The emergence of European private law and the plurality of authority

Alexis Galán & Stephanie Law*

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Abstract

This article aims to identify, analyse, frame the emergence of and advance a multidimensional understanding of diverse modes of authority, engaging the development of European private law as an analytical lens. It proceeds as follows. First, a general analysis of authority is undertaken whereby it is differentiated from power and legitimacy. Thereafter drawing on Christopher McMahon's threefold conceptualisation of authority, the article attempts to construct a multidimensional framework, which allows for sufficient consideration to be attributed to the plurality of authority's component parts. In respect of each dimension of this theoretical outline, the analysis is concretised via the integration of references to the emergence and evolution of European private law. The overview of the foundations and associated challenges of authority allows us to proceed to evaluate how the framework advanced herein can facilitate the identification and comprehension of the different types of authority that emerge transnationally in European private law development.

Keywords: authority; legitimacy; power; European private law; legal pluralism

* Post-Doc, 'Angelo Sraffa' Department of Legal Studies, Bocconi University and Senior Researcher, Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg, respectively. Both authors contributed in equal terms. A previous version of this article was presented in September 2012 in the conference 'Postnational Rulemaking between Authority and Autonomy,' celebrated at the University of Amsterdam. We would like to thank the participants of the conference for their comments and suggestions. We would also like to thank Yane Svetiev for his critical discussion of the paper.

I. Introduction

The interconnection of a multitude of developments at the supranational and transnational levels has led to shifts in the nature of law-making processes in various arenas in the broader context of globalisation.[1] These changes reflect a trend of 'thickening' in the realm of law making, interpretation and enforcement; that is to say, nation states and international organisations no longer operate alone but rather co-exist alongside a horde of other institutions and actors, including those of a private nature.[2] In the context of these global transformations, the European Union (EU) stands out as one of the more advanced cases.[3] The thick normative and institutional structure of the EU, with its decentralised and polycentric form, is to an extent without comparison[4] in the rest of the world.[5]

One of the effects brought forth by the evolution of the EU's governance model is the blurring of the public-private divide.[6] As van Leeuwen argues, the structure of the EU 'today consists of a complicated network of public and private regulation'.[7] It has become an almost impossible task to distinguish between the spheres of operation of public and private

[1] European integration and Europeanisation together constitute a 'transformative process', Lucina Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press, 2011), 3; or rather, sets of processes, occurring within an increasingly globalised space, see Hanne Peterson *et al* (eds), *Paradoxes of European Legal Integration* (Ashgate, 2008), 4.

[2] See, *inter alia*, Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996).

[3] These transformations are reflected in the new governance discourse, the literature on which is considerable; see, amongst others, Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and US* (Hart, 2006) and Jonathan Zeitlin (ed), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (Oxford University Press, 2015) and in particular, Charles F. Sabel and Jonathan Zeitlin, 'Learning from Difference: the New Architecture or Experimentalist Governance in the European Union,' (2008) 14(3) *European Law Journal* 271.

[4] Of course, more broadly, the EU has been engaged as a model of integration in the ASEAN regime, while the CJEU has been held as a model for the Andean Tribunal; in respect of the former, see Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press, 1999), 163 *et seq.* and in respect of the latter, see Karen J. Alter, Laurence R. Helfer and Osvaldo Saldias, 'Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice,' (2012) 60 *American Journal of Comparative Law* 629.

[5] Indeed, it has been asserted that '[t]he existence of the EU as a supranational regulator means that, unlike in the global setting, a strong public regulatory framework for transnational private regulators within Europe is present': Fabrizio Cafaggi and Agnieszka Janczuk, 'Private Regulation and Legal Integration: The European Example' (2010) 12(3) *Business and Politics* 6, 3.

[6] See for an analysis of the disintegration of the distinction, Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *U.Pa.L.Rev.* 1349, and in relation to EU law, and a discussion of the attempts to strike a balance between market integration and the protection of (public) interests, Constanze Semmelmann, 'The Public-Private Divide in European Union Law or an Overkill of Functionalism' (2012) *Maastricht European Private Law Institute Working Paper* 2012/12, at 12-13 and 15 *et seq*..

