

[8] Goldberg, 'Pragmatism and Private Law', 1641.

[9] see L Menand, *Pragmatism: A Reader* (New York, Vintage, 1997); L Menand, *The Metaphysical Club* (New York, Farrar, Straus and Giroux, 2001).

[10] RA Posner, 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1; TC Grey, 'Freestanding Legal Pragmatism' (1996) 18 *Cardozo Law Review* 21.

it is to give *ex post* coherence to a field that might otherwise look very messy and reconcile it with some normative commitments we might hold. In exploring the possible shape of ERPL, the intuition offered here is that it might be limiting to speak of the resulting normative framework as one for merely managing conflicts between normative orders. An alternative perspective *might* be that of integration, so that ERPL could be thought of as a platform that aims to integrate to the greatest extent possible the perspectives or rationalities (in the sense of goal/instrument combinations) of the various relevant law producers and enforcers in the pursuit of various dimensions of the public interest. Thus, in the final part I will sketch out some models of what such platforms could look like drawing on existing case examples. My purpose is to offer possibilities based on current templates emerging in different contexts and to explore some of their advantages and possible concerns, without fully evaluating them or endorsing here any one model as preferable.

8.2 Three problems

8.2.1 Normative and Institutional Pluralism

It is not uncommon in contemporary legal debates to begin with a recognition of the plurality of sources of norms that go beyond not only the traditional code or common law sources of private law, but also the usual state law-making processes in general. This is the descriptive claim of legal or normative pluralism.[11] It is worth underscoring that not only do we observe a plurality of sources of normativity, but also a plurality of institutions that fulfil the traditional functions of legal institutions, such as norm enforcement and dispute resolution. In other words, not only do various communities seek to make norms, but also the "touchdown"[12] of these norms is not necessarily judicial, nor does it necessarily take place within any other state institutions. Indeed, rules can sometimes be designed so as to avoid any "touchdown" at all so as to rely on various tools of self-enforcement.[13] Moreover, notwithstanding the plurality of sources, some decision-makers or specific practices can also fall in the interstices and apparently be governed by no law at all.[14]

[11] H-W Micklitz, 'Monistic ideology vs pluralistic reality—on the search of a normative design for European private law' in L Niglia (ed), *Pluralism and European Private Law* (Oxford, Hart Publishing, 2013).

[12] R Wai, 'Transnational liftoff and juridical touchdown: The regulatory function of private international law in an era of globalization' (2002) 40 *Columbia Journal of Transnational Law* 209.

[13] e.g. F Partnoy, 'The Shifting Contours of Global Derivatives Regulation' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 421, 479 (ISDA standard term contracts for transactions among derivatives dealers).

[14] G de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51 *Harvard Journal of International Law* 1; but also P Lugard and M Möllman, 'A Commitment-a-Day Keeps the Court Away' (2013) 3 *CPI Antitrust Chronicle* 1.

Cross-border economic integration is typically offered as a reason for these phenomena: where transactions take place cross-border they escape the jurisdiction of any single state and may invite transnational solutions.[15] The pluralisation of sources becomes much more visible when such sources or institutions directly compete with states, especially on the 'public' side of law, but it is worth noting that on the private side of regulating transactions and relationships—even if concealed—they have been present for a long time and likely for varying different reasons.[16]

In fact, states have themselves sought to stimulate such pluralism and engage different normative orders for their own needs. Thus, states have co-opted private law-makers in market-building and regulatory activities and outsourced functions to them—sometimes more, sometimes less visibly—on the basis of their supposedly technical and uncontroversial character or at the very least limited spillovers into questions of political controversy.[17]

The EU provides an example in which the outsourcing and the economic integration stimuli for such pluralisation, through reliance on private norm-making for example, intersect and mutually reinforce each other.[18] In the absence of a massive EU bureaucracy and to avoid political gridlock, mechanisms such as the "New Approach" have been used precisely for market building through outsourcing, stimulating not only private normative plurality but also institutional plurality.[19] Sometimes, the resulting standards interact imperceptibly with national private law, as they affect contract terms and conditions, or shape default contract rules and tortious liability standards. At other times, rules may be imposed more intrusively through the EU legislative or regulatory frameworks, particularly in the more heavily regulated national monopoly sectors,[20] where pure outsourcing to private actors would result in the exercise of naked market power.

8.2.2 Fragmented Legal Landscape

The pluralisation described above leads to another well-recognised problem, namely the fragmentation of law and even legal institutions beyond typical hierarchical con-

[15] G Teubner, 'Global *Bukowina*: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Dartmouth, Aldershot, 1997).

[16] e.g. L Bernstein, 'Private Commercial Law in the Cotton Industry, Creating Cooperation Through Rules, Norms and Institutions' (2001) 99 *Michigan Law Review* 1724.

[17] M Taggart, 'From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575.

[18] see H Schepel, *The Constitution of Private Governance* (Oxford, Hart, 2005).

[19] R van Gestel and H-W Micklitz, 'European integration through standardization: How judicial review is breaking down the club house of private standardization bodies' (2013) 50 *Common Market Law Review* 145, 150.

[20] Micklitz, 'The Visible Hand', 55–58; M Cantero Gamito, 'Towards Self-Sufficiency in European Regulatory Private Law: The Case of European Telecommunications Services Law' in H-W Micklitz and Y Svetiev (eds), *Self-Sufficient European regulatory private law: A viable concept?* (2012) EUI Law Working Paper 2012-31, (http://hdl.handle.net/1814/24534).

ceptions. Such fragmentation has been observed both in state public and private law (even long ago[21]) as well as in public international law.[22] Such an outcome might be viewed as the natural result of specialisation of law-making or regulatory activity to tailor it to specific contexts or policy goals.[23] Take the commonly used example of a sports league.[24] Even within the purely domestic domain, there are numerous legal regimes that are relevant to the running of such an endeavour, including contract law for engaging players or other input providers, corporate law for the governance of clubs or leagues, tort law for liability for injuries, specialised provisions of media law as regards the selling of media rights or competition law given the restrictions on competition necessary to run a common league, sell products and distribute revenues. Once we look outwards to international participation, the potential sources multiply as well as the geometries of intersection of rules and institutions. Moreover, the sports leagues themselves draft rules for their governance (domestic and international), that can take different forms, seek to opt out of national private law rules or otherwise modify them to the specific context and the problems it throws up. Such rules can also interfere with public international law rules on trade or human rights.

