Actors and Roles in EU Law

EU Law's Dark Private Legal Space: Researching Private Regulators and the Importance of Legal Doctrine

Anna Beckers*

Private actors as non-institutional, and therefore often overlooked, participants in EU legal processes – A specific focus on their role as private regulators – Private actors such as companies, contracting parties and industry associations, play a pivotal regulatory role in the EU legal order – Classifying the existing legal research on private regulation – A legal-doctrinal approach towards private regulation also needed – Theoretical background of a novel legal-doctrinal perspective on private actors – Addressing the most pressing practical methodological challenges – Specific focus on the problem of accessibility and the difficulty of understanding and interpreting private regulation doctrinally

Introduction

In the context of this special section on Actors and Roles, this contribution is concerned with private actors and takes a closer look at one of the roles that private actors play in EU law. Private actors are often overlooked in the institutional setting of the EU. They are not one of the established institutional actors[1] and thus are not perceived as having any formal role in political and legal processes. In the traditional sense, private actors are the objects, but not the subjects, of EU law. In many areas, however, EU legislation has assigned private actors a more active role in EU legal processes. Rules developed by private actors can be attributed a

*Associate Professor Private Law and Legal Methodology, Maastricht University

[1]On this distinction between institutional and non-institutional actors, *see* the contribution by Emilia Korkea-aho in this issue.

European Constitutional Law Review, 18: 657–681, 2022

doi:10.1017/S1574019622000402

quasi-legislative character. Common examples are technical standards by the Standardisation Organisations,[2] the rules developed by private Sports Federations,[3] private advertising bodies whose rules are considered as a defining feature in EU unfair commercial practices law,[4] or the rules of professions bodies.[5]

Private actors are also relied upon in the implementation of EU rules[6] and they play a vital role in the enforcement of EU law.[7] This role is not even confined to actions within the EU; in contrast, private actors engage in activities that extend the reach of EU law beyond its territory, an example being the inclusion of EU law into private regulation or the competence of private bodies to oversee compliance with EU laws in the import of goods.[8]

This contribution will analyse private actors from a theoretical and methodological perspective. More specifically, the paper will address the question of how – meaning with which methods and theoretical assumptions – we can and should look at these 'law-related' activities of private actors. In that regard, the contribution is confined to focusing on commercial private actors, namely companies and commercial parties. Moreover, the contribution singles out the analysis of private actors as regulators and thus centres questions on how to research of private regulation, generally and with a view to specifically the EU context.

[2]The most prominent examples of such private rulemaking with a quasi-legislative character are the technical standards, *see* Regulation 1025/2012/EU on European standardisation, OJ L316/12, 14 November 2012.

[3]On the relation between self-regulation in the sports sector and EU law in the aftermath of the Bosman ruling, *see* A. Duval, 'The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman', in A. Duval and B. van Rompuy (eds), *The Legacy of Bosman* (Springer 2016) p. 81; on sports rules and EU law more generally *see* M. Mataija, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law* (Oxford University Press 2016) ch. 5.

[4]Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L149/22, 11 June 2005, Art. 10.

[5]Mataija, *supra* n. 3, ch. 6.

[6]The most prominent example of this role is so-called notified bodies that may oversee compliance with Directives, *see* for the medical sector Regulation 2017/745/EU on medical devices, OJ L117/1, 5 May 2017, Art. 35ff. For the field of digital technologies and artificial intelligence, *see* European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts, COM(2021) 206 final, Art. 33.

[7]This role of enforcer is most visible in relation to the private enforcement of EU law, i.e., private actors enforcing EU law by means of reliance on their rights: *see generally* F. Wilman, *Private Enforcement of EU Law Before National Courts* (Edward Elgar 2015).

[8]A good example is third party verification for determining compliance with Regulation 2017/821/EU laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L130/1, 19 May 2017, Art. 6.

The contribution proceeds in the analysis of private actors as regulators as follows. In a first step, it maps the field of private regulation in the EU and discusses how the different approaches in private and public including constitutional law approach private regulation. This section shows that researching private actors and their role as regulators provides EU lawyers access to a hidden space in which arguably a significant part of EU law is created, implemented, and enforced. It also shows how private regulation is portrayed from the perspective of the different legal fields in EU law. In a second step, the contribution engages closely with the how-question of researching private regulation. It discusses different theoretical and methodological approaches towards researching private regulators as they characteristically appear in the literature. This analysis then reveals a significant gap: while socio-legal and normative legal approaches to private regulation are quite common, legal doctrinal research seems to not engage with private regulation as a research object. The final section in this part discusses some possible reasons for this focus. It identifies these reasons firstly in the public law perspective that is the approach mostly taken to private regulation. Yet, the third part will reverse the picture and discuss how, methodologically, private regulation has to be researched, if a private law and private constitutional perspective is taken. In this respect, it is argued that to fully understand and 'see' the legal and constitutional dimension of private regulation, a doctrinal methodology should be applied when researching private regulation. The final part of the contribution then also develops the contours of a doctrinal approach for researching private regulation.[9]

Private actors and their roles in the EU

Private regulation in the EU

EU law is enacted by public institutions that form the central institutional backbone of the EU. However, since the early 2000s and the significant changes in EU law-making and modes of governance,[10] private actors have become much more prominent actors.[11] They gradually became more strongly integrated into the process of developing, implementing and enforcing EU law. There are several examples of this development: in EU consumer law, one example is the

[9]On this point, this contribution is very close to Bruno de Witte in this issue and his argument on the need for legal-doctrinal scholarship on EU law and the supplementary role of law in context approaches.

[10]*See*, prominently, European Commission, White Paper European Governance, COM(2001) 428 final.

[11]For a detailed documentation of private regulation in the early EU Better Regulation Agenda, *see* P. Verbruggen, 'Private Regulation in EU Better Regulation', 19 *European Journal of Law Reform* (2017) p. 121 at p. 123 ff.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

Directive on Unfair Commercial Practices. It assigns private actors all three roles. According to the Directive, self-regulatory codes of conduct are recognised as rules that specify the abstract concept of unfairness; private bodies are recognised as instances that may implement the rules on unfair commercial practices; and the Directive relies on private actors as those enforcing the rules on unfair commercial practices within the framework of national law.[12]

The role of private actors as regulators seems, however, to stand out as a very important activity. Private actors can, in the EU context, develop rules that have a quasi-legal character; private regulation is part of the legal architecture of EU law.[13] This contribution defines private regulation as the rules that private actors – collective organisations and also single companies – create. In a first approximation, the term private regulation can be linked to the tradition in economics and social sciences where a distinction is drawn between public and private regulation, i.e. regulatory norms that derive from the public or private sphere.[14] Yet, more specifically, private regulation can be understood as those rules that private actors create with the result that they factually influence behaviour. In a monograph on the relation between private regulation and the EU internal market, Mataija adopts a particularly useful definition: private regulation, to him, is 'referring to non-State actors that, either jointly or independently, engage in standard setting, monitoring or enforcement of rules that govern access to markets, and/or the behaviour of market participants'.[15]

The rules created by private actors appear predominantly in the form of contracts, codes, or standards[16] and these shape the understanding of legal concepts. For instance, codes of conduct created by private actors can influence the understanding of fairness in the context of contract law.[17]

Private regulation and EU (constitutional) law

The relation between private regulation and EU law can be viewed from two legal perspectives. For (EU) private lawyers, private regulation typically evolves due to

[12]Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L149/22, 11 June 2005, Arts. 6(2)(b), 10, 11. On codes of conduct and their enforcement under unfair commercial practices law *see* C. Pavillon, 'The Interplay between the Unfair Commercial Practices Directive and Codes of Conduct', 5 *Erasmus Law Review* (2012) p. 267.