[7] Barend van Leeuwen, 'Private Regulation and Public Responsibility in the Internal Market' (2014) 33 *Yearbook of European Law* 277, 277.

institutions. This is especially true in the context of European private law (EPL). Whereas traditionally private law has been understood as 'publicly (mainly state-) produced law', focused on the promotion of private autonomy and the exercise of freedom of contract,[8] EPL departs to a degree from this model. Fundamentally, it is emerging as *'regulatory* private law', imbued with regulatory functions that are designed to foster, advance and manage certain policy objectives across diverse areas of law including package travel, unfair contract terms and commercial practices, consumer credit and rights, e-commerce, telecommunications, general services, product liability, intellectual property rights, financial markets and investor protection. While EPL – and even regulatory EPL – is still largely concerned with the facilitation of the internal market,[9] it is also increasingly focused on promoting regulatory (for example, administrative,[10] corrective, or fundamental rights-orientated) purposes[11] and has legislated for norms that advance such objectives. Moreover, while it remains the case that EPL is largely promulgated by the Union legislature, transposed by the national legislatures, interpreted by the Court of Justice of the European Union (CJEU) and applied by the national courts, it is no longer *only* designed and propounded at the European level within public institutions. Rather, private and mixed public/private actors and institutions are taking an increasingly prominent role in the production and enforcement of EPL (whether this encompasses – as explored further below – private, multi-national companies that draft codes or terms and conditions to govern their contractual relations, or alternative disputes resolution entities, including arbitrators, that apply those norms and resolve disputes and exist outside the state).[12] These transformations, which also generate changes to the vocabulary used to describe how such normativity is created and exercised, suggest that the time is ripe for exploring new avenues of analysis.[13]

As suggested above, one particularly significant and visible way in which our conceptual vocabulary is being influenced by these transformations concerns the notion of authority. EPL is a complex field of law full of juxtapositions in which private actors, alongside public and mixed actors, have acquired a prominent role in rule-making processes and in enforcement:

[8] Fabrizio Cafaggi, 'Private Regulation in European Private law' in Arthur S. Hartkamp *et al* (eds), *Towards a European Civil Code* (Kluwer; 4th edn., 2011), 93.
[9] With the EU, as a regulator, striking down national norms that constitute barriers to trade, or indeed harmonising those that can be justified.
[10] Hans-Wolfgang Micklitz, 'Administrative Enforcement of European Private Law' in Roger Brownsword *et al* (eds), *The Foundations of European Private Law* (Bloomsbury, 2011), 563.
[11] Hans-Wolfgang Micklitz (ed), *The Constitutionalization of Private Law* (Oxford University Press, 2014).
[12] Cafaggi (n 8) 91-92.
[13] Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2014), 12-13.

'private actors are now increasingly involved in regulatory processes through various participatory forms' while public and private actors interact in the public sphere 'through various cooperative and competitive processes'.[14] Public, private and mixed public/private actors and institutions thus find themselves endowed with authority, and with the possibility to influence the way in which matters arising within a distinct areas should be and indeed are regulated.Consequently, EPL provides an interesting landscape for the examination of authority as it emerges from diverse sources and institutions.[15]

Authority has always been a contested issue, having long given rise to a number of difficult questions: What distinguishes authority from mere naked power? How is authority affected by legitimacy? Can there be authority without power? The focus herein is driven by an intensification of the arguments within the authority discourses. These developments have provided fertile ground for the analysis of how authority is exercised beyond the traditional confines of the state and state-derived institutions.[16]

While this renewed interest is in itself a welcome development with regard to the significance attributed to understanding how authority currently – and indeed, potentially – operates, and while the literature has begun to use authority in an increasingly expansive way, we propose in this article that the discourse can be advanced even further. A powerful example of this trend can be found in the analysis of authority put forward by Armin von Bogdandy *et al*. After showing how authority is being transformed globally, they provide a conceptual framework in order to make sense of those changes, defining authority as:

> the legal capacity to *determine* others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation … The determination may or may not be legally binding. It is binding if an act *modifies the legal situation* of a different legal subject without its consent. A modification takes place if a

[14] Fabrizio Cafaggi and Horatia Muir Watt, *The Making of European Private Law: Regulation and Governance design* (European Governance Papers, No. N-07-02, 2007), 11.
[15] Jan Klabbers, 'Setting the Scene,' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009), 13-14.
[16] These analyses on the exercise of authority (as well as its impact on power and legitimacy) 'beyond the state' are by no means new. They transcend the discourse on constitutionalism in the EU, global administrative law, private law, or transnational law, see, Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 20; Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Criminal Law* 843; or Michael A. Helfand (ed), *Negotiating State and Non State Law – The Challenges of Global and Local Legal Pluralism* (Cambridge University Press, 2015).

