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1

European Transnational Private Law – Considerations for a Research Agenda

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I. BY WAY OF PREFACE

This book represents an end and a new beginning.

A. Ending the External Dimension of EU Private Law

The book is an end in that it represents the closure of the research project on the 'External Dimension of EU Private Law' funded by the Finland Distinguished Professor Programme (FiDiPro) of the Academy of Finland and hosted at the Faculty of Law of the University of Helsinki, 2015–2021. This research project investigated the role of European (regulatory) private law in different parts of the world beyond the EU internal market with an emphasis on the under-researched Global South. It was conceived as a complement to an earlier project on European regulatory private law,[1] which aimed to shape the foundations of EU private law after the failure of initiatives to establish an EU Civil Code and an EU Constitution. The project on European regulatory private law was inward-looking, focusing on the transformative power of EU lawmaking (by the Court, the Commission, and the EU agencies) in interaction with the private-law orders of its Member States.[2]

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[1] ERC Advanced Grant 2011–2016 [grant agreement: 269722], located at the European University Institute.

[2] For a representative account of the research design and main conclusions of the project, see HW 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*

The FiDiPro project was conceived of as a complementary outward-looking project. It focused on the ways European (regulatory) private law interacts with those of foreign countries or regions. To analyse these interactions, the project involved several perspectives. It took a top-down perspective to investigate the substance, the form, and the impact of European (regulatory) private law in those foreign countries or regions. It also took a bottom-up view of diverse types of regulated market and modes of private ordering that underpinned these same interactions. It finally looked horizontally across different fields of EU (regulatory) private law in their projections beyond the EU internal market. Based in one of the border countries within the EU, as it is in Finland, the FiDiPro project sought in this way to scrutinise the role of European (regulatory) private law beyond EU frontiers.[3]

The core findings of the project have already been reported. Publications focus on regulated industries, such as energy,[4] telecommunications,[5] and finance.[6] This sectoral ambition was also paralleled with a focus on relatively eccentric yet ubiquitous sources of rulemaking in contemporary private law – standards, contracts, and codes – in this way extending attention on the role of European private law beyond the gravitation that case law has usually had within traditional private law studies.[7] An additional strand of research took a more geographical perspective, focusing on the impact of EU (regulatory) private law in different regions of the world. These included specialised studies on the role of EU consumer law in Asia,[8]

of European Law 3–60; HW Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge, Cambridge University Press, 2018). For varied accounts on the European Regulatory Private Law project, see also the special issue on the project published in the 22 (5) edition of the *European Law Journal* (2016), available at https://onlinelibrary.wiley.com/toc/14680386/2016/22/5. For an overall description and other research outputs in the project, see in general: https://cordis.europa.eu/project/id/269722.

[3] For an earlier framing of this FiDiPro research endeavour, see HW Micklitz, 'The Internal versus the External Dimension of European Private Law: A Conceptual Design and a Research Agenda' in M Cremona and HW Micklitz (eds), *Private Law in the External Relations of the EU* (Oxford, Oxford University Press, 2016).

[4] L de Almeida, 'Market Access, Harmonization, and Governance in Network Industries: The European Union and the World Trade Organization compared' in E Brousseau, JM Glachant and J Sgard (eds), *Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (Oxford, Oxford University Press, 2021); 'Standardization of Standard Contracts: Fairness in EU Energy Exchanges' in HW Micklitz and M Cantero Gamito (eds), *The Role of the EU Transnational Legal Ordering: Standards, Contracts, and Codes* (Cheltenham, Edward Elgar Publishing, 2020).

[5] M Cantero Gamito, 'Europeanization through Standardization: ICT and Telecommunications' (2018) 37 *Yearbook of European Law* 395–423; 'The External Dimension of the EU Digital Single Market. Geo-Blocking and Open Internet' in T Pihlajarinne, J Vesala, and O Honkkila (eds), *Online Distribution of Content in the EU* (Cheltenham, Edward Elgar Publishing, 2019); 'Latin America' and 'Access to Justice' in M Durovic, G Howells, A Janssen and HW Micklitz (eds), *Consumer Protection in Asia* (Oxford, Hart Publishing, 2022).

[6] T Juutilainen, 'EU Securitisation Regulation: Legal Ordering in Symbiosis with Transnational Bodies' in Cantero Gamito and Micklitz (n 4); S van Erp, J Uitdehaag, P Athanassiou, T Juutilainen and D Philippe, *ELI Principles on the Use of Digital Assets as Security*. Report of the European Law Institute (Vienna, European Law Institute, 2022), available at www.europeanlawinstitute.eu/projects-publications/completed-projects-old/use-of-digital-assets-as-security.

[7] Cantero Gamito and Micklitz (n 4); L de Almeida, M Cantero Gamito and HW Micklitz, 'Institutional and Normative Cooperation in Private Law, Beyond the Hague Conference Towards Standard Setting Organizations' in J Odermatt and R Wessel (eds), *Research Handbook on the European Union and International Organisations* (Cheltenham, Edward Elgar Publishing, 2019).

[8] Durovic, Howells, Janssen and Micklitz (n 5).

Africa,[9] and South America, each accompanied by a conference held on each continent – in Hong Kong, Cape Town, and Porto Alegre.[10] The project covered interactions among these various regions and international institutions in consumer law, connecting them to the development of transnational law.[11] A final strand of research took up the role of case law by looking into the impact of Court of Justice of the European Union (CJEU) judgments on the courts in neighbouring countries, in the Eurasian Economic Union, Continental Europe, Post-Soviet States, the Middle East, as well as East and North Africa.[12] This range of research outputs is a testimony of the diverse and vibrant terrain covered throughout these analyses of the external dimensions of European (regulatory) private law.

B. Beginning European Transnational Private Law

While consolidating the findings and closing the project, it proved necessary to give a new conceptual and theoretical frame to the diverse and technical observations in terms of where EU private law played a role outside the EU. This is where this book is also a new beginning. Reporting on the findings, the book proposes, at its core, to understand the external dimension of EU private law through the prism of an evolving *European transnational private law*.

This conceptual direction is the result of the FiDiPro project's two closing conferences that we held (virtually and in hybrid fashion) at the University of Helsinki in September 2020 and 2021, jointly organised by the four editors of the book. These conferences brought together a combination of established and upcoming scholars from diverse backgrounds who usually do not share the same venues, ranging from jurisprudence, history, and socio-legal scholarship, as well as several legal fields traditionally associated with either private law (for instance, financial law or international commercial law) or public law (for example, tax law, trade law, or EU external relations law), all united under the umbrella of investigating the relation between European private law and global markets and orders. We sought in this way to transcend established cleavages and disciplinary silos within contemporary legal studies – between and among not only European and international, global, or comparative legal research, but also diverse areas of legal specialisation and theoretical strands.

The overall ambition was to enable this kind of cross-sectional exchange to tackle a double-edged challenge. On the one hand, the challenge consisted of the need to

[9] HW Micklitz, T Naude and C Twigg-Flesner (eds), 'Special Issue on Consumer Law and Policy in Africa' (2018) 41 *Journal of Consumer Policy* 303–471.

[10] M Barata, L Bernstein, C Lima Marques and HW Micklitz (eds), 'Special Issue Consumer Law in South America' (2022) 45 *Journal of Consumer Policy* 1–147.

[11] HW Micklitz, A Mathios, LA Reisch, J Thøgersen and C Twigg Flesner (eds), 'Celebrating 40 Years of the Journal of Consumer Policy: The Future of Consumer Law and Policy – Internationalisation, Digitalisation and Sustainability' (2020) 43 *Journal of Consumer Policy* 1–248, elaborated on by HW Micklitz in chapter 8 of this book.