[13]F. Cafaggi, 'Private Regulation and European Private Law', in A. Hartkamp et al. (eds.), *Towards a European Civil Code* (Wolters Kluwer 2011) p. 91.

[14]*See*, eg, F. Cafaggi and A. Renda, 'Public and Private Regulation: Mapping the Labyrinth', 1 *Dovenschmidt Quarterly* (2012) p. 16.

[15]Mataija, *supra* n. 3, p. 2.

[16]Extensively on all categories, *see* the contributions in R. Brownsword et al. (eds.), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar 2017).

[17]C. Pavillon, 'Private Standards of Fairness in European Contract Law', 10 *European Review of Contract Law* (2014) p. 85.

the autonomy of private actors to govern their social relations and the supporting role of private law to lend enforcement power to such privately created rules. In this regard, private regulation gains relevance and exists not because public law has allowed private actors to engage in law-making activities, but because private actors prima facie have autonomy to govern their social relations. To that, one may add the fact that it is primarily private and societal pressures, such as market pressure, that may render private regulation a de facto regulatory standard beyond the confines of a particular social relation. This is very visible in the field of standardisation, where different forms of standard-setting exist. Standards can originate from public institutions (where either government engages in standard-setting or delegates to private actors). But standardisation can, and regularly does, also originate from markets. A standard, typically created by a powerful actor or group of actors, gains de facto dominance because of the market power of that organisation; additionally, standards can originate from a committee-based process where public and private actors participate.[18] Hence, for private lawyers, private regulation appears as a self-standing form of regulation that may precede the development of public law and that regularly co-exists with it.[19]

Whether private regulation is to be qualified as legally binding is a matter of debate among private lawyers. Yet, most private lawyers seem to agree that the supporting, often also defined as the constitutive, role of private law is what renders private regulation legally binding. According to this perspective, private regulation is not an alternative to private law, but a product of a particular form of private law rules.[20]

From an EU public and constitutional law perspective, private regulation is viewed differently. Private regulation is seen as the rules that are created by actors that are not subjected to a democratic process and constitutional checks and balances.[21] At least in constellations where private regulation extends beyond the private relation and sets de facto standards related to market access, private regulation should, therefore, depend on the act of delegation. It should come with accompanying checks and balances to ensure that interpretative authority over private regulation is kept in the hands of public actors and that sufficient

[18]P.M. Wegemann et al., 'Multi-Mode Standardisation: A Critical Review and Research Agenda', 46 *Research Policy* (2017) p. 1370.

[19]Cafaggi, *supra* n. 13, p. 91; P. Verbruggen, 'Introduction: Regulating Private Regulators: Understanding the Role of Private Law', 27 *European Review of Private Law* (2019) p. 175 at p. 176.

[20]The most outspoken critical contribution on this is K. Pistor, 'Capital's Global Rule', 26 *Constellations* (2019) p. 430 at p. 433 ff. *See* for earlier, similar perspectives, R. Wai, 'The Interlegality of Transnational Private Law', 71 *Law and Contemporary Problems* (2008) p. 107 at p. 109 ff.

[21]*See*, on this problem, generally, C. Scott et al., 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', 38 *Journal of Law and Society* (2011) p. 1.

accountability (and liability) mechanisms exist.[22] A particularly suitable example for this type of understanding is what is currently discussed as European digital constitutionalism. With the power of large platform companies to perform quasi-public functions and set private rules for the governance of their platform, debate begins to surround the need to subject such activity of private actors to legal and constitutional oversight.[23] The emphasis from the constitutional perspective originates in the quasi-public role that private actors fulfil when adopting rules and the argument is made that fulfilling such public role needs to come with accompanying public oversight. From this public law perspective, private regulation does not pre-date the legal and constitutional rules. It is only considered legal (and is visible as regulation) when public law has permitted delegation and ensured the required constitutional checks.

Existing research on private regulation – an inventory of approaches

The previous section showed that there are various constellations in which private actors fulfil a regulatory role and that opinions differ in the private law and EU constitutional law debate on how to make sense of and normatively assess this role. Yet, it has also been emphasised that, as legal scholars, we should become interested in private actors, their role as regulators and the rules that they produce. Researching private regulators leads, however, to several important methodological questions. How can we make sense of and assess their activities and the rules that they produce? What are the theoretical and methodological possibilities of access and what type of understanding do we obtain about private regulation when we research these activities as legal scholars from different perspectives? Constitutional scholars seeking to subject private regulation to constitutional oversight need to obtain an understanding about what private regulation is and what it contains; private lawyers need to investigate what type of rules it is that private law incentivises and how such rules govern private relations.

In the following section, I seek to show – in the form of an inventory relying on categories from general discussions about traditions in legal scholarship – that legal research on private regulators has so far only accessed this activity from three perspectives: private regulation is understood as social practice, as information and

[22] *See*, eg, ECJ 12 July 2012, Case C-171/11, *Fra.bo SpA* v *Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)*; ECJ 27 October 2016, Case C-613-/14, *James Elliott Construction Ltd* v *Irish Asphalt Ltd*; ECJ 16 February 2017, Case C-219/15, *Elisabeth Schmitt* v *TÜV Rheinland LGA Products GmbH*.

[23] Most prominently for this discussion, *see* G. de Gregorio, 'The Rise of Digital Constitutionalism in the European Union', 19 *International Journal of Constitutional Law* (2021) p. 41.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

from normative value-oriented perspectives; in contrast, an approach viewing private regulation as legally significant or genuine law is still lacking. The section will end by discussing some of the reasons, practical and theoretical, on why this lack of doctrinal understanding of private regulation persists. A core insight will be to identify the reason for this lens in the commonly taken (EU) public law perspective on private regulation that only 'sees' such regulation as social norms that only become legally significant when subjected to formal legal and constitutional rules.

Legal scholarship traditions: legal doctrine, social practices, normative values

The field of legal scholarship has a variety of traditions that each take a different theoretical background and related methodological approach towards analysing the law. Let me therefore first take a step back from the specific question about how to research private actors and their regulatory activities and, instead, introduce, more generally, the conceptual and epistemological categories that legal scholars use when researching the law. This epistemological dimension is important in order to understand that the methodological choices about how to research private actors also involve a background assumption about the type of knowledge that is intended to be generated.[24]

Typically, legal scholarship distinguishes three scholarly traditions that each generate a different type of knowledge about the law.[25] First, legal research can be interested in researching law as a system of norms that is oriented on internal coherence. This is what is typically understood as the aim of legal dogmatics and its specific 'doctrinal method'.[26] Second, the socio-legal research tradition places the focus on the 'living', 'real' and 'in action' law; it is thus interested in researching the law as a social practice. Finally, normative legal research investigates the underlying normative principles and values of the law and thus how the law ought to be interpreted from an external perspective; this research is similar to the first, doctrinal, tradition with its interest in analysing how the law

[24]On this aspect *see* very pointedly, M. Bartl et al., 'Introduction to The Politics of European Legal Research', in M. Bartl and J. Lawrence (eds), *The Politics of European Legal Research* (Edward Elgar 2022) p. 1 at p. 6: 'Methodological struggles are collective political struggles about knowledge'.