> subsequent action which contravenes that act is illegal. Yet, we hold that the concept of authority needs to be conceived in a broader way than this rather traditional definition. The capacity to determine another legal subject can also occur through a non-binding act which only *conditions* another legal subject.[17]

The paragraph is rich and suggestive, generating a number of questions. *Prima facie*, this understanding of authority is correct; authority can generally be understood to encompass the ability to *shape* the will of an actor and does not tend to operate to facilitate the exercise of the actor's own judgment in a given situation.[18] More importantly, von Bogdandy *et al* rightly note that the concept of authority needs to be broadened, as new authorities that are not necessarily connected with the state might operate differently from those that are. While the conceptualisation of authority advanced can shed light on how novel authorities might exert their influence, we submit that this understanding needs to be further supplemented, particularly in order to acknowledge that authority is 'pluralistic'.[19]

Authority does not have a fixed or particular form but rather is dependent, amongst other possible considerations, on the relevant context in which and by whom it is engaged on its functions and its design. As Bodansky has argued, 'not every exercise of authority requires the same degree of justification'.[20] The implicit message is that if every exercise of authority needs to be justified differently, it is so because we are faced with a diverse range of authorities, each of which produces different effects. Authority then must be understood as multidimensional, not only in terms of its origins and engagement but also in terms of its impact. While a judge, an association, a parliament or a commission have authority in one way or another, the manner in which they exercise it necessarily differs. This differentiation is becoming increasingly exacerbated as authority becomes further fragmented and spread between multiple levels and amongst diverse actors and institutions, whether public, private or mixed public/private. The clearest advantage of a plural conceptualisation of authority lies

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[17] Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375, 1381ff. While it might seem strange in principle that we are citing public international lawyers, their preoccupation with authorities beyond the state goes to the heart of European private law. They are preoccupied with the exercise of authority, no matter its origins.

[18] Christopher McMahon, *Authority and Democracy – A General Theory of Government and Management* (Princeton University Press, 1994) 30.

[19] Nancy L. Rosenblum, 'Studying Authority: Keeping Pluralism in Mind' in James Roland Pennock and John William Chapman (eds), *Authority Revisited – NOMOS XXIX* (New York University Press, 1987), 111.

[20] Daniel Bodansky, 'The Concept of Legitimacy on International Law' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer, 2008) 316.

in its potential to provide a more nuanced framework for capturing how it operates not only in diverse contexts but also where these diverse actors and institutions, and multiple levels, exist in a single context. EPL is also exemplary in this respect.

Indeed, as noted, the choice of EPL as the field of analysis is a deliberate one. Its evolution as a reflection of the emergence of transnational law within the European context offers a stimulating environment in which the nature of authority can be examined.[21] On the one hand, EPL is a dynamic field that has been in an almost constant state of development since its infancy; this has become particularly clear in recent years, and especially post-Lisbon, as EPL has undergone considerable transformations in terms of its overall aims and objectives and the mechanisms and character of its formation, interpretation and enforcement. Moreover, as EPL increasingly engages both public and private actors and institutions, it also allows for authority, and its multiple dimensions, to be examined from the perspective of the connections between the processes of law-making and European integration.[22] Furthermore, while EU law is generally understood to be inherently public, that is to say, predominantly comprised of norms generated within and by either the Union or the state, thereby creating seemingly impenetrable ties between the two institutions, EPL introduces an additional private law-making facet to our examination of authority, whether via private parties or private regulatory organisations.

The article proceeds as follows. It begins with a discussion of the concept of authority. As a first step, authority is demarcated from two closely related and often intertwined concepts, power and legitimacy; while existing at the crossroads of both, it is important to differentiate authority from each. Thereafter, we briefly synthesise the particular character and elements of EPL and how public and private actors intermingle therein. We then introduce Christopher McMahon's tripartite conception of authority. This differentiated conceptualisation allows us to identify, capture and understand the multiple aspects of the exercise of authority at the European level. At the same time, the section concretises the analysis within the specific EPL context with reference to how authority has been approached in the literature, and the scope

[21] Reference might also be made to Nils Jansen's text on non-legislative authority, Nils Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (Oxford University Press, 2011), 87 *et seq*. In a similar way to this article, but focusing on an analysis of (historical and other) non-legislative sources, Jansen argues that the orthodox concepts of authority engaged are those which reflect 'officially-sanctioned' norms, with the 'official sanction' deriving from the state, thus cementing the 'domination' of the state.