[12] A Reich and HW Micklitz, *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford, Oxford University Press, 2020).

know better what is going on in the various fields of European private law by means of specialised research about private law in different sectors of the global economy. On the other hand, the challenge was also to find an appropriate conceptual framework that can productively encompass different ways of identifying, understanding, and assessing the place of European private law and the role that it is playing or could play in the (re-)configuration of foreign or transnational markets as well as reflecting upon its material, cultural, or normative implications. In other words, the challenge was to elaborate a framework that can strengthen the analytical link between theory and practice but without necessarily hampering theoretical and methodological positioning and experimentation. This is particularly relevant regarding an object of study such as the foreign reach of European private law, which situates itself at the crossroads of countless domains within and beyond legal studies and thereby resists disciplinary categorisation. It is out of those conversations that the concept of European transnational private law emerged as a productive way to address these challenges.

This introductory chapter expounds on why and how this is the case by elaborating on each of its components. As we move along these components, the emphasis is placed on the ways in which this notion relates to multiple strands of research concerning the role of the EU in global governance, as well as some of the latest approaches in global and comparative-law studies discussing Eurocentrism and colonialisation, which can productively be integrated into an emerging realm of European transnational private law. Along the way, we also underscore some of the prospects that the notion of European transnational private law conveys as a research agenda within and beyond this volume. Under this rubric we thus aim to inaugurate a dynamic interdisciplinary dialogue that integrates doctrinal analysis with theory, history, as well as practical or empirical insights on the place and role of EU private law in the changing landscapes of the global political economy. The title 'foundations' is a deliberate choice. We thereby seek to emulate a similar volume on the internal dimension of European private law that was published nearly a decade ago[13] and the title emphasises the preliminary and exploratory character of a concept that requires further shaping.

This introductory chapter starts by discussing the different components of the notion, that is, European law (section II) transnational law (section III) and private law (section IV). It then continues by discussing how the relation between European and private law is conceived in this book (section V) and then concludes with the methodological dimension of the project (section VI).

II. EUROPEAN

Studying European private law is a difficult endeavour, as the field itself is a moving target. It can relate to the self-standing rules on EU private law that the FiDiPro project

[13] R Brownsword, HW Micklitz, L Niglia and S Weatherill (eds), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011).

has been investigating under the umbrella of a self-sufficient regulatory private law.[14] EU regulatory private law then refers to the EU as the central political and legislative actor and a notion of private law that intersects with market regulation. But as every EU private-law scholar recognises, the field of private law in the EU, including its regulatory connotation, rests significantly on the private law of the Member States. Investigating the EU without the European is not possible. EU integration is unthinkable without a shared (European) understanding of law and its role in economic and societal life.

Yet, the analysis of the national level of conceiving private law expands our understanding of this European dimension of private law in many ways. Beyond merely representing sites of implementation of EU rules and being viewed comparatively from the perspective of different 'legal families' and traditions, European private law has a heritage of its own. In fact, one may conceive of private law as we understand and research it as having a distinctly European origin. Despite current approaches with the aim of de-Europeanising legal scholarship, private law is not free from the conceptual heritage of nineteenth- and twentieth-century European scholarship. Furthermore, the main monuments of nation-building, namely (European) private law codifications, have until today been central parts of legal communication with a global dimension. With increasing international trade and communication, not least with European colonialism and the considerable growth of academia, (ideas of) codes have circulated – both from and to Europe – and been translated into each national reality.

However, a wider, global perspective has demonstrated that the internationalisation of law and legal scholarship has been leading to what has been called the 'Europeanisation of the world'. As a consequence, studies of the reception of European law and references to expert cultures and elite networks have until today dominated legal history and private-law scholarship, for instance in Africa, Latin America, and Asia.[15] Therefore, with the move from an EU to a European perspective on private law we want to pay due respect to the fact that the concept of private law in and of itself originates in Europe but not necessarily in the EU.

III. TRANSNATIONAL (LAW)

What, then, has prompted the shift from the 'external dimension' to transnational law and ordering? In investigating the 'reach' or 'moving' of European and EU private law, the target has initially been understood relatively broadly; the project had been looking at other countries or regions of the world and their adaption of EU concepts as well as international private and public organisations. But one result of the FiDiPro research has also been the insight that the expansion of European private law has

[14] For the concept, Micklitz, 'The Visible Hand of European Regulatory Private Law' (n 2), specified in HW Micklitz, G Comparato and Y Svetiev, 'The Regulatory Character of European Private Law' in CH Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar Publishing, 2016).

[15] See P Letto-Vanamo, in chapter 5 of this book.

been significantly related to processes of (legal) ordering that are shaped and imagined by epistemic communities.

The paradigm of transnational law is increasingly capturing the imagination or re-imagination within law and legal thought nowadays. Driven by widespread and fast-evolving modes of normative ordering that have emerged in the context of cross-national commercial, political, and cultural activities, this ascendancy is manifested in an exponential range of publications on the topic in all genres of legal scholarship.[16] Yet transnational law is not only a scholarly or pedagogic endeavour. Even more importantly, it has started to permeate the legal consciousness of all those participating in these perceived transnational legal orders, inciting concomitant claims to legal/political authority, responsibility, and contestation.[17]

These developments have proceeded alongside ongoing transformation of the international economic and political order from multilateralism to segmented coalitions, which go hand in hand with the internal transformation of the nation state,[18] adding a new layer of complexity to the phenomenon and the scholarly debate. In addition, from the perspective of private law, processes of financialisation, digitalisation, and the rise of global value chains have propelled a new discussion on the role and function of different areas of private law. These phenomena have started a debate on the extent to which legal categories and legal institutions, contract in particular,[19] but also torts,[20] fit these new forms of global economic organisation. The result is not only a de-territorialisation of private law in the functional use of contracts and contract law by private actors along the value chain across borders, but also fundamental changes within core legal distinctions which the notion of transnational law intends to capture. This is apparent in the vanishing of the product/process divide that governs international economic law and old, taken-for-granted principles in contract law, such as privity of contract. This all sits uneasily on the legal concept of extraterritoriality, the predominant understandings of economic

[16] These certainly include specialised essays and monographs, but also – and most notably – signature textbooks or 'cases and materials', as well as prominent handbooks. See, eg, MW Reimann, JC Hathaway, TL Dickinson and JH Samuels, *Transnational Law, Cases and Materials*, 1st edn (St Paul/MN, West, 2013); AC Aman and CJ Greenhouse, *Transnational Law: Cases and Problems in an Interconnected World* (Durham/NC, Carolina Academic Press, 2017); and, for an overview of its diverse epistemic ramifications, P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford, Oxford University Press, 2021).

[17] P Zumbansen, 'Transnational Law, Evolving' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law*, 2nd edn (Cheltenham, Edward Elgar Publishing, 2012); TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (Cambridge, Cambridge University Press, 2015); J Black, '"Says Who?" Liquid Authority and Interpretive Control in Transnational Regulatory Regimes' (2017) 9 *International Theory* 286–310; and H Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge, Cambridge University Press, 2018): all offering rich accounts of these developments based on several concrete examples.

[18] R Michaels and N Jansen, 'Private Law beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *The American Journal of Comparative Law* 843–90; HW Micklitz and D Patterson, 'From the Nation State to the Market State: The Evolution of EU Private Law' in B van Vooren, S Blockmans a nd J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford, Oxford University Press, 2013).

[19] A Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Oxford, Hart Publishing, 2015).