[25]I am also linking this to the differentiation in A. van Aken, 'Opportunities for and Limits to an Economic Analysis of International Law', 3 *Transnational Corporations Review* (2011) p. 27 at p. 29 ff. who discusses this in the light of the distinctions introduced by Kantorowicz, Weber and Albert. Similar distinctions of legal scholarship as part of humanities, social sciences and autonomous disciplines are made by N. Walker, 'The Jurist in a Global Age', in R. van Gestel et al. (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) p. 84.

[26]J. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research', in van Gestel et al., *supra* n. 25, p. 207.

ought to be read. But, in contrast to legal doctrine, it relies on interdisciplinary insights and thus describes the law as a system that needs to be underpinned by specific principles and values.[27] In its interdisciplinary focus, the normative tradition shares a common ground with the second, i.e. socio-legal, tradition.

The differentiation between the traditions of legal doctrine, law and social sciences and normative values and principles as different ways to research the law has been prominently introduced by MacCormick with his idea on the four quadrants of jurisprudence.[28] The idea of the four quadrants is also interesting because of the fourth analytical category that is added: law as 'raw law'. MacCormick defines 'raw law' as the material that scholars rely on as their first encounter when their attempt is to research the law. 'Raw law' forms the essential yet unordered and uninvestigated real-life activities that are open to interpretation as legal;[29] it is somewhat comparable to what social scientists qualify as raw and unanalysed data. MacCormick himself describes it as 'the unexamined substratum of brute fact (if any) that gives theorised, scholarly law-constructs whatever anchoring they have in the real world'.[30] To be sure, this does not suggest that 'raw law' is a neutral category. On the contrary, the classification of an activity as part of 'raw law' is already based on pre-selection criteria and different understandings of what may form part of a law-like activity.[31] However, thinking of activities as 'raw law' is very helpful to approach law in a pre-structured manner and to leave the classification (what form of law is the activity) to the subsequent analysis. This category of unordered 'raw law' is arguably very helpful in developing an awareness of the normally unconscious classification and ordering that legal researchers undertake in their work.

If we apply the concept of 'raw law' to private actors, one can qualify the above-described activities of private actors – their rule-generating activities – in a most simplistic observation as 'raw law'. Private rule development forms the material and activities, the 'brute fact' that requires scholarly investigation. It is then for legal scholars to make sense of this 'raw law' based on their scholarly perspective with a theoretical grounding and to understand this raw law as law.

Research on private actors within these scholarly traditions

If we continue with categorising existing legal research on private regulation through this lens of the four quadrants of jurisprudence, an interesting

[27]Though there is no common understanding of what these values and principles are: different interdisciplinary traditions each have different normative underpinnings.

[28]N. MacCormick, 'Four Quadrants of Jurisprudence', in W. Krawietz (ed.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Duncker & Humblot 1994) p. 53.

[29]Fundamentally, MacCormick, *supra* n. 28, p. 54 ff.

[30]MacCormick, *supra* n. 28, p. 55.

[31]This is also recognised by MacCormick, *supra* n. 28, p. 55.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

observation comes to the fore. The vast amount of scholarship on private regulation so far chooses to order this 'raw law' in only two of these categories: socio-legal research exists that analyses these activities as a form of practice. As a variation of this, scholars increasingly rely on the ordering of private regulation in quantitative and computational terms and thus generate informational knowledge about private regulation. Normative scholarship, though, puts forward an evaluation of private regulation in the light of legal and constitutional principles and values. Yet, it is notable that, while legal-doctrinal approaches form the traditional core of legal scholarship, there is a striking deficit of such ordering in legal-dogmatic terms when researching the regulatory activities of private actors.

(1) *Private regulation as social practice*: It is probably not controversial to state that most research on private actors and private regulation is socio-legal scholarship. There are numerous studies that investigate the practices of private regulation. These are both detailed in their empirical material and ambitious in their theoretical framing. The most elaborated field is probably the field of food safety and advertising, where both the rules created by private actors become subject to scrutiny as well as the practice of the private bodies creating and enforcing them.[32] Other fields are transnational sustainability, human rights, and labour standards and how these regulate (or fail to regulate) on a global level[33] as well as the analysis of certification programs.[34] Research investigates the perceptions of private actors when developing such rules, an example being research in the field of business and human rights that looks into how corporate managers make sense of respect for human rights as an evolving responsibility of corporations.[35] A large amount of socio-legal research on private regulation takes an empirical focus that looks into how effective private regulatory instruments are for achieving a particular policy objective, such as improvement of workplace standards or environmental

[32]P. Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety* (Edward Elgar 2014).

[33]Prominent monographic treatments (employing different social scientific methodologies) include: R. Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge University Press 2013); P. Paiement, *Transnational Sustainability Laws* (Cambridge University Press 2017); T. Bartley, *Rules without Rights: Land, Labor, and Private Authority in the Global Economy* (Oxford University Press 2018).

[34]K.H. Eller, 'Private Governance of Global Value Chains from Within: Lessons from and for Transnational Law', 8 *Transnational Legal Theory* (2017) p. 296.

[35]L.J. Obara, '"What Does This Mean?" How UK Companies Make Sense of Human Rights', 2 *Business and Human Rights Journal* (2017) p. 249; A. McBeth and S. Joseph, 'Same Words, Different Language: Corporate Perceptions of Human Rights Responsibilities', 11 *Australian Journal of Human Rights* (2005) p. 95.

protection.[36] From an epistemological and methodological perspective, this strand of socio-legal research adheres to a particular understanding of private actors and their role as regulators. It understands private actors and their activities as social practices or, making the link to the law, as the 'living law' and 'law in action'.

(2) *Private regulation as information*: A variation on the socio-legal approaches described above are the studies on private regulators from a quantitative social scientific perspective with, increasingly, a link to using computational methods for the analysis. The analysis of rules and other sources with the help of quantitative empirical approaches is becoming ever more popular in legal scholarship. Its main advantages, in contrast to qualitative socio-legal approaches, are the possibility of scaling up and thus capturing the vast amount of information laid down in private regulatory documents as well as its ability to identify broader patterns in the analysis, which allows the findings to be presented as more objective than is commonly the case in legal-doctrinal research and qualitative studies.

Generally, in EU law, this type of quantitative and computational analysis is on the rise.[37] And also for researching private regulation, such statistical analysis with the help of computational methods has become increasingly popular. It appears in the form of studies that use corpus linguistic analysis for private regulation and include a massive number of documents in the analysis. A particularly telling example has been the research by O'Kelly, who has conducted a large-scale textual analysis about the content of corporate reports. The results have been generated by looking at what concepts and terms are in statistically significant proximity in the text to the term human rights.[38] Other examples are the large-scale coding of private regulatory documents to identify patterns in their text.[39]

From an epistemological perspective, such statistical and, even more, computational scholarship, can be understood as a variation of the analytical lens that is able to generate knowledge about private regulation as social practice. However, while quantitative approaches, very much like qualitative approaches, subscribe to a social-scientific understanding of the law and share the assumption of generating

[36] *See*, extensively, with further references, I. Kampourakis, 'Empiricism, Constructivism, and Grand Theory in Sociological Approaches to Law: The Case of Transnational Private Regulation', 21 *German Law Journal* (2020) p. 1411 at p. 1416 ff.