Fragmentation thus brings into sharp relief the interaction of the different regimes of norms and institutions, sometimes said to possess (or, alternatively, bear the burden of) their own rationalities. As already indicated, one interpretation of the idea of rationality is that legal regimes might possess a degree of unity and coherence. Another interpretation follows from the idea of specialisation, namely that each regime has a set of goals and a set of usual instruments with which to pursue such goals. Just as in economic production, specialisation would suggest an increasing capacity of law-making or enforcement institutions to deal with specific problems within a narrow scope. But one problem of a high degree of specialisation is that it tends to obscure from view the activities of other units highly specialised in other tasks. Since each specialist knows something others do not, specialisation implies "an increased inability to see another person's point of view".[25] A further problem is that high specialisation suggests incapacity to deal with a change in the nature of the problems at hand, either a change in the objectives or the instruments to use. Those who operate in highly specialised regimes might develop habits of thought and action that provide efficient ways of utilising current tools for typical objectives, but they may also be an impediment to innovation or adjustment to new circumstances.

[21] F Wieacker, *A History of Private Law in Europe* (Oxford, Clarendon, 1995) 431.

[22] E.g., M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

[23] J Pauwelyn, 'Fragmentation of International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2012) 1406.

[24] Teubner, 'Global *Bukowina*'; A Duval, '*Lex Sportiva*: A Playground for Transnational Law' (2013) 19 *European Law Journal* 822.

[25] GJ Miller, *Managerial Dilemmas: The Political Economy of Hierarchy* (Cambridge, Cambridge University Press, 1992) 33; also generally A Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *American Economic Review* 777.

One integrative mode of coping with integration is hierarchy and harmonization, which might be available in the EU setting, if not in many transnational ones.[26] But the interaction of different normative regimes could also be seen through the lenses of conflict and/or choice of rules and institutions to deal with a particular problem.[27] This has revived interest in the discipline of the conflict of laws (or choice of law) even at a conceptual level as a possible way to bring order to a world of plural legalities (or normativities).[28] At least in principle, it seems, a way in which to resolve the problem in the absence of clear hierarchical relationships, is by using the traffic signalisation metaphor in a way that ensures legitimacy. Coherence in such a world need not be substantive, but a softer form may be achieved through the sequencing and complementarity of normative regimes.[29]

In the EU context, such an approach may seem feasible, given the supranational structure that overlays not only the "federal" and different national normative (sub-) orders, but also transnational private ones, which as we said are often used and co-opted into EU law-making and enforcement processes. One way of reconciling supremacy and subsidiarity is for the EU to be viewed as a conflicts regime whereby in the face of collisions choices are made on principled grounds and in a legitimating way so as to "compensate" for the "threat to democracy" inherent in situations where citizens are subject to laws they did not author,[30] which in turn might elide or even merge the constitutional and private law perspectives on European integration.

8.2.3 Conflicts and Choices: Legitimacy and Evaluation

Traditional conflicts law,[31] probably much like the traditional approach in comparative law,[32] is based on an idea of, equality of, and equal respect for, different

[26] Though note the observation that formal harmonization often tends to disguise persistent divergences related to local context. C Knill and A Lenshow, 'Compliance, competition, and communication. Different approaches of European governance and their impact on national institutions' (2005) 48 *Journal of Common Market Studies* 583.

[27] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

[28] e.g. H Muir-Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347; J Heymann, 'The Relationship between EU Law and Private International Law Revisited: Of Diagonal Conflicts and the Means to Resolve Them' (2011) 13 *Yearbook of Private International Law* 557.

[29] c.f. F Cafaggi, A Nicita, and U Pagano, 'Law, economics and institutional complexity: An introduction' in F Cafaggi, A Nicita, and U Pagano (eds), *Legal Orderings and Economic Institutions* (London, Routledge, 2007).

[30] C Joerges, P Kjaer and T Ralli, 'A New Type of Conflicts Law as Constitutional Form in the Post-National Constellation' (2011) 2 *Transnational Legal Theory* 153, 154.

[31] HE Yntema, 'The Historic Bases of Private International Law' (1953) 2 *American Journal of Comparative Law* 297, 298 ("assum[ing] a certain cosmopolitan respect, or at least tolerance, for foreign conceptions of justice").

[32] but see R Michaels, 'The functional method of comparative law' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 342.

legal sources. Such a view was also buttressed by the fact that they emanated from equal sovereigns.[33] Being principally focused on horizontal choice of law, arguably private international law was principally concerned with the legitimacy of the application of legal rules to particular situations: because a particular sovereign State would have been entitled to regulate the conduct, this in turn also makes the choice of law legitimate from the point of view of the parties' expectations as to what constituted legal conduct. Such an approach focuses on identifying the functionally equivalent rules from different jurisdictions and eschews judgments about the quality of the law or the efficacy with which the law achieves its purposes.

Evaluative criteria about the law's purpose and effects however start to be relevant both in conflicts and comparative law for various reasons. In conflicts law, a set of developments originated principally from the US where in the face of substantial market integration leading to a high degree of interdependence and reduced sovereigntist concerns, there was nonetheless continued legal diversity as between the various states. In that context, courts and scholars proposed inquiries into the specific object of legal rules vis-à-vis the conduct involved (the 'governmental interest'[34] a specific rule is meant to promote and whether the conduct falls within that interest), but also evaluations about a rule's efficacy (the 'better law' approach[35]), with a resulting tendency for hybridisation through dépeçage.[36]

In comparative law evaluative criteria beyond doctrinal ones might have been spurred by both the observation of commercial parties in exercise of their contractual autonomy preferring the laws or courts of some jurisdictions to govern their mutual relationships, or even opting for alternative fora such as arbitration to resolve disputes. There is also the parallel, and probably not independent, influence of economics, through the evaluation of the efficiency of individual legal rules[37] and beyond that of entire legal systems or families.[38] This has spurred a substantial critique of the methodologies and approaches that have been used to perform such micro or macro evaluations.[39] For present purposes, a key difficulty to note is the choice of both standard and metric of evaluation. Not only might different communities value efficiency or the growing importance of financial markets differently, but in a fragmented legal landscape, different normative regimes might be pursuing different public goals (if we accept that they are at least to some extent publicly

[33] Yntema, 'Historic Bases', 305.

[34] e.g. B Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function' (1958) 26 *University of Chicago Law Review* 9.

[35] e.g. RA Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 *New York University Law Review* 267.

[36] W Reese, '*Dépeçage*: A Common Phenomenon in Choice of Law' (1973) 73 *Columbia Law Review* 58.

[37] U Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 *International Review of Law and Economics* 3.

[38] e.g. R La Porta, F Lopez-de-Silanes and A Shleifer, 'The economic consequences of legal origin' (2008) 46 *Journal of Economic Literature* 285.

[39] See generally, R Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57 *American Journal of Comparative Law* 765.

oriented), which might in some instances either be directly opposed or they might appear incommensurate at least in the short term.

To come back to the issue of dealing with "collisions" in the EU legal landscape, apart from the traditional horizontal legal conflicts, which were the ordinary provenance of private international law, there are also "vertical" conflicts between EU and national rules on the same subject matter.[40] While this might appear to be a question the answer to which depends on who is the competent and/or legitimate rule-maker, the interaction of supremacy and subsidiarity appears to reinterpret legitimacy at least in part through evaluating the extent to which a specific legal instrument at national or EU level achieves commonly identified goals.