[20] R Condon, *Network Responsibility: European Tort Law in the Society of Networks* (Cambridge, Cambridge University Press, 2022).

organisation and, indeed, with the very concept of boundaries in transnational regulatory terrains.[21]

This focus on transnational legal problems has innovatively challenged traditional doctrines of legal sources by illuminating the extent to which several legal situations and positions are purportedly governed by modes of rulemaking or adjudication that transcend the frontiers of any single state. This insight underpins the emblematic definition of transnational law advanced by Jessup as encompassing 'all law which regulates actions or events that transcend national frontiers', including public and private international law as well as 'other rules which do not wholly fit into such standard categories'.[22] In this sense, the notion of transnational law has become disruptive. It undermines several pillars that had traditionally sustained modern legal imaginaries, such as assumptions of hierarchy, territoriality, universalisation, and what counts as 'law' through the inclusion of private regulation. It also breaks the taboo regarding the ultimate legal and political authority of the nation state by highlighting how several states perform as agents rather than as principals within broader modes of transnational legal orderings.[23]

This has several advantages. The concept of transnational law has contributed to opening up modern legal imaginaries to a range of undercurrents and countercurrents that have long been populating modern law and legal thought, including those of legal pluralism, law-in-action, law-in-context, and other strands of legal theory and socio-legal studies broadly conceived.[24] The concept has indeed become a venue for prominent theoretical innovation and methodological experimentation for studying law and dynamics of legal change in a post-national context, which are driven by concurrent modes of purported legal ordering happening without, above, below, within, beside, between, or beyond states.[25] In this sense, the concept of transnational

[21] See, in general, M Renner, *Zwingendes transnationales Recht: zur Struktur der Wirtschaftsverfassung jenseits des Staates* (Baden-Baden, Nomos, 2010); GP Calliess and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford, Hart Publishing, 2010); and R Brownsword, RAJ van Gestel and HW Micklitz (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Cheltenham, Edward Elgar Publishing, 2017).

[22] PC Jessup, *Transnational Law* (New Haven, Yale University Press, 1956) 3.

[23] P Glenn, 'A Transnational Concept of Law' in P Cane and MV Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press 2005); R Cotterrell, 'What Is Transnational Law?' (2012) 37 *Law & Social Inquiry* 500. See also G Handl, J Zekoll and P Zumbansen, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden, Martinus Nijhoff Publishers, 2012); and HM Watt, 'Private International Law beyond the Schism' (2011) 2 *Transnational Legal Theory* 347–437.

[24] S Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Social Inquiry* 975–95; P Zumbansen, 'Sociological Jurisprudence 2.0: Updating Law's Inter-Disciplinarity in a Global Context' in R Buchanan and P Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford, Hart Publishing, 2014); and R Cotterrell and M Del Mar (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Cheltenham, Edward Elgar Publishing, 2016).

[25] For some landmark contributions, see G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Dartmouth, Aldershot, 1997); B de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge, Cambridge University Press, 2002); R Wai, 'The Interlegality of Transnational Private Law Transdisciplinary Conflict of Laws' (2008) 71 *Law and Contemporary Problems* 107–27; R Michaels, 'Transnationalizing Comparative Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 352–58; and N Krisch, 'Framing Entangled Legalities beyond the State' in N Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge, Cambridge University Press, 2021).

law is productive in terms of transcending entrenched heuristics and cleavages that have been driving modern legal thinking, such as the public/private, national/international, hard/soft, or law/non-law distinctions. More incisively, the concept has also prompted salient modes of historiographical revisionism that have challenged the alleged centrality of the nation state in lawmaking processes even during modern times. In this way the concept of transnational law has revitalised some of the old wars of faith regarding where the authority of law stems from, whether on political will, transcendental reason, or social practices.[26] Thus the concept of transnational law has nowadays become in itself an 'essentially contested concept'.[27]

Jessup of course acutely anticipated such tensions. In a relatively overlooked excerpt, he stated that:

> Although every generation is confronted with novel complexities, it is a truism that the developments which these decades are witnessing require that old concepts be constantly re-examined with a mind unfettered by blind acceptance of traditional classifications and labels. It is to ease the transmission of thought in its approach to legal problems which transcend national frontiers that the term 'transnational' has recently come to be used more and more widely.[28]

Drawing upon this seminal status and sustained scepticism raised by the concept of transnational law that was originally foregrounded by Jessup, throughout this volume and our overall research agenda on European transnational private law we propose to reflexively turn Jessup's own predicament about this notion of transnational law to itself. This entails an invitation to use and scrutinise the very notion of 'transnational law' as a productive way to imagine or re-imagine current and future developments of European private law. Thus, by seeking to overcome established cleavages and disciplinary silos within contemporary legal studies, our project on European transnational private law – in the reflexive spirit of Jessup – precisely seeks to prompt a way for the very place and role of European private law in shaping transnational markets and orders to 'be constantly re-examined with a mind unfettered by blind acceptance of traditional classifications and labels'. Through the research agenda on European transnational private law that we inaugurate in this book, we therefore seek to encourage interdisciplinary and transdisciplinary analysis and interrogation, as Jessup himself concluded, on 'the interrelationships between the multiple factors which contribute to the unending processes of legal evolution' in European private law.[29]

IV. PRIVATE LAW

By investigating private law at the intersection of the European and the transnational, we also suggest a specific focus on the legal areas and the conceptual apparatus for

[26] For an overview, see G Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 *Annual Review of Law and Social Science* 231–65; N Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford, Oxford University Press, 2010).

[27] WB Gallie, 'Essentially Contested Concepts' (1955) 56 *Proceedings of the Aristotelian Society* 167–98.

[28] PC Jessup, 'The Concept of Transnational Law: An Introduction' (1963) 3 *Columbia Journal of Transnational Law* 1–24, esp 1.

[29] ibid 2.

our research project. The book contains two central conceptual chapters that outline the different ways in which to conceive of private law for the purposes of our project,[30] but it is nonetheless worth providing some more background and substance to the concepts as they shape the conceptual understanding of our research project. The focus on private law has been a stable factor; it was characteristic of the FiDiPro project on the external dimension as well as a characterising feature of our subsequent work on developing the concept of European transnational private law. And yet, the concept has been undergoing some transformation along the way.

A. Regulatory Private Law

Starting from the premise of private law as the core rules that constitute the economic institutions of – amongst others – property, contract, tort, and personhood, it became clear early on that such a 'traditional' understanding could be a useful starting point, but it would not get us sufficiently far in understanding private law beyond the nation state.

Already on the level of the EU, it is insufficient to equate private law with the perspective of a European civil code of which the Draft Common Frame of Reference[31] or the Common European Sales Law[32] are understood as building blocks. The Draft Common Frame of Reference suffered from serious shortcomings, such as missing rules on *relational contracts*,[33] where the parties engage in long-term commitments in contrast to one-shot transactions;[34] on *network contracts*, which play a dominant rule in the energy, telecommunications, transport and financial services sectors,[35] and on *contract governance*, which cuts across relational and network contracts.[36] The same holds true of the many open questions with regard to the so-called optional model on which the Common European Sales Law was based.[37] As is well-known, the two projects failed, as did academic proposals to build a European Civil Code from bottom-up rather than top-down.[38]

[30] See HW Micklitz in chapter 3 and A Beckers in chapter 2 of this book.

[31] C Von Bar, E Clive and H Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law*, 9 volumes (Köln, Otto Schmidt, 2009).

[32] COM (2011) 635 final 11 October 2011.

[33] S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55–67.

[34] C Joerges (ed), *Das Recht des Franchising: Konzeptionelle, rechtsvergleichende und europarechtliche Analysen* (Baden-Baden, Nomos, 1991) 153.

[35] G Teubner, *Networks as Connected Contracts* (Oxford, Hart Publishing, 2008); F Cafaggi, 'Contractual Networks and the Small Business Act' (2008) 4 *European Review of Contract Law* 493–570; M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-Operation* (London, Hart Publishing, 2009).