[37] Generally on this methodological approach *see* O. Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text', in Bartl and Lawrence, *supra* n. 24, p. 109.

[38] C. O'Kelly, 'Human Rights and the Grammar of Corporate Social Responsibility', 28 *Social & Legal Studies* (2019) p. 625.

[39] *See* P. Paiement and S. Melchers, 'Finding International Law in Private Governance: How Codes of Conduct in the Apparel Industry Refer to International Instruments', 27 *Indiana Journal of Global Legal Studies* (2020) p. 303.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

data from an anchoring in the real world,[40] their reliance on coding as a technique and on computational methods suggests a significant shift in the epistemology. Through computational methods, the law-like activities of private actors are stripped, at least to some degree, of their social context and are coded based on the mere text and its translation into numbers. This suggests a translation of the 'raw law' into the technical language of information. Such analysis is different from doctrinal scholarship with its focus on norms and also from qualitative socio-legal scholarship with its focus on practice; rather than treating the law as a text with meaning that is open to interpretation and inherently ambiguous, computational approaches assume information to be clear, fixed and readable in technical terms.[41]

Accordingly, it seems more accurate to add quantitative approaches that rely on computational methods as a self-standing type of legal scholarship that accesses 'raw law' from an informational perspective. In quantitative analysis, private regulation is presented as accumulated data in which statistical patterns can be identified. It can thus be classified as a new type of scholarship that generates knowledge about private regulation as textual information that is open to being coded in a binary manner. It is oriented not so much on what the practices are of private actors, but rather on providing information on the textual content of these rules with the content of the rules being largely de-contextualised.

(3) *The normativity of private regulation*: Next to the social scientific understanding, another prominent approach towards private regulation is a distinctly normative one. Research investigates private regulation as to its underlying normative embedding and draws related conclusions for how the law should respond to it. A dominant perspective here is to link private regulation to the market, market values and rationality. This is either conducted from a critical perspective to show a marketisation, 'market capture' or market-building through private regulation,[42] or it is done affirmatively to treat market-based private regulation as one regulatory option in contrast to public law intervention and assess its merits in accordance with criteria of efficiency or cost-benefit analysis.[43] Several EU public law scholars embrace this normative perspective when researching private regulation. Their focus

[40]S. Deakin, 'The Use of Quantitative Methods in Labour Law Research: An Assessment and Reformulation', 27 *Social & Legal Studies* (2018) p. 456 at p. 458.

[41]The most sophisticated account of portraying law as information is provided by M. Hildebrandt, 'Law as Information in the Era of Data-Driven Agency', 79 *The Modern Law Review* (2016) p. 1 at p. 28 and *passim*.

[42]*See*, prominently J. Bakan, 'The Invisible Hand of Law: Private Regulation and the Rule of Law', 48 *Cornell International Law Journal* (2015) p. 279; in a similar direction, *see* E. Christodoulidis, 'On the Politics of Societal Constitutionalism', 20 *Indiana Journal of Global Legal Studies* (2013) p. 629; more cautious in critique and including the possibility of 'post-market building' is L. Moncrieff, 'Karl Polanyi and the Problem of Corporate Social Responsibility', 42 *Journal of Law and Society* (2015) p. 434.

[43]Cafaggi and Renda, *supra* n. 14.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

in the analysis is to look at private regulation from the perspective of how EU law can and should control private regulation to ensure that it serves the public interest.[44] On this basis, private regulation is assessed against the background of legal and constitutional principles as the normative background to determine whether it fits within the legal architecture of the EU. One may find another normative inroad also in contributions that analyse private regulation from a constitutional perspective. Here, private regulation is analysed – taking the normative standards of constitutional principles related to procedure (how to enact private regulation) and substance (compliance with constitutional norms) – in relation to how it could and should be subjected to constitutional principles.[45]

Despite the fundamentally different perspectives on how to ultimately treat private regulation, these approaches have in common their methodological starting point. They locate private regulation in the social sphere (the market or society) to analyse its underlying values, principles, interests, and pressures to measure it against normative principles. On this basis, conclusions are drawn on whether and how these should be recognised from a legal perspective.

(4) *The lack of doctrinal research*: This analysis of research on private regulation has produced a quite surprising result. Private regulation is researched extensively from empirical and normative-theoretical perspectives and, consequently, legal knowledge is produced about its character as a social practice, as information and the values and interests that it needs to observe. Yet, there is scarcity about researching private regulation from a genuine legal perspective and producing knowledge in legal (doctrinal) terms. When doctrinal research integrates private regulation in the analysis, it does so by taking the perspective of formal (state-made) law and focuses on how the law does or should enable or constrain private actors in their ability to regulate. This, however, is not doctrinal research on private regulation, but doctrinal research on formal law's relation to private regulation. There is, in a nutshell, significant knowledge about the private actors' practices and values, but very little is known about the private rules as norms.[46]

(5) *Reasons for the lacking doctrinal view*: One of the reasons for this lack of doctrinal research is probably a practical one: as there is no publicity requirement for private

[44]*See*, for an example, V. Hatzopoulos, *Regulating Services in the EU* (Oxford University Press 2012) ch. 7, p. 300 ff. Compare also the approach taken by Mataija, *supra* n. 3.

[45]On this from the perspective of (public) constitutional law, *see* Scott et al., *supra* n. 21, p. 1; on the role of private law, *see* P. Verbruggen, 'Private Food Safety Standards, Private Law, and the EU: Exploring the Linkages in Constitutionalisation', in M. Cantero Gamito and H.-W. Micklitz (eds.), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts, Codes* (Edward Elgar 2020) p. 54.

[46]This marks a contrast to the analysis by Mendes in this issue, who shows for the field European administrative law a strong and almost exclusive reliance on doctrinal reconstruction.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

rules, legal scholars may not even access them and may also deem this lack of publicity as a criterion to not perceive private regulation as legally relevant.[47] Yet, another, underlying reason may be the theoretical assumptions that scholars rely on when investigating private regulation.[48] As discussed above,[49] private and public law scholars relate the binding character of private rules to the supporting rules of formal private law or the legislative or administrative act of delegation. This theoretical framing presupposes that it is always formal (state-enacted) law, and not the private regulatory rules themselves that produce the binding legal character.

Private regulation and legal doctrine

This contribution could certainly end with this section and conclude with an emphasis on the specific theoretical assumptions of EU legal scholars that make them see private regulation in a particular non-legal fashion. Such assumptions allow EU legal scholars to tend towards relying on methodologies that understand private regulation as social practices or measure them against normative (including constitutional) norms and not see them as rules. Yet, I aim continue the analysis by discussing whether a different theoretical perspective, namely one that is grounded in private law and related ideas on private and societal constitutionalism, would yield different results and come with different choices of methodology. If so, one could counter the argument that legal doctrine is reserved to formal positivist law and argue instead that even private regulation with its high degree of informality can and should be researched doctrinally.