Finally, in the so-called "diagonal" conflicts cases, "a national regulation belongs to one field, where the (EU) lacks true legal competence in that field, but where nevertheless the regulation may interfere with European law" such as competition or free movement law.[41] In such diagonal conflicts situations, the problem of the legitimacy/evaluation interaction is exacerbated by the fact that the goals of the different instruments are not identical, even if they bear on the same underlying problem and point to different outcomes in a single case. This brings the spectre of having to prefer some goals (market integration for example) over others (social cohesion or protection of labour rights). As some have argued, given the logic and structure of EU integration and the path-dependent precedential evolution of EU law, such conflicts may ineluctably be decided by preferring the former goals.[42]

There are undoubtedly some cases of diagonal conflicts that can be interpreted as supporting such a systematic preference, there may be others that suggest otherwise and judgments may vary over time.[43] But that probably makes it even more difficult to make pithy evaluations or claims about the logic or rationality of different legal regimes, their legitimacy or efficacy. Beyond a descriptive acknowledgment of legal pluralism and an intuition that it is likely taking us irreversibly in a particular direction, can we make no further headway?

8.3 Three impulses

To return to the original concern of this contribution, we might ask the question whether the ERPL perspective on EU legal integration can assist us in making some headway on the foregoing problems. To answer that question, two lines of inquiry

[40] Joerges et al, 'A New Type of Conflicts', 155.

[41] *ibid*; e.g., CU Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation—A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing' (2000) 8 *European Review of Private Law* 155.

[42] F Scharpf, 'The asymmetry of European integration, or why the EU cannot be a "social market economy"?' (2010) 8 *Socio-Economic Review* 211.

[43] Eg, A Stone Sweet and TL Brunell, 'Trustee Courts and the Judicialization of International Regimes' (2013) 1 *Journal of Law and Courts* 61.

might be useful, including first exploring the impulses behind this perspective and subsequently identifying what ERPL could provide as normative design models for European private law.

Beginning with the impulses behind the ERPL perspective, I wish to highlight at least three. Again, I reiterate that these views are offered to some extent as an outsider or at least latecomer, and to that extent they ought to be taken with a few grains of salt, even if an outside perspective can often be useful for clarification purposes.

The first (in light of the 'private law' focus) might be described as an impulse towards a bottom up view of EU legal integration, including an interest in how it affects actors in managing their affairs, structuring relationships and resolving problems and disputes. This may even be seen as a Hayekian impulse, favouring an approach that sometimes gets obscured in the top-down inter-institutional focus that EU lawyers typically adopt. It is Hayekian in its bottom-up focus and its emphasis on the importance of tacit local knowledge as encoded in local law, rather than due to a faith in the price mechanism as a mechanism for economic or social organisation. In fact, it seems that this impulse is simultaneously coupled with some degree of agnosticism as between liberal and paternalist views of individual actors and their proper relationship with the state.[44]

A second impulse appears to stem from scepticism towards the untested claims of specialist communities that their tools work well and are effective, even the most effective (and perhaps no less legitimate than others), at achieving the public policy objectives assigned to them explicitly or implicitly. Thus, EU lawyers and officials might become accustomed to think that EU action is necessary for the achievement of integration goals and moreover that such action also promotes other aspects of the public good. Similarly, national private lawyers might view EU interventions as intrusions that disrupt a coherent legal regime that works well within its ambit.[45] Self-regulatory or standard-setting bodies might also harbour similar views, independent of any evidence about the effects of their activities.[46] This is yet another version of a familiar blending of means and ends, whereby the means of action for specialised groups—sometimes even imperceptibly—become final goals supported by a black-box theory of a link to the various dimensions of the public interest that we truly care for.[47] By way of a minor digression, given that legal or regulatory regimes generally have not developed means for evaluating their own contribution to the public good, one important challenge for ERPL as a scholarly effort is whether or not a socio-legal method focused on in-depth study of individual instantiations

[44] see S Frerichs, 'False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics' (2011) 34 *Journal of Consumer Policy* 289.

[45] Y Svetiev, 'W(h)ither private law in face of the regulatory deluge' in Micklitz and Svetiev (eds), *Self-Sufficient European regulatory private law*.

[46] van Gestel and Micklitz, 'European Integration through Standardisation', 149 f.; B van Leeuwen, 'European Standardisation in Healthcare: Towards Convergence Through Self-Regulation' in Micklitz and Svetiev (eds), *Self-Sufficient European regulatory private law*.

[47] Compare C Lindblom, 'The Science of "Muddling Through"' (1959) 19 *Public Administration Review* 79.

can provide the kind of evidence needed for evaluation. One risk is that the evidence would be insufficient or inconclusive, with the possible tendency to slip into over-emphasis of traditional conceptions of legitimacy as promoted by traditional instruments.

A third impulse could even be characterised as a sentimental or nostalgic one, rooted in a belief of the continued relevance of both law as an instrument and national private law as its specific embodiment or institution. This impulse is animated further by the idea of embededdness of law into national legal or societal cultures.[48] After all, often enough we all fall prey to the givens of the communities that have given shape to who we are, personally or scientifically. To some extent, such an impulse is faced with the difficulty of the state's intervention in law-making for its own specific objectives, often divorcing law wholly from the forces of societal self-organization.[49] Nonetheless, perhaps the intuition is that there are some underlying values, even shared ideas of justice, that shape not only national culture and legal culture, but also the modalities of state-building[50] and law-making. If such varieties exist, they should be taken into account in any process of legal integration or scholarly effort to understand and evaluate it. There is a further claim associated with this impulse, namely that there may be some value in retention of such diversity. It is not clear, and remains a true open question, whether such diversity is valuable to be preserved in and of itself or whether it is also valuable for the promotion of some other goals of the public interest.[51]

8.4 The Shape of ERPL

If I am right so far in the identification of the problems and the driving impulses behind the ERPL perspective on European legal integration, one remaining question is precisely the one of the normative design of European private law. In particular, in the remainder of the essay I offer some observations about the shape that ERPL might take as a normative order of EU integration in its private law dimension.

For this purpose, a useful departure point might be the conflicts perspective on EU legal integration, as supplemented and to some extent even inspired by systems theoretic contributions on transnational private law. In particular, this perspective allows us to paint a much richer picture of the landscape, including about the possible reasons and effects of the differentiation (or specialisation) of

[48] H-W Micklitz, 'The Unsystematics of a European legal culture' in G Helleringer and K Purnhagen (eds), *Towards a European Legal Culture* (Oxford, Hart, forthcoming).

[49] c.f. J Cohen and C Sabel, 'Extra Republicam Nulla Justitia?' (2005) 34 *Philosophy and Public Affairs* 147, 149.