[36] F Cafaggi and H Muir Watt (eds), *Making European Private Law* (Cheltenham, Edward Elgar Publishing, 2008); S Grundmann, F Moslein, and K Riesenhuber (eds) *Contract Governance – Dimensions in Law and Interdisciplinary Research* (Oxford, Oxford University Press, 2015).

[37] Special issue in (2013) 50 (1–2) *Common Market Law Review*.

[38] H Collins, *The European Civil Code: The Way Forward* (Cambridge, Cambridge University Press, 2008); W van Gerven, J Lever and P Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford, Hart Publishing, 2001); D Schieck, L Waddington and M Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007); HW Micklitz, J Stuyck and E Terryn, *Cases, Materials and Text on Consumer Law*

European private law – this is the lesson to be learnt – should be conceived of as a genuine legal order which remains largely distinct from the national private law orders – an order which is autonomous in its 'own right' and self-standing.[39] This private law is understood as economic law,[40] covering not only contract and tort – systematically speaking, the European civil law continental codifications – but also public and private regulation of the economy. At the forefront is regulation of services, such as telecommunications, postal services, energy, transport, and financial services. In that respect, the new path of private law on a European level consisted of a regulatory private law that is inherently linked to the European Union understood as a market state.[41]

The Treaty of Rome did not affect national private law orders. It presupposes their existence and their functionality in governing private economic transactions across national borders. The 1968 Brussels Convention on Jurisdiction and the 1980 Rome Convention on the Applicable Law were based on traditional mechanisms of international lawmaking, meant to complement the European Economic Community as it then was. Savigny's international private law provided the conceptual answer to building national private law orders as a means and technique to decide on jurisdiction and applicable law in cross-border transactions. In the new millennium the original Conventions from 1968 and 1980 were transformed into EU regulations: the Brussels Convention into Regulation 44/2001/EC on jurisdiction, the Rome Convention into Regulation 593/2008/EC on contract law and Regulation 423/2007/EC on tort law. In a constant stream of judgments, the Court of Justice of the European Union (CJEU) has given shape to the Brussels Convention/Regulation on Jurisdiction, but not to the Rome Regulations I and II. The development of European private law took another path. It developed through constitutionalisation and through secondary regulation.

The constitutionalisation of European private law through the CJEU occurs via economic freedoms and fundamental rights. Private law is submitted to EU – and European – constitutional values. Largely unnoticed, the CJEU has used the economic freedoms and competition to develop an autonomous understanding of the key concepts underpinning private law. Plenty of cases affect the concepts of contract, of property, unjust enrichment, tort, state liability, prescription periods, and procedural rules.[42] The second strand of constitutionalisation goes back to the

(Oxford, Hart Publishing, 2010); A Hartkamp, C Sieburgh and W Devrou, *Cases, Materials and Text on European Law and Private Law* (Oxford, Hart Publishing, 2017); JM Smits, *Private Law 2.0: On the Role of Private Actors in a Post-National Society* (Chicago, Eleven International Publishing, 2011).

[39] The interaction between European private law and the national private law orders is a topic in itself to be studied in G Comparato, HW Micklitz and Y Svetiev *Private Law and Regulation* (Oxford, Hart Publishing, forthcoming).

[40] HD Assmann, G Brüggemeier, D Hart and C Joerges, *Wirtschaftsrecht als Kritik des Privatrechts* (Königstein/Ts. Athenäum, 1980).

[41] A Afilalo and D Patterson, 'Statecraft and the Foundations of European Union Law' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford, Oxford University Press, 2012).

[42] E Steindorff, *EG Vertrag und Privatrecht* (Baden-Baden, Nomos, 1996); C Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union* (Baden-Baden, Nomos, 2010); AS Hartkamp, *European Law and National Private Law* (Alphen aan den Rijn, Kluwer Law International, 2012); AS Hartkamp, et al

Charter of Fundamental Rights, which was made legally binding in the Treaty of Lisbon. The case law of the CJEU illustrates the impact of fundamental rights on economic freedoms and on secondary EU law. In labour law, social security, migration law and even in consumer law there is a certain tendency to apply the Charter in a non-economic non-market-driven context. Tendencies to overstep the boundaries of the internal market rationale are sometimes interpreted as a move to genuine European statehood.[43] However, in the core of private law relations, contract and tort, private law – 'traditional private law' – the instrumental market-driven use of economic freedoms and fundamental rights clearly dominates.

By far the most visible Europeanisation of private law matters has happened through secondary EU law, first through directives which had to be implemented and later ever more often through directly applicable regulations. It all started with the two unanimously agreed consumer policy programmes in 1976 and 1981. In the late 1960s the Member States had begun to react to the rise of the consumer society by adopting laws on consumer credit, on consumer safety, and on unfair terms. The decline of the welfare state goes along with the rise of the EU to boost the development of consumer law as a means of completing the internal market in the aftermath of adoption of Single European Act.[44] For nearly 25 years – until the adoption of Directive 99/44/EC on Consumer Sales in 1999[45] – building a European consumer contract law remained largely unnoticed. It remained a domain for consumer lawyers around the globe, disconnected from traditional private law scholarship. After the adoption of the Consumer Sales Directive, the European scene changed dramatically. Academics and politicians began to realise that the Europeanisation of consumer law had led to a growing body of rules which steadily and ever more intrusively affected national private law orders – much more than the Brussels and the Rome Conventions.[46] Closely connected to consumer law are attempts by the EU to harmonise labour law and in particular non-discrimination law. Two phenomena stand out. First and foremost is anti-discrimination law, which started in employment law and social security, but which entered into the private law domain to the dismay of some sections of legal academia, but largely supported by politics. Today, non-discrimination is a common European value which cuts across all areas of law.[47]

The third, and more covert, path of European regulatory private law comprises: (1) network markets and network law; (2) commercial practices, intellectual property

The Influence of EU Private Law on National Private Law (Alphen aan den Rijn, Kluwer Law International, 2014); HW Micklitz and C Sieburgh (eds), *Primary EU Law and Private Law Concepts* (Antwerp, Intersentia, 2017).

[43] See the (critical) contributions by Collins, Commandé, Ciacchi, Cherednychenko, Got and Mak in HW Micklitz (ed), *Constitutionalisation of European Private Law* (Oxford, Oxford University Press, 2014).

[44] S Weatherill, *EU Consumer Law and Policy* (Cheltenham, Edward Elgar Publishing, 2005); HW Micklitz, *Politics of Justice in European Private Law* (Cambridge, Cambridge University Press, 2018) 222.

[45] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

[46] See HW Micklitz in chapter 8 of this book.

[47] On the rise of non-discrimination law, see HW Micklitz (n 44) 201; on the relevance of non-discrimination in a sociological perspective, see R Münch, *European Governmentality, The Liberal Drift of Multilevel Governance* (London, Routledge, 2010) 28 et seq.

rights, and contract law; (3) competition law, state aid, and public procurement; and (4) health, food safety, and regulation of services. These four areas of European private law create new principles, new modes of concluding contracts, new remedies, new forms of contractual standard-setting, and new liability standards. The overview aims to demonstrate the vast areas of regulatory private law which are shaped by the EU and which are downgraded in analysis of European private law. It is here that the clash between the traditional concept of private law and modern market state concepts is most visible.

This concept of EU regulatory private law, namely as EU law intervening in private law relationships, has shaped this project significantly. It has been a core conceptual basis for the project of the external dimension, and it continues to influence the conception of European transnational private law. One can see this in the decisions of sectors and contributions that examine European private law through the lens of specific markets and the intersection between market regulation and private law.