Legal doctrine for private regulation? Theories of transnational private law and constitutionalism

European private law scholars have long recognised that it is not only states and public institutions that can produce laws, but also private actors.[50] This is also

[47]This is very pointedly stated by the ECJ in GC 22 February 2022, Case C-160/20, *Stichting Rookpreventie Jeugd and others* v *Staatssecretaris van Volksgezondheid, Welzijn en Sport*, ECLI:EU:C:2022:101, para. 73: 'it should be recalled that Article 4(1) of Directive 2014/40 is not binding on the public generally insofar as it refers to ISO standards not published in the *Official Journal of the European Union*'.

[48]This importance of the theoretical assumptions behind who does what is specifically emphasised in the introduction: *see* R. Gadbled and E. Muir, 'Actors and Roles in EU Law: Asking "Who Does What?" in the European Union Legal System', in this issue.

[49]*See supra* text at n. 18 ff.

[50]J. Smits, 'Plurality of Sources in European Private Law, or: How to Live with Legal Diversity?', in R. Brownsword et al. (eds.), *The Foundations of European Private Law* (Hart Publishing 2011) p. 323; Cafaggi, *supra* n. 13, p. 91; Brownsword et al., *supra* n. 16.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

visible in some newer studies that integrate private regulation as part of the pluralist legal orders that characterise European private law today. To give some examples: very recently, Vanessa Mak has shown extensively and with a great attention to detail how private regulation in the field of the platform economy, specifically standard form contracts, significantly shapes EU consumer law and consumer rights.[51] In a similar vein, private rules of platforms have been analysed by a private law scholar from the perspective of whether and what type of legal orders they create.[52]

This pluralist understanding links well to theories on transnational (private) law that have developed sophisticated understandings of the conditions and theoretical justifications regarding the existence of non-state law. These are based on, amongst others, theories of positivist law and systems theory,[53] legal pluralism,[54] transnational law,[55] and theories of global orders.[56] Despite differences in their theoretical justification, a common denominator of these theories is that they outline the conditions for private regulation to qualify as genuinely legal. Such legalisation can happen autonomously by means of the creation of secondary rules[57] within a private order itself[58] or it can occur when formal law recognises and institutionalises private orders. The development of autonomous secondary rules within the private order or recognition by the state system is pivotal for qualifying private rules as genuine legal orders and thus accessing them doctrinally. Thus, the system of norms that we investigate with respect to private regulation can either focus solely on the autonomous private

[51]V. Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) ch. 6.

[52]V. Ulfbeck et al., 'Platforms as Private Governance Systems: The Example of AirBnB', 1 *Nordic Journal of Commercial Law* (2018) p. 39.

[53]G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law Without A State* (Dartmouth Gower 1997) p. 3; L.C. Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator', 39 *Connecticut Law Review* (2007) p. 1739.

[54]P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012)

[55]P.C. Jessup, *Transnational Law* (Yale University Press 1956); G.-P. Calliess and P. Zumbansen, *Rough Consensus and Running Code. A Theory of Transnational Law* (Hart Publishing 2010); for a recent extensive re-contextualisation of Jessup's ideas *see* P. Zumbansen (ed.), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020).

[56]H. Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries', 73 *Modern Law Review* (2010) p. 30.

[57]According to positivist theory, legal orders are composed of primary and secondary rules. Secondary rules are those that set the rules on how to change primary rules, *see* fundamentally H.L.A. Hart, *The Concept of Law* (Oxford University Press 1961) ch. 5 at p. 79 ff.

[58]*See*, as a prominent example, the analysis of environmental corporate policies of multinational corporations in relation to their setting, implementation and enforcement by M. Herberg, 'Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making', in O. Dilling et al. (eds), *Responsible Business. Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008) p. 17.

order and how legal norms are structured within that system; or it can integrate formal law in the analysis and thus consider the role of the state in terms of norm construction, enforcement, recognition, and legitimation of private regulation.[59]

In the present context, these theoretical frameworks on private legal orders and transnational law are relied upon for descriptive-analytical purposes. The theories thus provide the analytical lens that allows legal scholars to 'see' these private orders as part of the law and analyse them in legal terms; but it does not yet provide a definite normative theory.[60] In the different traditions of legal scholarship as outlined above, these theories provide a basis that allows the conduct of doctrinal scholarship on private regulation without necessarily making an external normative conclusion about whether such orders have to be recognised as efficient, just, or legitimate. A legal-doctrinal lens to researching private regulation can then offer a new perspective that piggybacks on the form-giving potential of law with a view to understanding the specific legal conflicts within these private orders.[61]

In this context, a doctrinal perspective can also have constitutional significance. If we understand – admittedly this is a contested claim – that constitutions can occur not only in national and EU political and legal processes, but also originate from the societal sphere,[62] then using a doctrinal lens to view these private rules allow us to identify genuine legal conflicts that may take constitutional form. As a concrete example, one may again mention the discussions surrounding digital constitutionalism.[63] While in that debate legal constitutional scholars indeed primarily focus on how EU law can constrain private actors that fulfil

[59]This emphasis on the role of the state and state law for transnational law comes across very prominently in the work of Ralf Michaels, eg R. Michaels, 'State Law as a Transnational Legal Order', 1 *UC Irvine Journal of International, Transnational, and Comparative Law* (2016) p. 141 at p. 147 ff; R. Michaels, 'The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism', 51 *Wayne Law Review* (2005) p. 1209.

[60]For this difference between theoretical (descriptive) and normative frameworks in legal research, *see* S. Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice', 8 *Law and Method* (2018) p. 1. Similarly, *see* E. Lieblich, 'How to Do Research in International Law? A Basic Guide for Beginners', 62 *Harvard International Law Journal* (2021) p. 42 at p. 49 ff.

[61]On this potential of legal research in relation to social phenomena, *see generally* P. Kjaer, 'How to Study Worlds: Or Why One Should (Not) Care About Methodology', in Bartl and Lawrence, *supra* n. 24, p. 208 at p. 216 ff.

[62]Fundamentally on this understanding of constitutionalism *see* D. Sciulli, *Theory of Societal Constitutional: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press 1992); G. Teubner, *Constitutional Fragments: Societal Constitutionalism under Globalization* (Oxford University Press 2012); N. Walker, *Intimations of Global Law* (Cambridge University Press 2015) p. 97 ff.

[63]*See supra* text at n. 23 ff.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

quasi-public functions, one could also approach digital constitutionalism as an inquiry into the potential within the private rules themselves to adhere to a constitutional logic.[64] However, such constitutional logic can only be seen when the private law-related activity in question is analysed in legal terms.

The purpose of doctrinal research on private regulation

Accepting the theoretical lens that portrays private regulation under specific conditions as genuinely legal – possibly even constitutional – then enables a methodological perspective to be used for researching it with legal doctrinal methods. Or, in other words: once private regulation qualifies as law, it is and needs to be open to legal interpretation.

To explain what such a doctrinal analysis of private regulation can look like, a first discussion is needed on what exactly doctrinal scholarship, or the doctrinal method, is as opposed to social sciences methods and normative methods. Even though legal scholarship rarely discusses these methodological aspects openly, there is a growing academic literature specifically dedicated to legal doctrinal scholarship and its method.[65] What there seems to be agreement upon is that doctrinal scholarship works with a positivist understanding of the legal system. Legal doctrinal scholars treat the law as an existing system of norms and they see themselves as taking an internal perspective that situates them, as scholars, within that system of rules.[66] Legal doctrinal scholarship is about making genuine legal arguments. The reason for this internal perspective is related to the fact/norm divide[67] and the legal scholars' understanding of the nature of the legal system itself.[68]

Even if legal reasoning includes knowledge about facts and opinions, legal scholars ultimately translate those into legal-doctrinal categories and related legal arguments. External insights, the facts of the case, the demands by social actors, the underlying values of the law, are interpreted from the perspective of the system

[64]A. Golia, 'The Critique of Digital Constitutionalism', Max Planck Institute for Comparative Public Law and International Law Research Paper Series, No. 2022-13, p. 25 ff.