[50] e.g. S Steinmo, *The Evolution of Modern States: Sweden, Japan and the United States* (Cambridge, Cambridge University Press, 2010).

[51] but see C Sabel and J Zeitlin, 'Learning from difference: The new architecture of experimentalist governance in the EU' (2008) 14 *European Law Journal* 271.

normative regimes and their reliance on new institutional forms. An open question that seems to be at the bottom of much scholarly inquiry, which is also captured in the conflicts perspective, is precisely that of the mutual interaction of different normative regimes and, for our purposes, the role—if any—of EU law in managing or guiding that interaction.

From the traditional private international law perspective, the identification of a "conflict" of laws leads to the need for making a "choice" of the applicable law on the basis of principled criteria (desirably *ex ante*, even if in reality typically *ex post*). Thus one model for the shape of ERPL is as a choice of law and/or institution regime. Note however that, as already indicated, the traditional private international law focus is on functionally equivalent legal rules of different jurisdictions and the legitimate selection of a rule from the perspective of both the sovereigns and the parties involved. But in the setting of horizontal, vertical and diagonal conflicts between EU, Member State public, semi-public and purely private normative regimes, each with their own rationalities (here interpreted as combinations of goals and habitually-relied upon instruments for achieving them), a pure focus on "choice" may necessarily entail a preference for some aspects of the public good over others. In the judicially-propelled precedent-driven process of integration, as Scharpf has suggested, such preference may tend to become encrusted and stable, encoded into the DNA of the integration process. Such persistently propagated preference of some policy goals might ultimately undermine the very foundations of the process of integration, to the extent that the relevant communities also value other goals (or conceptions of justice even).

An alternative response might be for EU law to seek to be the promoter of formal legitimacy for various norm-making, norm-enforcing or dispute resolution regimes so as to ensure that different publicly-oriented perspectives are better represented within them. We may already be able to identify some efforts in that direction on the part of the EU institutions, including EU rules on the creation of independent national sectoral regulatory authorities,[52] or recently promulgated EU legislative solutions for alternative dispute resolution and online dispute resolution schemes[53] or for the elaboration of an EU approach to standard setting.[54] Such efforts might be salutary, but may fall short of their promise for a number of different reasons. First, this is because formal legitimacy does not necessarily entail empirical legitimacy in the sense of wider social acceptance of a practice.[55] This reflects the fact that it is possible for formally or procedurally proper processes or decisions to nonetheless disguise substantial imbalances in input and access. Secondly, strengthening procedural formalities does not necessarily guarantee that regimes will be effective

[52] see SACM Lavrijssen and AT Ottow, 'Independent Supervisory Authorities: a Fragile Concept' (2012) 39 *Legal Issues of Economic Integration* 419.

[53] Dir 2013/11/EU on alternative dispute resolution for consumer disputes (Directive on consumer ADR); Reg (EU) No 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR).

[54] Reg (EU) No 1025/2012 on European standardisation.

[55] J Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2468.

in pursuing their mandate. Finally, and particularly important for present purposes, strengthening procedural formality requirements does not provide a normative model of interaction between different normative orders and institutions and might even strengthen their differentiation or self-sufficiency.

A yet further conception of a normative model of EU legal integration, and the last one that I consider here, is a more integrative one, perhaps reflecting the intuition of the original codification exercises: to identify commonalities (to use a relatively neutral term) that might supply the backbone of an effort of legal consolidation.

The most ambitious and all-encompassing version of an integrative model would be the idea of codification of EU private law, in a way that both consolidates and makes coherent its various sources (both autonomy promoting and instrumentalist). Thus, in the face of CJEU caselaw which appears to sacrifice the public interest of justice between the parties to the public interest of EU integration,[56] Schmid suggests that an all-encompassing code would "almost inevitably have to follow the European tradition" of a "justice-oriented non-instrumental private law". The potential to integrate various dimensions of the public interest in a code that incorporates not only the instrumentalist rules of current EU private law, but also puts "autonomy and solidarity" as core private law principles on equal footing as market integration, would be further enhanced by committing such a code to the new EU fundamental rights charter.[57] The desirable result would be to deliver rules, principles and practices that balance as between these various worthy public goals, currently ambient in various normative orders.

There are some obvious reasons for caution, which have been explored at length elsewhere. It adds nothing new to the debate to say that such a task seems quite daunting both from a practical and from a conceptual point of view. From a practical point of view, it is quite doubtful that the profound normative diversity can be subsumed under a single roof, unless this is to be a mere collection and pruning exercise (as is the case with the so called "US Code" for example), which does not seem to be not what proponents envisage.[58] Even more fundamentally, the diversity of goals and instruments make this task conceptually daunting as well. As Wilhelmsson points out, there can even be different views about what the best market-promoting private law measures are. If we expand the view also to interventions that are meant to pursue different substantive welfare ideals, "there is no coherent system of values behind the present welfarism of the contract laws of the EC and

[56] CU Schmid, 'The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code' (2005) 1 *European Review of Contract Law* 211, 225 ("the *effet utile* of market integration is placed above all—including above justice among the parties").

[57] *ibid* 225 f.

[58] Given the dynamism of normative change in many of the relevant law-producing settings, it seems even mere collection and pruning would be quite difficult, if not meaningless.

the Member States" nor is it in his view "possible to combine the varieties of welfarism" in one coherent whole at one point in time, let alone over time.[59]

Interestingly, we see that in the practical instantiations of such codification attempts, both academics and law-makers immediately strive to carve off separate chunks of the problem so as to make it practically more manageable and perhaps also to cabin off protests from different specialised communities with vested interests in their existing instruments. The proposed sales instrument as the only concrete output so far on the table,[60] given its optional nature, only adds to the fragmentation rather than achieving consolidation or integration. By itself, this is neither here nor there, but unless such an instrument carries other benefits[61] the mere fact that it increases legal complexity seems to be a negative.

An integrative model of fragmented normativities and resulting conflicts that is neither mere choice of law nor codification might be that of a platform. The concept of a platform is used both in technology and in economics[62] and is proposed here in the rather ecumenical sense of a mechanism that creates value by bringing together and allowing for the interaction of various relatively separate units, without purporting to encompass or unify them under a common roof. A platform solution might allow the different normative orders to exist separately, while at the same time providing for mutual interaction in a way that, on an optimistic scenario, promotes various dimensions of the public interest, while also controlling some of the dysfunctions that can arise within relatively isolated specialised groups. Given this rather functional conception, it is little surprise that such a platform can have different kinds of practical instantiations. In light of the exploratory nature of this essay, I suggest three examples that offer possible prototypes for such platform integration, to identify circumstances that give rise to them, as well as canvass some possible advantages and problems. I do not suggest that this is an exhaustive menu and acknowledge that there are probably others not canvassed here. Nor do I propose to express a preference for any one of these prototypes, not least because it is quite likely that different types of integrative platforms could subsist at any one time in different contexts.