B. Transnational Private Law and Private Regulation

Besides, the inquiry into European regulatory private law, whether horizontal like consumer law or sector-related like that of regulated industries, leads us also into new forms of rule/lawmaking and of new devices for enforcement. A common regulatory technique in European private law is co-regulation. Secondary law sets the statutory frame, which is then completed by rules which are either developed by private bodies (comitology, for example European and national standards bodies) or by European and national enforcement authorities (the Lamfalussy procedure). Whether and to what extent these rules affect private law is mainly a matter of empirical research.[48] The open method of co-ordination used to attract much more attention despite how ubiquitous these co-regulatory processes still are.[49] A strong governance dimension is evident in that these new processes of lawmaking and rulemaking are developed outside the scope of legal procedures – whether they are quasi-constitutional, quasi-administrative, or entirely self-organised.

These new forms result from the ever-increasing importance of European regulation, which typically mixes national with European regulatory approaches. The key players are national and European agencies as well as the European Commission, which intervene in lawmaking and law enforcement, often in a grey legal zone. This refers to boundary shifts in the division of competences between the EU and the Member States, typically in formally non-binding rules that nevertheless enjoy a wide de facto reach. These new forms of governance oscillate between lawmaking

[48] Cafaggi and Muir-Watt (n 36); F Cafaggi and H Muir-Watt (eds), *The Regulatory Function of European Private Law* (Cheltenham, Edward Elgar, 2009).

[49] J Zeitlin and P Pochet (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Brussels, PIE-Peter Lang, 2005); S Smismans, *Civil Society and Legitimate European Governance* (Cheltenham, Edward Elgar Publishing, 2006); FC Sabel and J Zeitlin 'Learning from Difference. The New Architecture of Experimentalist Governance in the EU (2008) 14 *European Law Journal* 271–327; CF Sabel and J Zeitlin, 'Experimentalism in the EU: Common Ground and Persistent Differences' (2012) 6 *Regulation & Governance* 410–26.

and law enforcement and are not limited to market regulation, but spill over into the relationship between private parties. Sometimes national and European actors intervene jointly in ongoing contractual relations. The rise of these new modes of governance presupposes the existence of a dense net of national and European agencies, which reach out to all relevant parts of the market.

Technical standards have also acquired a very special significance. Here state and private actors closely co-operate, typically in a constant exchange across national and European regulatory levels. This form of co-regulation is supplemented by constantly growing due-diligence obligations. The law on financial services is the forerunner in a development where the EU imposes on companies ever more sophisticated obligations which have to be implemented through internal or external compliance mechanisms and supervised and monitored by national and European enforcement authorities. In the Digital Services Act,[50] the EU regulator went one step further in promoting, as one form of compliance, elaboration of codes of conduct in which companies are encouraged to involve stakeholder organisations. Functionally, European technical standards and state-induced codes of conduct take on the role of a non-existent European contract law in business to business (b2b) relationships.[51] They form a regulatory underground, which is accomplished through the supervisory superstructure. In that sense b2b relations are sandwiched between EU regulation both from above and from below.[52]

A considerable part of regulatory private law, new forms of private lawmaking and enforcement in the EU have evolved as a self-standing dimension of transnational law. As is visible in several contributions, the focus on these new forms of private regulation prompts a shift in perspective: from the EU as a regulator intervening in private relationships to private actors setting their own regulations. A concept of transnational private law so conceived can trace not only formal rules, but also incorporate self-regulation, technical standards, contracts or the travelling of concepts via intellectual circles in academic projects.

V. RELATING EUROPEAN AND TRANSNATIONAL

Having clarified the concepts, we turn to the question of relation: How does our book, in the chapters and our conceptual foundations, relate the European and the transnational to one another? Is European private law something other than transnational private law or does one represent a part of the other? The book, with its diverse contributions, does not offer one single answer to this; instead, the contributions themselves yield different results in terms of what the relation between the two can be. The following analytical accounts of this relation suggest some directions as to how these relationships can be conceived and how our book relates to this question.

[50] Art 43 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

[51] HW Micklitz, 'Soft Law, Technical Standards and European Private Law' in M Eliantonio, E Korkea-aho and U Mörth (eds), *Research Handbook of Soft Law* (Cheltenham, Edward Elgar Publishing, 2023).

[52] HW Micklitz in chapter 3 of this book.

A. European Law as Transnational Law

One dominant approach has been to understand EU law as an example or even as a paradigmatic case of transnational law. From this view, EU law would qualify as a particular type of transnational legal ordering and can be productively conceived and studied as such.[53] This approach boasts a long heritage within EU legal studies. Its articulation can be traced to the enduring debate over the nature of the EU as a polity and its legal ordering. In particular, it can be traced to those that conceive the EU as neither a federal state nor an international organisation, but as a *sui generis* entity with its own and – in many ways distinctive – legal configuration as well as scientific and political appeal.[54] Certainly, this categorisation comes with many internal qualifications, disputes, and divergent positions.[55] Nevertheless, the concept of transnational law has proven jurisprudentially productive, in all its plasticity, to structure and channel these enduring debates.[56]

In our book, this understanding features in the historical analysis by Pia Letto-Vanamo, which relates current global or transnational legal vocabulary first and foremost to Europe.[57] It is also visible in the jurisprudential contribution by Rodrigo Vallejo, who discusses the European legal process in relation to the broader idea of transnational legal processes.[58] Instead of merely assimilating or distinguishing EU law from transnational law, our project conceptually conceives EU law as already immersed in broader modes of transnational legal ordering that transcends EU frontiers. In this view EU law is conceived as just a node within these larger and far-reaching arrays of networks that compose transnational legal orderings across the globe. These orderings are driven by a wide range of actors as well as recursive and multipolar processes of more/less formalised instances of rulemaking, monitoring, and enforcement, as well as political contestation at any stage of policy processes. This view thus aligns with some prominent articulations of transnational law as

[53] See, eg, for some salient articulations of this simile, KH Ladeur, 'European Law as Transnational Law – Europe Has to Be Conceived as an Hierarchical Network and Not as a Superstate' (2009) 10 *German Law Journal* 1357–89; and M Maduro, K Tuori and S Sankari, *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge, Cambridge University Press, 2014).

[54] A *locus classicus* of the latter is JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003). See also, more recently, J Habermas, *The Crisis of the European Union: A Response* (Hoboken, John Wiley & Sons, 2014). On the scientific appeal of EU law, see HW Micklitz, 'A European Advantage in Legal Scholarship?' in R van Gestel, HW Micklitz and EL Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge, Cambridge University Press, 2017).

[55] Some of which may be found in G de De Búrca and JHH Weiler, *The Worlds of European Constitutionalism* (Cambridge, Cambridge University Press, 2011); Dickson and Eleftheriadis (n 41); M Poiares Maduro and M Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (Cambridge, Cambridge University Press, 2017).

[56] For some further instantiations and variations, see PF Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-Nation al Constellation* (Oxford, Hart Publishing, 2010); A Vauchez and B de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Oxford, Hart Publishing, 2013); S Sankari and K Tuori (eds), *The Many Constitutions of Europe* (London, Routledge, 2016); Jiří Přibáň (ed), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (London, Routledge, 2016).

[57] See P Letto-Vanamo in chapter 5 of this book.