[65]E.g. M. van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2013); J. Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012); R. van Gestel and H. Micklitz, 'Why Methods Matter in European Legal Scholarship', 20 *European Law Journal* (2014) p. 292; van Gestel et al. (eds.), *supra* n. 25; S. Taekema et al. (eds.), *Facts and Norms in Law: Interdisciplinary Reflections on Legal Method* (Edward Elgar 2017).

[66]*See*, with further references, Smits, *supra* n. 26, p. 209 ff.

[67]Extensively S. Taekema, 'Introduction: Facts, Norms, and Interdisciplinary Research', in Taekema et al., *supra* n. 65, p. 3.

[68]P. Westermann, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law', in van Hoecke, *supra* n. 65, p. 87.

of rules and the structure of the legal system.[69] The process of legal interpretation, i.e. of developing the legal argument, has been described as being grounded in interpretation and hermeneutics as well as in construction.[70] It is an approach aimed at integrating the new legal arguments within the system of rules[71] and identifying and reconstructing what McCormick has been describing as 'legal knowledge result[ing] from an interpretative inquiry into law as a conceptual category'.[72]

Moreover, legal scholars work not only with a background theory of positive law and a shared understanding of how to interpret sources from an internal perspective; they also share an understanding of the validity and the relevance of the sources they collect. There seems, even if only at the surface level, to be a basic agreement about what qualifies as primary and secondary sources and how they relate. Interestingly, legal systems with a less strong positivist grounding, be that EU legal scholarship or international legal scholarship, already demonstrate how this shared agreement about the sources is partly broken up.[73]

Legal scholarship's discomfort in thinking about private regulation in a doctrinal fashion can precisely be related to the fact that such shared agreement about internal coherence, the system of norms and the authority of sources, does not exist in relation to private regulation. Transnational law, and private regulation in particular, is seen – at best – as law in the making. But even if it were to qualify as law, as the above theories on transnational private law suggest, it is a new system containing opaque, disputed, fragmented, and vague norms.[74] This provides a first indication of why transnational law is so strongly conducted with a focus on empirical work that sheds light on the practice, and researchers still shy away from analysing its character as genuine legal norms. It may also explain why

[69]Compare R. Stürner, 'Die Zivilrechtswissenschaft und ihre Methodik', 214 *Archiv für die civilistische Praxis* (2014) p. 7 at p. 11: 'Allgemein gesagt liegt das Wesen rechtswissenschaftlicher Dogmatik in der systematischen Zuordnung des Einzelfalles zu Grundregeln und Grundprinzipien auf der Basis des geltenden Rechts'.

[70]Taekema, *supra* n. 67, p. 11.

[71]C. McCrudden, 'Legal Research and the Social Sciences', 122 *Law Quarterly Review* (2006) p. 632 at p. 633 ff.

[72]N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) p. 290.

[73]A prominent example for such debate about the sources is the recognition of soft law in respective legal order : *see* for EU law, L. Senden, 'Changes in the Relative Importance of Sources of Law – The Case of EU Soft Law', in U. Neergaard and R. Nielsen (eds.), *European Legal Method – in a Multi-Level EU Legal Order* (Djof Publishing 2012) p. 225 at p. 253 ff; for international law, *see* K. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) p. 421.

[74]*See* already on this, C. Menkel-Meadow, 'Why and How to Study "Transnational Law"', 1 *UC Irvine Law Review* (2011) p. 97 at p. 112 ff.

https://doi.org/10.1017/S1574019622000402 Published online by Cambridge University Press

transnational law and its theory have been described as a method in itself, as a way of thinking about what counts as law, rather than as an interpretation of the rules themselves.[75]

The differences between 'traditional' formal law and private regulation notwithstanding, I suggest that this does not mean that legal research on such fragmented, incoherent, and evolving orders cannot be conducted at all. To the contrary, it can equally be that doctrinal research may simply look different in its purpose and method when being applied to these fragmented orders. Scholars working on global and transnational law and the rise of new forms of private legal orders suggest that there may be a shift in the role and function of legal doctrinal research from interpretation to construction of legal orders. In his analysis on global law, Walker has put this pointedly: '... it is precisely the unsettled quality of legal ordering to which global law responds and which it in turn displays – the erosion of taken-for-granted frameworks of legal authority – which offers the global jurist an expanded jurisgenerative role'.[76]

This means that doctrinal scholarship on private regulation, in particular in a global context, fulfils the function to contribute to the creation of this order in the making. Legal doctrinal scholars do not simply describe the system of rules, but they create and justify it. This is a purpose that legal doctrinal scholarship has unconsciously pursued in its analysis of state legal orders as well,[77] but it is a purpose that becomes more prominent in research on less formalised forms of legal ordering. To make this more specific and relate it to the example discussed above, this suggests that the mere act of investigating standards, contracts, codes, from the perspective of how they constitute, re-frame and organise EU law on a global scale is already research on constructing a new form of European-influenced transnational private law. In that sense, doctrinal scholarship on transnational law becomes an exercise in ordering, decoding vague legal categories, and making them visible in policy practice.[78]

Contours of doctrinal research on private regulation

Legal doctrinal scholarship on private regulation is then about constructing legal norms based on the materials, the 'raw law', that private actors create. Such

[75]Most prominently P. Zumbansen, 'Transnational Law, Evolving', in J. Smits (ed.), *Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) p. 898 at p. 904.

[76]Walker, *supra* n. 62, p. 106.

[77]Smits, *supra* n. 26, p. 219 ff.; P. Schlag and A.J. Griffin, *How to do Things with Legal Doctrine* (Chicago University Press 2020) p. 12 ff.; C. Jamin and P. Jestaz, *La doctrine* (Dalloz 2004).

[78]M. Reimann, 'The American Advantage in Global Lawyering', 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2014) p. 1 at p. 16 ff. (who then argues that lawyers trained in common law are better equipped to engage in such transnational doctrinal work).

construction does not take place in a vacuum, and it is emphatically not an exercise in 'anything goes' that allows the researcher to find and construct whatever category they like. Instead, this construction needs to follow a theoretical framework that helps to identify what can qualify as law. Again, one can revert to Walker, who has been showing for scholarship on global law how these build upon a well-established heritage in legal thought, be that global administrative law, conflict of laws, or *ius gentium*.[79] Accordingly, doctrinal scholarship on private regulation requires a methodological lens that takes note of the vast array of existing legal concepts and investigates them from this established perspective.

For instance, when researching how EU law relates to private regulation, this could mean basing the analysis on the legal-doctrinal concepts in EU law[80] and then looking at how the private legal rules compare to that in their analytical category.[81] Such investigation can take two directions: it can take the formal legal concepts – here in EU law – as the legal conceptual framework against which private legal rules are compared in how they accommodate or shift the meaning of these very concepts; or one can start from private regulation and a construction of the concepts therein to then relate them to established legal concepts. In both directions, the legal-doctrinal analysis is methodologically grounded by means of looking at the object of inquiry through the lens of existing legal concepts.