[59] T Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal* 712, 732 f. Both national and sectoral variability is a relevant obstacle. To take an example at random, tenants might require very different contractual protections depending on the current state of the housing market and leasing practices typical in different settings.

[60] Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final.

[61] e.g. S Grundmann and W Kerber, 'An Optional European Contract Law Code—Advantages and disadvantages' (2005) 21 *European Journal of Law and Economics* 215.

[62] A Hagiu and J Wright, 'Multi-Sided Platforms' (2011) *HBS Working Paper* 12-024 http://www.hbs.edu/faculty/Publication%20Files/12-024.pdf.

8.4.1 Judicial Platforms: Mutual Monitoring

The first example is that of a judicial platform which is quite familiar to EU lawyers and made possible by the fact that the various judicial regimes (national and EU) are structured hierarchically with the apex court in each regime sometimes declaring to be the master of their own domain having the right to review even the actions of other apex courts.[63] This has produced the famous "so long as" formula of the German Bundesverfassungsgericht from the *Solange* line of cases[64] for the avoidance (or management) of possible conflicts with the EU legal order whereby one normative regime invites another one to consider and promote values (or dimensions of the public interest) that the first one is tasked with or holds particularly dear, but which may otherwise be sacrificed by the pursuit of other (also worthy) goals by the second normative order. The formulation "I will defer to your decisions in pursuit of goal X (e.g., market integration), so long as at the same time you do not sacrifice goal Y (e.g., fundamental rights)", has the advantage of allowing deliberative interaction over time between the two orders through mutual monitoring, a model that could be extended to other contexts. EU integration is the platform that creates the mutual interdependence between the two normative orders, which in turn means that they cannot simply ignore each other and thus might engage in mutual monitoring and even conversation that could result in an "overlapping consensus" in the promotion of relevant shared goals of public policy.[65]

The foregoing description both suggests some conditions that may be necessary for such interaction between two orders to take place as well as possible concerns and limitations. For this type of mutual monitoring platform to emerge, one condition seems to be that a body which is part of one normative order can credibly threaten to interfere or interrupt the activities of another legal order if a particular objective is sacrificed, yet at the same time it seems that there also needs to be some uncertainty as to its ability to interfere effectively. Thus, a court which sits at the top of the judicial hierarchy within its own domain, such as the Bundesverfassungsgericht or the EU judiciary in cases like *Solange* or *Kadi*, could make such a threat vis-à-vis normative orders to which they were not in a clear hierarchical relationship, even if the efficacy of such a volley is quite uncertain. The absence of a clear hierarchical relationship between the orders is what may ensure that one normative order will neither be able nor tempted to simply assign the promotion of all dimensions of the public interest to itself and will pay due respect to the specialisation of the other normative order. Where a public authority delegates a task to a private standard-setting organisation, this condition may not be satisfied: the

[63] De Búrca, 'The ECJ and the International Legal Order', 43 f.

[64] BVerfG, 29/5/1974, 37 *Entscheidungen des Bundesverfassungsgerichts* 271; BVerfG, 22/10/1986, 73 *Entscheidungen des Bundesverfassungsgerichts* 339.

[65] CF Sabel and O Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 511.

public authority would at least formally be able to take over the task and even if it is not capable of performing the task itself, it might at least be tempted to do so.[66]

In addition, a potential limitation stems from constraints on the efficacy of the monitoring regime due to two related considerations, including (i) the type of right or public goal that is to be protected, and (ii) the infrastructure and capacity of the relevant bodies to monitor each other's activities *and* their effects on different goals. Thus in the standard cases in which such formulations arose, the nature of the public goal to be protected were fundamental rights defined principally by their procedural character, so that whether the goal was promoted or not could to a large extent be determined on a case-by-case basis and a simple observation of the case file. There are many types of public goals, namely ones which entail substantive positive obligations of action, such as the promotion of competition or the sustainable exploitation of energy resources, where case by case monitoring is inadequate precisely because even if there is a restriction (say on competition) in a single case, it might be necessary to promote another goal (say sustainable energy use or technology interoperability). Yet the restriction might be implemented and adjusted over time in a way that ameliorates the initial restriction on competition. To validate such claims, however, may require a more elaborate monitoring infrastructure, particularly compared to what courts are ordinarily equipped with.[67]

8.4.2 Agency Platforms: Reflexivity or Merger

A second model for the platform integration of normative orders that promote different aspects of the public interest would be to exploit the EU push for the establishment of independent regulatory agencies. Such agencies are themselves specialised in certain sectors or tasks, but they could also build more elaborate and flexible mechanisms for interaction with other relevant actors, as well as for monitoring within their domain of expertise. Thus, Brousseau and Glachant have envisaged the work of regulatory agencies as "reflexive governance platforms",[68] allowing for the continuous interaction of relevant stakeholders to a specific regulatory problem, in a way which might promote different policy goals. In network industries such goals could include competition and access, consumer protection, universal service,

[66] See for example the relationship between the Dutch competition authority and the Dutch Association of Travel Agents and Tour Operators (ANVR). NMa, Dutch travel trade association must amend its General Agency Conditions (1 May, 2012).

[67] see B Kas, 'Reshaping the Boundaries of the Enforcement of European Social Regulation: Unitas in Diversitate—the Construction of a Hybrid Relationship' (in particular the reconstruction of the case of C-237/07 *Janecek v Freistaat Bayern* [2008] ECR I-6221); Guido Comparato, 'Behind Judicial Resistance to European Private Law', both in Micklitz and Svetiev (eds), *Self-Sufficient European regulatory private law: A viable concept?*

[68] E Brousseau and JM Glachant, 'Regulators as Reflexive Governance Platforms' (2011) 12 *Competition and Regulation in Network Industries* 194.

investment in infrastructure, environmental protection and so on. Thus, because the "relevant information and knowledge are dispersed and permanently evolving, regulators have to organize fora in which the stakeholders have incentives to reveal information".[69] The model for such reflexive governance platforms appear to be the Florence Electricity Forum and the Madrid Gas Forum, which were created as mechanisms that "permit and indeed encourage industry input into the legal architecture."[70] They are precisely aimed at bringing together various market participants, including associations of transmission operators, producers, consumers, users, traders so as to shape legal measures and regulatory action.[71]

Again, without proposing to fully evaluate such an approach of integrating specialised regimes, I mention three immediate potential concerns. First, to the extent that this model is built on the quasi-corporatist principle of representation, it faces the usual problem of determining the adequate level and diversity of representation, including by less well-resourced or organised actors and associations.[72] Secondly, to the extent that the model depends on repeated interactions between the same organisations and individuals, for the purpose of building shared perspectives on the underlying problems and an epistemic community, it leads to concerns about scrutability and capture. To take just one example, it might be easy for all participating actors to come to share the view that it is precisely the fact that they are shielded from public scrutiny that enables frank and open discussion and sharing of views that promotes an environment of reflexivity.[73] Such a view could be buttressed by a distinct position that discussions involve sensitive commercial information of private operators in an industry, furthering a bias against scrutiny and openness.[74] Repeated behind closed doors informal interactions[75] could produce stability, shared perspectives, and a cohesive if reflexive epistemic community, but given its inscrutability, its activities in the creation and enforcement of norms would both be vulnerable to capture and very difficult to evaluate.