[58] See R Vallejo in chapter 4 of this book.

rendering a kind of method to productively navigate the increasing legal complexity of our interdependent worlds.[59]

In the analysis of sectors, we can see this transnational character of EU law, in solidly concrete form, in the field of finance and taxation. In these areas, as Anna Chadwick[60] and Katerina Pantazatou[61] show, the EU has been largely aligning to transnational paradigms of regulation; the EU has been downloading a significant degree of what has evolved on a transnational level. And, as Vibe Ulfbeck shows, in the field of climate change we also see in litigation and regulation how the European states are embedded within a wider transnational trend in terms of relying on tort law and regulation through corporate group and supply-chain obligations.[62] A prominent field of European transnational private law is European consumer law, where the EU has turned into a major regulatory power, quite often indirectly in countries through adaptation of national laws via amendments to the legal order of the former colonial power.[63]

B. European Law vs Transnational Law

A second perspective would be to distinguish EU law sharply from transnational law. In this view, EU law would stand separate from transnational legal orderings that populate the fluid realm of global governance. This approach has lately gained momentum in addition to ample analytical traction within EU law and EU legal scholarship as a basis for examining how EU law interacts (or should interact) with these diverse sets of transnational legal orderings.[64] This momentum has been boosted by a series of political agendas advanced by the Commission and the Council regarding global issues, as well as polemic ECJ judgments concerning these relationships based on established doctrine on the so-called *autonomy of EU law*. One illustration comes from the landmark *Kadi* judgment and its impact in the reconfiguration of the transnational counterterrorism regime.[65] A second illustration comes from the more recent *Achmea* judgment concerning the relationship of EU law and transnational investment law that has been paralleled by a political agenda

[59] Along these lines, see TC Halliday and G Shaffer, 'Transnational Legal Orders' in TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (Cambridge, Cambridge University Press, 2015); P Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21 *Transnational Law & Contemporary Problems* 305–36. See also K Tuori, *Properties of Law: Modern Law and After* (Cambridge, Cambridge University Press, 2021).

[60] See A Chadwick in chapter 9 of this book.

[61] See K Pantazatou in chapter 12 of this book.

[62] See V Ulfbeck in chapter 13 of this book.

[63] See HW Micklitz in chapters 3 and 8 of this book.

[64] A seminal study in this regard is M Avbelj, *The European Union under Transnational Law: A Pluralist Appraisal* (Oxford, Hart Publishing, 2018).

[65] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461. For a specialised study, see K Istrefi, *European Judicial Responses to Security Council Resolutions: A Consequentialist Assessment* (Leiden, Brill Publishers, 2018). On this transnational regime, see also, more broadly, G Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (Cambridge, Cambridge University Press, 2020).

strongly advanced by the EU by way of establishing a permanent world investment court to replace the ad-hoc arbitration panels that are currently driving the regime.[66]

In our book, this perspective also takes its place. This is particularly the case because of our reliance on and connection to previous works that look on the EU as a global regulatory actor and that investigate the European extension of law and extraterritorial effect of EU law. Seminal work by Anu Bradford and Joanne Scott has broken new ground in our understanding of the impact of EU law beyond its proper territory. Throughout the book we have taken their findings as a point of reference, and we asked the contributors to link their research to Bradford and Scott. At the same time, however, Bradford and Scott's research includes neither traditional private law nor regulatory private law but, rather, focuses on the law of external relations more broadly under inclusion of data protection, food, and competition law.[67] What we have learned from this salient research during the last decade is that EU law holds a significant place and fulfils a significant role among this diverse range of transnational nodes. This explains why, throughout this volume on European transnational private law, we have made the conscious choice of taking a distinctively European perspective in examining the place and role of European private law within these transnational legal configurations. In terms of research design, this entails figuratively positioning the EU at the centre of these complex networks so as to render it our protagonist within our object of study.

This is highly visible in the conceptual apparatus with its understanding of the concept of private law as an essentially European concept and regulatory private law as one closely entangled with the EU and its effects on European private law. We can see this in the contributions centring on the European construction of regulated industries and the external dimension of EU consumer law by Hans-W Micklitz. Similarly, the contribution by Anna Beckers shows how, specifically, the concept of regulatory private law can be assigned a European origin that has increasing effects beyond borders. Moreover, in the sectoral contributions, we see a distinct European-ness vis-à-vis transnational law appearing in the labour law analysis related to European Works Councils by Ulla Liukkunen[68] and transnational securities regulation as investigated by Antonio Marcacci.[69] It also features prominently in the analysis of trade

[66] Case C-284/16 *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158. This has prompted a huge amount of literature analysing these tensions between EU law and transnational arbitration within and beyond the investment regime. See, eg, J Berger, *International Investment Protection within Europe: The EU's Assertion of Control* (London, Routledge, 2020); C Baltag and A Stanič (eds), *The Future of Investment Treaty Arbitration in the EU: Substance, Process and Policy* (Alphen aan den Rijn, Kluwer Law International, 2020); and K von Papp, *EU Law and International Arbitration: Managing Distrust Through* Dialogue (Oxford, Hart Publishing, 2021). See also, more generally, JR Mata Dona and N Lavranos (eds), *International Arbitration and EU Law* (Cheltenham, Edward Elgar Publishing, 2021).

[67] A Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1, where she developed the theory and the book, A Bradford, *The Brussels Effect – How the European Union Rules the World* (Oxford, Oxford University Press, 2019); J Scott, 'The New EU "Extraterritoriality"' (2014) 51 *CMLR* 1343–80; J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87–125; M Cremona and J Scott (eds), *EU Law beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford, Oxford University Press, 2019). See also, E Fahey, *The Global Reach of EU Law* (London, Routledge, 2016).

[68] See U Liukkunen in chapter 6 of this book.

[69] See A Marcacci in chapter 10 of this book.

law by Mislav Mataija,[70] who shows the distinct place that the EU takes in structuring global trade relationships. For his part, Mathias Möschel shares the distinctiveness of European conceptions in anti-discrimination law as a starting point, but reminds us that such distinctiveness can also be absent on the transnational level.[71]

C. Transnational Law as European Law

To these rather classic understandings of the relation between European law and transnational law, more recent debates have added another perspective: transnational law and ordering as European and as originating in Europe. This understanding very much relates to blind spots in past debates that have arguably failed to acknowledge the strong European influence on the evolution and conceptual apparatus of transnational law. In the current debate, this 'Europeanness' of transnational law very much links to the post-colonial dimension, as the concept of transnational law has been used to explain – and thereby more or less implicitly legitimise – foreign modes of ruling and distributive disparities by those actors that already hold asymmetrical powers within our global political economies.[72] This debate has gained considerable momentum in recent years and focuses on the meaning of colonialism and post-colonialism,[73] on Eurocentrism and EU-centrism, on the Europeanness of 'law', culminating very recently in the debate on who is allowed to speak and write on post-colonialism.[74] A related, second strand, approaches the topic from other critical perspectives, such as gender[75] or race theory.[76]

[70] See M Mataija in chapter 11 of this book.

[71] See M Möschel in chapter 7 of this book.

[72] See, eg, EW Said, *Orientalism* (New York, Vintage Books Edition, 1978); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2007) 223–35; AC Cutler and Thomas Dietz (eds), *The Politics of Private Transnational Governance by Contract* (London, Routledge, 2017); P Singh, 'The Private Life of Transnational Law: Reading Jessup from the Post-Colony' in P Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge, Cambridge University Press, 2020).

[73] A Behm, C Fryar, E Hunter, E Leake, S Lin Lewis and S Miller-Davenport, 'Decolonizing History: Enquiry and Practice' (2020) 89 *History Workshop Journal* 169–91.

[74] KK Patel, 'The Latence of the European Colonial Past' (2022) 1 *European Law Open* 1059–62; M Brown, 'A Reply by the Author' (2022) 1 *European Law Open* 1063–66 and the review by P Dann, I Feichtner and J von Bernstorff (eds), *(Post)Koloniale Rechtswissenschaft: Geschichte und Gegenwart des Kolonialismus in der deutschen Rechtswissenschaft* (Mohr Siebeck, 2022); C Barskanmaz, 'Die Autorenauswahl des Bandes (Post)koloniale Rechtswissenschaft ist ein Akt Symbolischer Gewalt' ('The Authors' Choice in the Volume (Post)Colonial Jurisprudence is an Act of Symbolic Violence') *Frankfurter Allgemeine Zeitung* (16 March 2023) and the reply by A Kemmerer, E Anfang 'ist gesetzt (Post)Koloniale Rechtswissenchaft' ('A Beginning has been Made') *Frankfurter Allgemeine Zeitung* (17 March 2023).