And such concepts equally need to be built and made explicit. When we ask the research question of how private regulation contributes to the global reach of EU law, two directions can be envisaged: we can, on the one hand, analyse private standards, contracts, codes through the lens of existing EU legal rules and ask, for instance, how precisely – i.e. in what form and with what meaning – private actors create similar legal concepts in private regulation. In this case, the analysis focuses on how this EU legal understanding is reflected, recodified or contested in private rules, i.e. how companies in their corporate policies, their supply chain agreements and how private standardisation interpret and reconstruct the rules that they are subject to. On the other hand, we can ask how private regulation, i.e. standard form contracts in various sectors, institutionalised trading practices, corporate policies, relates to (EU) private law concepts, such as contract law and fairness.[82]

[79]Walker, *supra* n. 62, p. 156.

[80]L. Azoulai, 'The Europeanisation of Legal Concepts', in Neergaard and Nielsen, *supra* n. 73, p. 165.

[81]This approach is similar to what comparative law discusses as the possible application of its methodology to non-state law: *see*, for more details, text at n. 101 ff.

[82]*See*, for instance, on the changes implicated by private legal orders on the concept of contract with the example of derivatives, A. Chadwick, 'Commodity Derivatives, Contract Law, and Food Security', 9 *Transnational Legal Theory* (2018) p. 371; on changing contract law and interpretation

This approach of grounding the analysis in legal concepts then provides an avenue to thoroughly investigate these new forms of law-making from a legal perspective and thereby generate doctrinal knowledge about private legal rules as part of the global legal order.

Methodology: accessing and understanding private regulation

From the argument in favour of analysing private regulation doctrinally, 'slippery methodological questions'[83] follow and these need to be addressed as well. A claim about the need for a doctrinal approach to private regulation cannot be complete if not complemented by a discussion on how to do this type of research.

The 'elephant in the room' is probably the problem of access for research purposes. It should not be forgotten that private regulation does not have the same status as official legal sources; it is hardly accessible in the same manner as official law. In contrast, it is best qualified as 'unseen' or 'hidden' law appearing in 'unusual places'.[84]

This practical issue of the lack of accessibility of private legal sources is probably the most pressing problem of all. It regularly forms the start of a research project on private regulation and regularly a discouraging one, to find out that sources planned for analysis are secretly guarded by the actors that crafted them. Once we postulate that such private rules are legal and, moreover, that they can be accessed doctrinally, then it is of utmost importance to be able to analyse and consequently to access these rules. Legal scholars are, however, not very well-equipped to handle such invisibility. In contrast to empirical social scientists, they regularly work with the assumption that formal law can be retrieved, organised, and analysed by everyone. The problem is well-documented – think of Jessup's hint of transnational law requiring 'access to secret archives',[85] or, very prominently, Bernstein's informal and confidential club houses.[86]

in the light of the normative-institutional demands deriving from private practices, *see* D. Wielsch, 'Contract Interpretation Regimes', 81 *Modern Law Review* (2018) p. 958.

[83]N. Affolder, 'Transnational Law as Unseen Law', in Zumbansen (2020), *supra* n. 55, p. 364 at p. 366.

[84]N. Affolder, 'Looking for Law in Unusual Places: Cross-Border Diffusion of Environmental Norms', 7 *Transnational Environmental Law* (2018) p. 425.

[85]P.C. Jessup and H.J. Taubenfeld, 'Outer Space, Antartica, and the United Nations', 13 *International Organization* (1959) p. 363 at p. 363: 'There are those who are troubled by the difficulty of mastering a new massive subject matter some of which is shrouded in unfamiliar scientific terminology and some of which is imprisoned in official security classifications'.

[86]L. Bernstein, 'Opting Out of the Legal System: Extracontractual Relations in the Diamond Industry', 21 *The Journal of Legal Studies* (1992) p. 115.

Accessing private regulation: scholarly strategies and proposals

The legal literature on private regulation has developed different strategies to overcome this problem, and three of these stand out.

A first very common methodological strategy is the turn to investigate the 'practice', such as through ethnographic studies and, from there, infer the rules.[87] However, linking back to the previous categorisation, such research approaches can again better be described as research that investigates the social practices and does not generate sufficient knowledge about the rules.

A second prominent methodological choice is to rely on indirect methods of access. Several studies rely on publicly available documents and base their analysis on the assumption that such publicly available documents simultaneously reveal something about the 'hidden documents' to which access cannot be gained. This strategy is very popular when it comes to analysing business contracts. Instead of gaining access to the contracts directly, the analysis focuses solely on accessible documents, such as the statements by companies on their contracting practices.[88] Others rely on case law by courts in which such contracts have been under scrutiny and rely on the factual description that is employed there. Such a strategy has an obvious advantage because it relies on openly accessible documents and, if done well, contains additional theoretical explanation on why the accessible documents consulted could provide indirect insights into the hidden documents. Yet, there is of course a major disadvantage with such public documents being indirect sources. If we qualify them in truly legal terms, then these documents form the commentaries or explanatory memoranda. But legal scholars would hardly recognise that an analysis of such secondary materials can be a substitute for an analysis of primary sources.

A third strategy – increasingly common with the social sciences influence on legal scholarship – is to make a case for a proper empirical study of these private rules. What may thus be needed is a systematic collection of data, whether through interviews with managers, consultants or other stakeholders, or through questionnaire-based data collection. Relatedly, a quite frequent solution for legal scholars is to choose to work with anecdotal evidence and rely on a number of documents that the scholar has managed to obtain access to through informal means[89] or their own

[87]Affolder, *supra* n. 83, referencing prominently as examples the work of F. Johns, *Non-Legality in International Law* (Cambridge University Press 2013) and for private regulation J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge University Press 2000).

[88]As an example, *see* K. Peterkova Mitkidis, 'Using Private Contracts for Climate Change Mitigation', 2 *Groningen Journal of International Law* (2014) p. 52.

[89]E.g. the works of F. Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures', 36 *Fordham International Law Journal* (2013) p. 1557.

past experience[90] or to rely on evidence that has already been collected in empirical studies.[91] However, such empirical studies, in particular interviews and questionnaires, encounter similar problems as the ethnographic approach described above, because of their indirect access to the sources. What managers indicate, what they allow access to, is not a direct window into the documents itself – it is carefully crafted information based upon invisible criteria by the person who has drafted it. As one observer put it: 'Interview-based studies help elucidate hidden aspects of . . . practice, yet they run into some of the same problems of "trust me" default visions of expertise'.[92]

How can one overcome these challenges and research the hidden practices? I, of course, cannot claim to have the all-encompassing answer; yet, I do propose two methodological strategies that may allow to provide a fuller picture of opening the 'black box' of transnational private rules (and not just practices).

A first strategy could be a suitable one where enough empirical evidence on a particular form of private regulation exists, as is the case for instance for supply chain contracting or technical standards. In this context, legal doctrinal research on private regulation may take the form of a comprehensive review of such evidence from a legal-doctrinal perspective. Such systematic reviews of the literature and meta-studies are not very well-known in legal research, but they are regularly conducted in other academic disciplines from which law could learn.[93] Given their publication in academic journals, the material for those reviews is regularly accessible.