Another form of integration of different dimensions of public policy implemented by administrative agencies has been observed in some EU Member States, through the merger of different if allied policy mandates under the single roof of

[69] Ibid.

[70] P Cameron, *Competition in Energy Markets: Law and Regulation in the European Union* (Oxford, Oxford University Press, 2007) 101.

[71] Ibid, 102.

[72] E Bohne, 'Conflicts between national regulatory cultures and EU energy regulations' (2011) 19 *Utilities Policy* 255, 260, 264 (regulatory complexity itself can foreclose participation by certain groups).

[73] Ibid, 265 f.

[74] The mere presence of public authorities does not in itself guarantee that an alternative attitude to transparency would prevail. E.g., CJEU, judgment of 6/6/2013, Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG*, not yet reported.

[75] Bohne, 'Conflicts between national regulatory cultures', 264 f., highlights the importance of informal negotiations in the energy sector.

one agency as opposed to the more usual sectoral models of specialised agencies.[76] Germany, for instance, always relied on an integrated agency, the Bundesnetzagentur, for the regulation of the networked industries, including electricity and gas, telecommunications, post and rail. More recently, the Netherlands has undertaken a prominent merger of its communications, consumer and competition authorities[77] (with the latter already having the responsibility for the energy market) into the new Dutch Authority for Consumers and Markets (ACM), with Spain and other EU Member States apparently undergoing or considering similar agency mergers.

Such mergers could offer various possibilities for reinforcement across different policy mandates, including their private law and regulatory dimensions.[78] Thus, to the extent that consumer and competition law are both transversal policies and are both concerned with the interest of consumers as market participants, merging the authorities could enable them to exploit policy complementarities. Agency mergers across sectors or mandates might also enable different agencies to disrupt their habits as to how they typically employ their usual instruments of implementation or how they define their goals, as well as to try new instruments or even reformulate their goals. At least with respect to the Dutch merger, it seems that an explicit goal of the process was to produce cross-fertilisation, as well as disruption of policy habits and cultures in a way that might lead to institutional and policy innovation.[79]

One risk of such an attempt at integration is that it occurs only formally, while the different component parts of the new institution continue to focus on narrowly defined policy mandates through habitual patterns of decision-making and analysis.[80] A more significant risk is that given the mode of integration or the organisational and personnel make-up of the new institution, one policy mandate becomes dominant, in the sense that the others become subordinate to it. Thus, for instance, consumer welfare may be pursued exclusively through the promotion of the typical intermediate goals of competition or liberalisation, without the more active mandatory tools that might otherwise be used by a consumer agency. In a recent case, the Dutch ACM investigated a decision of the trade association of the Dutch energy industry, Energie Nederlandplan to close down coal power plants built in the 1980s, made in conjunction with a broader accord (SER Energieakkoord) of the Social and Economic Council of the Netherlands, including "employers' associations, unions, environmental organizations, central, regional and local government, and other so-

[76] AT Ottow, *Erosion or Innovation? The Institutional Design of Competition Agencies—A Dutch Case Study* (unpublished manuscript, 2013).

[77] A move that apparently was contrary to the experts' advice offered to the Dutch Ministry. K Yesilkagit, 'To Merge or Not to Merge: The Institutional Re-design of Telecoms Regulation in the Netherlands' in D Aubin and K Verhoest (eds), *Multilevel Regulation in Telecommunications: Adaptive Regulatory Arrangements in Belgium, Ireland, the Netherlands, and Switzerland* (Palgrave Macmillan, Basingstoke, forthcoming).

[78] c.f. Y Svetiev, 'Antitrust Law and Development Policy: Subordination, Self-Sufficiency or Integration?' (2013) 4 *European Yearbook of International Economic Law* 223.

[79] Ottow, 'Erosion or Innovation'.

[80] DA Hyman and WE Kovacic, 'Competition Agencies with Complex Policy Portfolios; Divide or Conquer?' (2013) *GWU Law School Public Law Research Paper* No 2012-70 http://ssrn.com/abstract=2110351.

cial organizations" aiming to make the supply of energy more sustainable.[81] The ACM came to the conclusion that the association agreement was contrary to Dutch and EU competition law, based on its assessment that on balance it harms consumers, and offers too few environmental benefits.[82]

My aim again is not to examine the merits of such cases or the approach of the ACM in making such an assessment. It is simply to highlight the possibility that a unification of mandates could result in subordination of policy goals and instruments. In many instances, looking at a problem in a single case instance can involve a trade-off between goals such as competition or access versus energy sustainability or consumer protection. There may be different ways to achieve alternative public goals that do not involve a restriction of competition, such as through public financing or legislation instead of a private association agreement, but one might question whether a markets authority is capable of evaluating them or the likelihood that they would be adopted or that they would be even more restrictive of competition. Moreover, the implementation of a planned action or an association standard over time can oftentimes be shaped in a way that minimises anticompetitive or exclusionary effects. At the same time, an integrated authority is more likely to have the monitoring and adjustment capacities that could ensure the achievement of synergies as opposed to mere trade-offs in policy mandates.

8.4.3 Problem-based Platforms

The final model for ERPL as an integrative platform is neither purely judicial nor purely administrative, but problem-based. An example comes from the growing use by the European Commission and national competition authorities of a contractual tool for resolving cases[83] through negotiated remedies with undertakings *pace* the competition law rules and precedents.[84] While typically this tool is interpreted as a settlement agreement between authority and defendant,[85] an alternative view is that it provides a platform that can take into account various policy goals that are at issue in the underlying problem, including access, consumer protection, innova-

[81] Analysis by the Netherlands Authority for Consumers and Markets (ACM) of the planned agreement on closing down coal power plants from the 1980s as part of the Social and Economic Council of the Netherlands' SER Energieakkoord.

[82] see also above n. 66.

[83] Thus, it may be viewed as an example of 'regulatory private law' in its instruments, as well as its goals.

[84] In fact, the tool has been frequently used in the context of private standard-setting efforts, including sports leagues and technology standard-setting. S Rab et al, 'Commitments in EU Competition Cases' (2010) 1 *Journal of European Competition Law and Practice* 171, 176–180.