[75] R Ziadah and B Bhandar (eds), *Revolutionary Feminisms: Conversations on Collective Action and Radical Thought* (New York, Verso, 2020); S Tamale, *Decolonization and Afro-Feminism: An Afro-Feminist-Legal Critique* (Wakefield/Québec, Daraja Press, 2020); and AK Joseph-Gabriel, *Reimagining Liberation: How Black Women Transformed Citizenship in the French Empire* (Champaign/IL, University of Illinois Press, 2019). See also, N Bourbonnais, 'Gender and Decolonisation' (*Geneva Graduate Institute*, October 2021), available at https://globalchallenges.ch/issue/10/gender-and-decolonisation/.

[76] K Crenshaw, N Gotanda, G Peller and K Thomas (eds), *Critical Race Theory. The Key Writings that Formed the Movement* (New York, New York Press, 1995); R Delgada and J Stefanic, *Critical Race Theory. An Introduction* (New York, New York University Press, 2017); R diAngelo, *What Does it Mean to be*

Another critical strand focuses on the post-social connotations of transnational law, closely connected to the rise of neo-liberalism in whatever shape. The concept of transnational law in this view would be undermining the imaginaries of the social that have underpinned most struggles for economic redistribution and political revindication. The concept of transnational law would in this way be eroding modern pathways to social justice by assimilating the claims of disadvantaged groups to those of mere interest groups. Along the way, transnational legal thinking transforms the political achievements of social democracy into a mere stakeholder democracy, thereby subjecting the political process to entrenched modes of marketisation or 'market capture'.[77] The EU and its law are usually assigned a prominent role in this trend, specifically due to its '(internal) market rationality'.[78] The various strands have led to reactions by 'Eurocentrists', which cover a broad range of counter-critique from highlighting their quasi-religious character of race theories[79] to the moral relativism of post-colonial theories, to which radical universalism is offered as an enlightened alternative.[80] In these post-colonial and post-social connotations, the concept of transnational law has also responded with some conceptual changes and a more critical orientation.[81]

The fierce controversies surrounding the European-ness of concepts require positioning through a book that explicitly problematises the relation between the transnational and the European. In our book, we recognise that the evolution of the notion 'European transnational private law' that we pursue is from a European perspective, both in authorship and in conceptual orientation. We do indicate on occasions that an external perspective exists and that the concepts we identify are open to contestation.[82] Indeed, several of the sector-specific and issue-specific contributions prominently address this critical issue of possible European economic and

White?: Developing White Racial Literacy. Counterpoints (New York, Peter Lang, 2012); R diAngelo, *Nice Racism: How Progressive White People Perpetuate Racial Harm* (Boston, Beacon Press, 2021).

[77] A Somek, 'The Social Question in a Transnational Context' in Zumbansen (n 16); and E Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge, Cambridge University Press, 2021). For a case study in this vein, see also AJ Cohen and A Lang, 'Ethical Markets and Economic Development: How the Fair Trade Movement Created a Neoliberal "Social"' in R Buchanan, L Eslava and S Pahuja (eds), *Oxford Handbook of International Law and Development* (Oxford, Oxford University Press, 2023).

[78] M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 *European Law Journal* 572–98.

[79] S Schröter, *Global Gescheitert? Der Westen zwischen Anmaßung und Selbsthass* (Freiburg, Herder, 2022) 88.

[80] O Boehm, 'Radical Universalism. Beyond Identity' *Süddeutsche Zeitung* (15 September 2022), available at www.sueddeutsche.de/kultur/omri-boehm-radikaler-universalismus-identitaetspolitik-1.5657989, as well as the contributions in O Liav and R Koopmans (eds), *Majorities, Minority Rights, and the Future of Nationhood* (Cambridge, Cambridge University Press, 2023).

[81] P Zumbansen, 'Can Transnational Law Be Critical? Reflections on a Contested Idea, Field and Method' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham, Edward Elgar Publishing, 2019).

[82] See HW Micklitz in chapter 8 of this book emphasising the possible reading of colonialism and imperialism of external EU consumer law; A Beckers in chapter 2, ending her contribution by highlighting the current contestation of European expansion of private regulation; R Vallejo in chapter 4, on the geopolitical setting and post-colonial encounters that impinge on developments of European transnational private law; and P Letto-Vanamo in chapter 5, referencing global legal history as a necessary theoretical frame to understand the travelling of normative concepts.

colonial domination.[83] But although our hints may offer a direction for further debate, a comprehensive analysis from a non-EU perspective remains to be written. It is our hope that the book inspires such further research.

VI. METHOD: STUDYING EUROPEAN TRANSNATIONAL PRIVATE LAW

This open invitation to further research brings us to the final question on method: How to study the notion of European Transnational Private Law? In reality, the methodological question presents itself in a twofold manner. First, a methodological quest lies behind our project: How have we, methodologically, developed the concept of European transnational private law? What have been its theoretical and methodological building blocks? What, consequently, are its assumptions and limitations? And what would be viewed differently if other choices were made?

Second, the very concept of European transnational private law as such poses a methodological question: How can we further study European transnational private law? How can this concept be fruitful for further analysis in terms of the methodological implications? And how do we engage in what social scientists would qualify as 'theory-testing', as an inquiry on the validity and boundary of the theoretical concept that we develop in this book?

A. Developing European Transnational Private Law

The starting point of our project was an idea of understanding the recursive dynamics between the European and the transnational that we observed throughout the project. Indeed, observation of different sectors and fields, of discussions during the conferences with experts from inside and outside the EU, provided the starting point for the conceptual work. In this regard, the project has developed very much in the sense that Richard Swedberg understands as the methodological work of theorising that should be based on observation of the social facts.[84] As Swedberg describes it:

> At the early stage of the research process the emphasis is on getting a good empirical sense of the phenomenon you want to study, in order to theorise it in a preliminary way. What is at issue is not to study it in the rigorous way that is necessary once the research design has been constructed and the main study is carried out. But again, without any data at all, it is impossible to theorize well.[85]

[83] Examples include A Chadwick in chapter 9 of this book, who addresses the market critique by embedding the analysis of EU financial regulation within the framework of global political economy and argues that it is ultimately also EU law that is on the global market, as well as chapter 14 by J Salminen, M Rajavuori and KH Eller, who highlight how the EU's regulatory piggybacking on Global Value Chains for sustainability can be read as an extension of internal market discipline to global production with huge repercussions on the Global South.

[84] R Swedberg, *The Art of Social Theory* (Princeton, Princeton University Press, 2014) chapter 2.

[85] ibid 29.

In our case, this has been, at a deeply concrete level, a list of fields and topics that we needed to have covered in order to understand the phenomenon of the external dimension of European private law. For the first Helsinki conference in 2020, we delineated the different theoretical and doctrinal origins from which we needed experts, with a focus on public law and EU external relations, private law, and private international law, legal theory, and transnational legal studies and historiography of legal globalisations and post-colonial legacies.[86] For all areas, we invited what we called 'sector-level' experts that could provide empirical evidence from the different fields and senior-level experts that could help us with working on the main lines.

Moving ahead with the insights we gained, we organised a second conference in 2021 in which the goal was to gather evidence from a wide range of sectors: private law and codifications, private international law, social rights, labour law, non-discrimination, and consumer law. In addition, we excavated three central, sector-crossing areas on which the EU is regulating, sustainability/Green Deal, digitalisation, and the European Health Union. Finally, we wanted to include the global economic law dimension related to investment, development, trade, finance, and taxation. This, we thought, would help us move forward with the conceptual apparatus, as indeed it largely did.