Yet, such methodology requires a more systematic approach towards reviewing such studies from a legal doctrinal perspective. In particular, these studies would need to be organised to follow a legal-conceptual lens and consequently arrange empirical evidence by the legal concepts with which one looks at private regulation. Hence, the review would not be oriented on synthesising 'what we know' about a particular form of private regulation. Instead, it would develop an explicit and openly acknowledged theoretical and legal-doctrinal framework to review the studies and thereby reconstruct 'what it is important to know' from a legal perspective. Such research would need to pay particular attention to the diverse

[90]D. Danielsen, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance', 46 *Harvard International Law Journal* (2005) p. 411 at p. 411 ff.

[91]*See*, eg, Affolder, *supra* n. 83, p. 428. *See also* A. Beckers, 'From Corporate Personality to Corporate Governance in International Human Rights Law: The Transformation of Human Rights Through Corporate Governance Structures', in N. Bhuta and R. Vallejo Garreton (eds.), *Human Rights in Global Governance* (Oxford University Press forthcoming).

[92]Affolder, *supra* n. 84, p. 376 ff.

[93]*See*, for a first attempt to translate systematic reviews to law, M. Snel and J. de Moraes, *Doing a Systematic Literature Review in Legal Scholarship* (Eleven International Publishing 2018).

nature of empirical studies and the compatibility of different methodological approaches in terms of the knowledge they generate. If, for instance, research is about how companies integrate the requirements of EU law into supply chain contracts, then the legal doctrinal approach would be to look at existing empirical studies on supply-chain contracting through this legal lens of EU law and identify where studies provide evidence for such integration, explicitly or implicitly.[94]

A second methodological strategy links the idea of access much more strongly to the normative requirement of transparency as a condition for qualifying as a legal source. As such, legal scholars could base their analysis of private regulation on publicly available materials, such as standard-form contracts or public statements by companies, as is currently the case. However, these publicly available sources would not be analysed as mere proxies for the internal actual documents, but they would be treated as the private legal rules themselves. The theoretical emphasis would need to be placed on the fact that modern law's characteristic is to treat writing and availability as a condition for validity.[95] This would mean that a *legal* inquiry into the rules of transnational law would inevitably be limited to accessible rules. These are not an 'imperfect bridge' to what is actually happening; instead, accessibility is treated as a prerequisite for transnational rules to be of a legal nature that are open to an interpretation as 'transnational law in the books'. In this regard, the methodological discussion surrounding access to the document is interlinked with a normative argument on the legal quality of the sources that limits doctrinal analysis to those documents that meet the essential conditions of publicity.

Understanding private regulation

However, even when the practical problem of obtaining access to private regulation has been solved, a second methodological problem arises. Accessing private documents not only means getting your hands on the documents, but also requires substantive access to what is written in these documents. Private regulation regularly does not contain legal terminology and may be difficult to understand for legal researchers; it may contain novel terms and concepts and to a large degree is written in non-legal expert language or as a promotional document. Thus, even if legal scholars have practical access, they encounter documents that are often written in a manner that is incomprehensible to them. This problem was already identified by Jessup when he emphasised the barriers to obtaining

[94] *See*, for such integration in the field of taxation, A. Beckers, 'The Creeping Juridification of the Code of Conduct for Business Taxation: How EU Codes of Conduct become Hard Law', 37 *Yearbook of European Law* (2018) p. 569 at p. 587 ff.

[95] N. Luhmann, *Law as a Social System* (Oxford University Press 2004) p. 238 ff.

knowledge about transnational law due to the 'unfamiliar scientific terminology' that is used.[96] The problem is, of course, broader than just a requirement for scholars to learn the language of experts and their terminology. The question is: how can the language and concepts that are not formalised as legal documents be made understandable and interpretable as part of legal doctrine?

In this context, it may be helpful to remember that formal legal texts are documents with different meanings and belong to different social spheres. Even when we look at the study of courts and court decisions, we may find that these decisions are now analysed not only from the doctrinal perspective, but also by considering them as cultural artifacts that speak to society[97] or as text that is to be coded and analysed in statistical terms.[98] They are read not only as legal documents, but also as documents with a moral, social, or informational significance. In a similar vein, one can look at private regulation: these types of documents can equally be understood as belonging to different social spheres and thus as being open to investigation from a social and legal perspective. However, in this case, the order of analysis is reversed. In the first place, private regulatory documents are read as social sources, but it is equally possible to construct them as legal documents. This requires a legal meaning to be read explicitly into the text and the perceived expert language. Researchers in private law have already shown that contracts belong to different contracting worlds : they form an economic transaction, a productive creation, and a legal agreement.[99] Accordingly, they are open to different forms of interpretation and, depending on the perspective taken, different aspects are seen.

A similar approach should be taken to accessing private regulation. Legal researchers need to understand these documents in legal terms. If we, again, take our example of analysing how EU law is translated into private regulation, then an analysis of how private regulation frames EU law would suggest reading the private document to search for functional equivalents to the formal legal concepts, such as how the EU legal requirement to conduct due diligence in the Conflict Minerals Regulation[100] is integrated into the private policies of traders or the reports of auditors. It suggests searching in a non-legal document for the legally significant terms and constructing them as such. This may be an imperfect and

[96]Jessup and Taubenfeld, *supra* n. 85, p. 109 ff.

[97]S. Mair, *Europe Re-Interpreted: The Court of Justice as a Narrator of the Self-Governing Polity* (PhD Thesis, European University Institute 2020).

[98]U. Šadl and H.P. Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts', 30 *Leiden Journal of International Law* (2017) p. 327.

[99]G. Teubner, 'Contracting Worlds: The Many Autonomies of Private Law', 9 *Social and Legal Studies* (2000) p. 399.

[100]Regulation 2017/821/EU, *supra* n. 8.

equally flawed way to give private regulation a proper legal meaning. But it may open up a space in which legal scholars are able to more clearly see what role private actors actually fulfil when they act as regulators. Inspiration for such methodology can be taken from the field of comparative law. Comparative law has long been concerned with the search for functional equivalents in different legal systems as a basis for comparison.[101] Moreover, comparative law has opened itself up to an analysis of non-state legal orders as part of their comparison.[102] The doctrinal analysis of private regulation can be linked to this tradition by suggesting a functional approach to researching private legal orders.

Conclusion

This contribution has been concerned with an analysis of private actors. It has specifically focused on their role as private regulators and has thus looked into private regulation as a research object and how to conduct legal research on this topic. This article could show that EU legal scholars generally prefer to look at private regulation as a social practice, as information, and to assess it in the light of fundamental values. In contrast, there has not yet been enough investigation of private regulation as rules. The contribution has, as a normative proposal for the debate on how to research private actors as regulators, introduced some first ideas on how to apply a legal-doctrinal approach to private regulation. The contours of a doctrinal methodology for private regulation have been sketched. It is hoped that such first steps towards identifying a legal scholarly lens for the vast array of private rulemaking will help others to follow and show how legal-doctrinal scholarship can contribute to our understanding of private regulation.

[101]R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) p. 339.

[102]M. Siems, 'The Power of Comparative Law: What Type of Units Can Comparative Law Compare?', 67 *American Journal of Comparative Law* (2019) p. 861.