[85] e.g. F Wagner-von Papp, 'Best and Even Better Practices in Commitment Procedures After *Alrosa*: The Dangers of Abandoning the "Struggle for Competition Law"' (2012) 49 *Common Market Law Review* 929.

tion or even environmental goals.[86] As such, it can also provide a platform to brings together various specialisations that could ensure both the intervention's efficacy along various public interest dimensions and its accountability. Before the implementation of the negotiated remedies, both third parties[87] and national competition authorities[88] are given an opportunity to provide input on the proposed remedies. Following the formal decision, such a mechanism allows further opportunities for institutional innovation in the monitoring of implementation, where both private expert monitors but also national sectoral authorities have been used.[89]

Again the foregoing is just one example that provides a possible platform format. The fact that it also comes from competition law is not meant to privilege a particular perspective, but it is likely also not accidental. Like traditional private law, competition law is transversal (as it applies across sectors), and yet in the EU the view that it has heterodox goals and can be used to advance various aspects of the public interest is part of the law's DNA[90] and continues to hold sway.[91] As with the other examples, I avoid an attempt at a complete evaluation of the merits of this tool as a platform model. The literature points to numerous potential concerns about the use of such mechanisms, which must be carefully considered. One such concern is about the abandonment of the "struggle for law"[92], even if it is possible to view this practice as a source of remedial law rather than a law of prohibitions.[93] Compared to the other prototypes, it may offer more scope for institutional innovation precisely because different problems may call for different specialties and this platform format avoids both the stability of the merged agency and the repeated interactions that may be inherent in the "reflexive governance" forum.

8.5 Conclusion

As is now generally recognised, the plurality of normative orders is not necessarily a new phenomenon, though it was perhaps somewhat obscured from view by a dominant focus on State-law and legal institutions.[94] It is little surprise then that such a perspective has also come to be prevalent in EU law scholarship, focusing

[86] Y Svetiev, 'Settling or Learning Through Commitments?', *EUI Law Working Paper* (forthcoming).

[87] See Art 27(4) of Reg 1/2003 (publication for market testing).

[88] See Art 14(1) of Reg 1/2003 (review of decisions by the Advisory Committee on Restrictive Practices and Dominant Positions).

[89] COMP/39.386– Contrats Long Terme France (EDF) (17.03.2010) par. 51.

[90] See Art 101(3) TFEU.

[91] e.g. M Motta, *Competition Policy* (Cambridge, Cambridge University Press, 2004) 15–17.

[92] see Wagner-von Papp, 'Best and Even Better'.

[93] Svetiev, 'Settling or Learning'.

[94] E.g., B Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

on EU legal instruments and emanations in the form of regulations or directives, or doctrinal innovations for the interaction of EU and national law, such as supremacy and direct effect. Due to valuable contributions of many scholars, increasing attention has been paid to the bottom up perspective on EU integration, including its private law dimension, revealing perhaps unsurprisingly that there can also be a diversity of bottom-up perspectives. Relying on the contribution of the conflicts perspective on EU integration, one way to represent the fragmentation of legal orders is through the lens of specialisation and in particular the narrowing of goals as well as the usual instruments (including institutions) for the achievement of such goals. As such, even in the absence of complete rationalities or coherence, different normative orders might develop habitual ways to pursue seemingly well-defined goals. We might say that they pursue different aspects or dimensions of the public interest, even if at the same time they may be subject to blind spots or path-dependent suboptimal trajectories or overt capture.

Yet even cases where we might identify conflicts between normative orders in the 'true conflicts' sense—so that they seem to point to different outcomes in a specific instance—such conflicts can be handled either through choice or some attempt at integration. Choice privileges a particular perspective, and given some legal, structural or institutional constraints, that perspective may become systematically privileged within a transnational legal integration regime, which can lead to both efficacy and legitimacy concerns. A more integrative conception for European Regulatory Private Law is as platform law, which seeks to bring together various normativities and the dimension of the public interest that they habitually pursue, while at the same time allowing for instrument innovation via blending, hybridisation or even the outright borrowing of instruments from one realm into another. The essay offers some examples from somewhat disparate areas that can provide avenues for the pursuit of consilience –even across perspectives—and that seem to have arisen precisely out of the structures or interactions created by EU integration (at the very least EU integration may both have hastened their creation and provided the infrastructure for their realisation[95]). While some possible advantages and concerns of each of these models have been canvassed, I leave the full evaluation of their promise or viability as the question for another day.

References

Alchian, A, and Demsetz, H, 'Production, Information Costs, and Economic Organization' (1972) 62 *American Economic Review* 777.

Azoulai, L, 'The Court of Justice and the Social Market Economy. The emergence of an ideal and the conditions for its realization' (2009) 45 *Common Market Review* 1335.

Bernstein, L, 'Private Commercial Law in the Cotton Industry, Creating Cooperation Through Rules, Norms and Institutions' (2001) 99 *Michigan Law Review* 1724.

[95] c.f. L Azoulai 'The Court of Justice and the Social Market Economy. The emergence of an ideal and the conditions for its realization' (2009) 45 *Common Market Review* 1335.

von Bogdandy, A and Bast J, 'The Federal Order of Competences' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart, 2009).
Bohne E, 'Conflicts between national regulatory cultures and EU energy regulations' (2011) 19 *Utilities Policy* 255.
Brousseau, E, and Glachant, JM, 'Regulators as Reflexive Governance Platforms' (2011) 12 *Competition and Regulation in Network Industries* 194.
Cafaggi, F, Nicita, A and Pagano, U, 'Law, economics and institutional complexity: An introduction' in F Cafaggi, A Nicita, and U Pagano (eds), *Legal Orderings and Economic Institutions* (London, Routledge, 2007).
Cameron, P, *Competition in Energy Markets: Law and Regulation in the European Union* (Oxford, Oxford University Press, 2007).
Caruso, D, 'The Baby and the Bath Water: The American Critique of European Contract Law' (2013) 61 *American Journal of Comparative Law* 479.
Christensen, CM, *The Innovator's Dilemma* (Boston, Harper, 2003).
Christensen, CM, Roth, EA and Anthony, SD, *Seeing What's Next* (Boston, Harvard Business Review Press, 2004).
Cohen, J and Sabel, CF 'Extra Republicam Nulla Justitia?' (2005) 34 *Philosophy and Public Affairs* 147.
Currie, B, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function' (1958) 26 *University of Chicago Law Review* 9.
de Búrca, G, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51 *Harvard Journal of International Law* 1.
Duval, A, '*Lex Sportiva*: A Playground for Transnational Law' (2013) 19 *European Law Journal* 822.
Fischer-Lescano, A and Teubner, G, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.
Fox, E, 'Chairman Miller, the Federal Trade Commission, Economics and *Rashomon*' (1987) 50 *Law and Contemporary Problems* 33.
Frerichs, S, 'False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics' (2011) 34 *Journal of Consumer Policy* 289.
van Gestel, R, and Micklitz, H-W, 'European integration through standardization: How judicial review is breaking down the club house of private standardization bodies' (2013) 50 *Common Market Law Review* 145.
Goldberg, J, 'Pragmatism and Private Law' (Introduction to the Symposium 'The New Private Law') (2012) 125 *Harvard Law Review* 1640.
Grey, TC, 'Freestanding Legal Pragmatism' (1996) 18 *Cardozo Law Review* 21.
Grundmann, S, and Kerber, W, 'An Optional European Contract Law Code—Advantages and disadvantages' (2005) 21 *European Journal of Law and Economics* 215.
Hagiu, A and Wright, J, 'Multi-Sided Platforms' (2011) *HBS Working Paper 12-024*.
Heymann, J, 'The Relationship between EU Law and Private International Law Revisited: Of Diagonal Conflicts and the Means to Resolve Them' (2011) 13 *Yearbook of Private International Law* 557.
Hyman, DA and Kovacic, WE, 'Competition Agencies with Complex Policy Portfolios; Divide or Conquer?' (2013) *GWU Law School Public Law Research Paper* No 2012–70.
Joerges, C, Kjaer, P, and Ralli, T, 'A New Type of Conflicts Law as Constitutional Form in the Post-National Constellation' (2011) 2 *Transnational Legal Theory* 153.
La Porta, R, Lopez-de-Silanes, F and Shleifer, A,'The economic consequences of legal origin' (2008) 46 *Journal of Economic Literature* 285.
Lavrijssen, SACM and Ottow, AT, 'Independent Supervisory Authorities: a Fragile Concept' (2012) 39 *Legal Issues of Economic Integration* 419.
Leflar, RA, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 *New York University Law Review* 267.
Lindblom, C, 'The Science of "Muddling Through"' (1959) 19 *Public Administration Review* 79.