But – and this brings us to the somewhat shaky terrain in methodology – choices are not always one's own and determinations on the decision for a direction may also be influenced by the highly practical imperative of possibility. With such a large-scale project, we ran into the practical problem – familiar to many – of invitations to contribute that were declined, selective perspectives because of the choice of experts and the somewhat erratic process of publication where coincidence and also other factors determine what ends up being represented in the book. We were fortunate enough to receive wide-ranging support from different scholars, who provided discussion papers and contributions for the conference that we could rely on for our process of theorising and conceptual advancement.[87] But still, relying on expertise in the fields covered and experts' theoretical orientation provides at least some direction. This all helped enable our context of discovery.[88] It turned out to be a painful – but fortunate – coincidence that the material we collected and the contributions we received depict a diverse image on the role of the EU. This made theorising immensely challenging, but helped us to not be satisfied with easy answers that would fit in our frame.

[86] See the Workshop programme of the 2020 conference.

[87] This refers to the discussion papers of the 2020 conference by M Everson, 'Reconstituting the Private – The Example of Capital Markets and Corporate Governance'; J Kleinheisterkamp and M Pénades Fons, 'Commercial Law and International Arbitration'; H Lindahl, 'Terrestrializing (European) Private Law'; H Muir Watt, 'The Political Economy of EU Private Regulatory Law from the Perspective of Normativity'; S Sankari and S Frerichs, 'Consumer Choice and Sustainability'; T Wilhelmsson, 'External Dimension of European Regulatory Private Law – a Perspectivist Perspective' as well as the contributions for our 2021 conference by L Burgers, 'Rights of Nature v Rights of Future Generations'; J Mähönen, 'External Dimensions of EU Sustainable Finance'; T Juutilainen, 'Digital Assets – European Transnational Law?'; M Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help us Reduce Inequality and Regain Democratic Control?'; and M Rizzi, 'The Transnational Dimension of EU Regulation of Implants – a View from Down Under'.

[88] H Reichenbach, *Experience and Prediction* (Chicago, University of Chicago Press, 1938) 6ff.

Nevertheless, methodologically, we are aware that our concept and how we have filled it with substance along the way has evolved from material that suffered from some inherent limitations, the most important being: (1) the influence of our own conceptions that in turn influenced what we considered as (EU) private law;[89] (2) the absence of certain sectors and topics;[90] (3) the perspective that the authors presented to us;[91] and (4) the largely European and overall Western perspective that the book takes.[92] These gaps should not lead to dismissing the concept that we propose, but indicate our own awareness of the context and input that helped us build this concept.

It is our hope that, with this methodological openness, we allow further research on the concept of European transnational private law that may expand upon its relevance or, conversely, limit it to certain sectors or policy issues.

B. How to Study European Transnational Private Law

This brings us to the second methodological dimension of our concept: How can we further study European transnational private law? To that end, our book offers methodological inspiration: We can research the relation between European private law and transnational law strictly speaking legally, by what legal scholars would call the dogmatic or doctrinal method.[93] This may lead us to close analysis of the legal rules in the EU in terms of how they define and extend European territory and how they legally reconstruct transnational law, including private regulation. We also fulfil the role of empirical – in particular qualitative empirical – research whenever research in the field tackles the activities of private actors, such as corporate counsel, global value chains, technical standardisation bodies[94] and the norms (for instance, standards, contracts, codes[95]) that they produce as well as the broader social understandings that support these norms in their formulation and implementation. These are the 'unusual places' in which European private law is unfolding or may yet unfold.[96]

[89] The context was preceding projects on European regulatory private law, which led us to centre a regulatory private law concept.

[90] This applies specifically to the topic of digitalisation (including data protection, platform regulation, and Artificial Intelligence) on which the EU is regulating intensively, but where we – despite making several efforts – did not manage to obtain a separate contribution in this book.

[91] Examples are the lead firm-centric perspective on Global Value Chains of J Salminen, M Rajavuori and K Eller, in this book, in chapter 14, or the specific reading of transnational finance through the lens of political economy by A Chadwick, in chapter 9 of this book.

[92] See the elaborations above in section V.C.

[93] J Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal Dogmatic Research' in R van Gestel, HW Micklitz and E Rubin (eds), *Re-Thinking Legal Scholarship* (Cambridge, Cambridge University Press, 2017); R van Gestel, HW Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292–316.

[94] See M Möschel in chapter 7 of this book, J Salminen, M Rajavuori and KH Eller in chapter 14 and HW Micklitz in chapter 3.

[95] Cantero Gamito and Micklitz (n 7).

[96] N Affolder, 'Looking for Law in Unusual Places: Cross-Border Diffusion of Environmental Norms' (2018) 7 *Transnational Environmental Law* 425–49. See also, more generally, A Beckers, 'EU Law's Dark Private Legal Space: Researching Private Regulators and the Importance of Legal Doctrine' (2022) 18 *European Constitutional Law Review* 657–81.

Previous research on the Brussels effect and the EU as a global actor also teaches us the importance of including the field of international relations and geopolitics for any research that looks into how and why European norms with an impact on private law doctrines, relations, or institutions are taken on board. In this respect, the question of normative evaluation in our book only features as a side element. As noted, some contributions take a normative stance on the phenomenon we see,[97] while others highlight the significance of researching deontological visions and pragmatic compromises sought by participants in the relevant practices as a sign of evolving normative conventions rather than evaluating those practices from a merely external, ready-made normative parameter.[98] We also had these normative inroads featured during the conference[99] and in previous publications.[100] Yet a thorough normative perspective on our concept, on its critical, emancipatory potential or hegemonic character, is something that can only be properly developed on the basis of further research concerning the role of European private law across different sectors of the economy and possible theoretical frameworks underpinning those roles.

VII. ACKNOWLEDGEMENTS: IN PRAISE OF TEAMWORK

We hope that our book may provide a starting point for further discussion amongst (EU) private lawyers on the relation between the European and the transnational and that our concept of European transnational private law helps as a conceptual apparatus in this endeavour. In developing the concept, the four editors stand for its visible part, both in receiving compliments and taking critique 'on the chin'. Yet, behind the concept has been a huge network of actors and institutions that have lent their personal, professional, and institutional knowledge. Without this vast network, we would never have been able to come up with such an ambitious concept.

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[97] Specifically, A Chadwick in chapter 9 of this book and J Salminen, M Rajavuori and KH Eller in chapter 14.

[98] See R Vallejo in chapter 4 of this book.

[99] This refers particularly to contributions and discussion papers by Martijn Hesselink, Antoine Duval, and Laura Burgers at our 2021 conference and by Isabel Feichtner Horatia Muir Watt, Ralf Michaels, and Hans Lindahl at our 2020 conference who all emphasised the need to normatively and critically embed the findings on the role of the EU.

[100] HW Micklitz, 'The Role of the EU in the External Reach of Regulatory Private Law – Gentle Civilizer or Neoliberal Hegemon? An Epilogue' in Cantero Gamito and Micklitz (n 7).

Isabel Feichtner, Sabine Frerichs, Martijn Hesselink, Poul Kjaer, Jan Kleinheisterkamp, Hans Lindahl, Jukka Mähönen, Ralf Michaels, Horatia Muir Watt, André Nunes Chaib, Heikki Pihlajamäki, Manuel Penades Fons, Marco Rizzi, Ralf Rogowski, Suvi Sankari, Robert Wai, Thomas Wilhelmsson, and Jan Wouters. The book could not have been finalised without the helping hand of Simona Ciccarini and Hilma Mäkitalo in collecting material and supporting us with editorial assistance, let alone Christopher Goddard, who with endless patience corrected the non-native contributions.

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