Lugard, P, and Möllman, M, 'A Commitment-a-Day Keeps the Court Away' (2013) 3 *CPI Antitrust Chronicle* 1.
Knill, C and Lenshow, A, 'Compliance, competition, and communication. Different approaches of European governance and their impact on national institutions' (2005) 48 *Journal of Common Market Studies* 583.
Koskenniemi, M, and Leino, P, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.
Mattei, U 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 *International Review of Law and Economics* 3.
Menand, L, *The Metaphysical Club* (New York, Farrar, Straus and Giroux, 2001).
Menand, L, *Pragmatism: A Reader* (New York, Vintage 1997).
Michaels, R, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57 *American Journal of Comparative Law* 765.
Michaels, R, 'The functional method of comparative law' in M Reimann and R Zimmermann (eds) *Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006).
Micklitz, H-W, 'Rethinking the public/private divide', in M Maduro, K Tuori, S Sankari (eds) *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge, Cambridge University Press, forthcoming).
Micklitz, H-W, 'The Unsystematics of a European legal culture' in G Helleringer and K Purnhagen (eds), *Towards a European Legal Culture* (Oxford, Hart, forthcoming).
Micklitz, H-W, 'Monistic ideology vs pluralistic reality—on the search of a normative design for European private law' in L Niglia (ed), *Pluralism and European Private Law* (Oxford, Hart Publishing, 2013).
Micklitz, H-W, 'The visible hand of European regulatory private law—The transformation of European private law from autonomy to functionalism in competition and regulation' (2009) 28 *Yearbook of European Law* 3.
Micklitz, H-W and Svetiev, Y (eds), *Self-Sufficient European regulatory private law: A viable concept*?, EUI Law Working Paper 2012–31.
Miller, GJ, *Managerial Dilemmas: The Political Economy of Hierarchy* (Cambridge, Cambridge University Press, 1992).
Mintz, J, Auerbach, A, Luborsky, L and Johnson, M, 'Patient's, Therapist's and observer's views of psychotherapy: a 'Rashomon' experience or a reasonable consensus?' (1973) 46 *British Journal of Medical Psychology* 83.
Motta, M, *Competition Policy* (Cambridge, Cambridge University Press, 2004).
Muir-Watt, H, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347.
Ottow, AT, *Erosion or Innovation? The Institutional Design of Competition Agencies—A Dutch Case Study* (unpublished manuscript, 2013).
Partnoy, F, 'The Shifting Contours of Global Derivatives Regulation' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 421.
Pauwelyn, J, 'Fragmentation of International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2012) 1406.
Posner, RA, 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.
Rab, S, et al, 'Commitments in EU Competition Cases' (2010) 1 *Journal of European Competition Law and Practice* 171.
Reese, W, '*Dépeçage*: A Common Phenomenon in Choice of Law' (1973) 73 *Columbia Law Review* 58.
Sabel, CF and Gerstenberg, O, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 511.
Sabel, CF and Zeitlin, J, 'Learning from difference: The new architecture of experimentalist governance in the EU' (2008) 14 *European Law Journal* 271.
Scharpf, F, 'The asymmetry of European integration, or why the EU cannot be a "social market economy"?' (2010) 8 *Socio-Economic Review* 211.

Schepel, H, *The Constitution of Private Governance* (Oxford, Hart, 2005).
Schmid, CU, 'The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code' (2005) European *Review of Contract Law* 211.
Schmid, CU, 'Diagonal Competence Conflicts between European Competition Law and National Regulation—A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing' (2000) 8 *European Review of Private Law* 155.
Steinmo, S, *The Evolution of Modern States: Sweden, Japan and the United States* (Cambridge, Cambridge University Press, 2010).
Stone Sweet, A, and Brunell, TL, 'Trustee Courts and the Judicialization of International Regimes' (2013) 1 *Journal of Law and Courts* 61.
Svetiev, Y 'Settling or Learning Through Competition Commitments?', *EUI Law Working Paper* (forthcoming).
Svetiev, Y, 'Antitrust Law and Development Policy: Subordination, Self-Sufficiency or Integration?' (2013) 4 *European Yearbook of International Economic Law* 223.
Taggart, M, 'From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575.
Tamanaha, B, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.
Teubner, G 'Global *Bukowina*: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Dartmouth, Aldershot, 1997).
Wagner-von Papp, F, 'Best and Even Better Practices in Commitment Procedures After *Alrosa*: The Dangers of Abandoning the "Struggle for Competition Law"' (2012) 49 *Common Market Law Review* 929.
Wai, R, 'Transnational liftoff and juridical touchdown: The regulatory function of private international law in an era of globalization' (2002) 40 *Columbia Journal of Transnational Law* 209.
Weiler, J, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.
Wieacker, F, *A History of Private Law in Europe* (Oxford, Clarendon, 1995).
Wilhelmsson, T, 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal* 712.
Yesilkagit, K, 'To Merge or Not to Merge: The Institutional Re-design of Telecoms Regulation in the Netherlands' in D Aubin and K Verhoest (eds), *Multilevel Regulation in Telecommunications: Adaptive Regulatory Arrangements in Belgium, Ireland, the Netherlands, and Switzerland* (Palgrave Macmillan, Basingstoke, forthcoming).
Yntema HE, 'The Historic Bases of Private International Law' (1953) 2 *American Journal of Comparative Law* 297.