[22] Which, as Cafaggi has insisted, 'requires a reassessment of rule-making power, its constitutional design, and its institutional implications': Cafaggi (n 18) 92.

for its differentiated understandings following McMahon's multidimensional model. The choice of McMahon might seem somewhat surprising at first sight. Discussions and analysis of authority within the literature usually rely on authors like Hannah Arendt or Joseph Raz, or they present typologies like that of Max Weber. We argue that there are important reasons for drawing on McMahon. Indeed, what separates McMahon from the former authors is his explicit focus on differentiation. This provides a new lens from which one can understand the current transformations of authority in a multilevel and pluralistic world. Such an approach does not deny the importance of the work of those authors on how to think of authority – or that other scholars have profited from them – but they do not extensively discuss authority's plural character.[23] Another advantage of engaging McMahon's distinction is that his understanding highlights how authority works within a 'legal-rational' worldview. Take for instance Weber's tripartite distinction of authority: that of charismatic, traditional and legal-rational authority.[24] While this conception still retains its validity, it is less suited for the purposes of dealing with many current phenomena. The rise of authority beyond the state falls largely into the category of legal-rational, essentially rendering Weber's distinction too broad for our purposes.[25] In contrast, McMahon's framework can accommodate and indeed differentiate between the types of authorities currently identifiable.

II. At the crossroads: authority between power and legitimacy

The concept of authority is contested largely because it is difficult to delineate its exact boundaries.[26] It is found at the point of convergence of other concepts that are similarly contentious and difficult to define. Authority thus needs to be conceived as part of a 'semantic field' in which connections and overlaps with other concepts can be found. As Friedrich Kratochwil posits, a concept cannot be grasped simply by producing 'some form of simple matching operation between 'reality' and our terms of discourse, but by systematically showing the links of the concepts to other concepts placing it in a semantic field'.[27] It is in

[23] See for instance, Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 *Transnational Legal Theory* 354, an article in which he advances his analysis through Arendt's understanding of authority.
[24] M. Weber, *Economy and Society – An Outline of Interpretative Sociology* (University of California Press, 1978), chapter 3.
[25] When a rating agency delivers its judgment, charisma or traditional authority is not at play; rather, it is the legal-rational form that takes precedence.
[26] See Richard B. Friedman, 'On the Concept of Authority in Political Philosophy' in Joseph Raz (ed), *Authority* (Blackwell, 1990) 56, 56.
[27] Friedrich Kratochwil, 'On Legitimacy' (2006) 20(3) *International Relations* 302, 307; also John N. Gray, 'On the Contestability of Social and Political Concepts' (1977) 5(3) *Political Theory* 331.

light of this consideration that we examine authority at the crossroads of interconnected concepts. These include the notions of legality, rights, obligations, power, and legitimacy. We will focus on the latter two as they are the closest, and perhaps the most contested, with respect to authority.

The concepts of power and legitimacy, which in turn are connected with coercion and persuasion, appear in the vast majority of discussions regarding authority.[28] Notwithstanding that people can comply 'with authoritative directives without being coerced and also without necessarily being convinced that what they direct is the best course of action in the circumstance',[29] authority involves both without necessarily being absorbed by either. As such, in order to better understand authority, we will firstly briefly distinguish it from power and legitimacy.

To begin, it should be always emphasized that this distinction is not clear-cut and any attempt to define the concepts will necessarily focus on certain phenomena. This is done on the basis of the understanding that identification is generally 'relative to one or more perspectives and is, indeed, inherently perspectival […]; there is no objective – in the sense of perspective – neutral – way of [distinguishing]'.[30] Instead, when dealing with concepts like authority, power and legitimacy, we encounter a coexistence of multiple interpretations, each of which has equal standing. Accordingly, in this article we do not make any claim of comprehensiveness by virtue of discouraging or dismissing other accounts but rather advance the view that there is scope and indeed a need, for the adoption of a plural perspective.

Keeping these limits in mind, we can turn to briefly examine the relationship between authority and power. At first glance, authority and power seem to be difficult to disentangle. Indeed, as Barry Barnes notes, they tend to be used interchangeably in much of our daily discourse.[31] This is unsurprising as authority implies some claim to power; it involves the ability 'to change the normative situation of another',[32] that is, to affect, modify or influence one's status, and as such, it is dependent on the exercise of power. Nevertheless, it would be

[28] See Venzke (n 23) 354.
[29] McMahon (n 18) 25; Miller (n 1) 3; Peterson (n 1) 4.
[30] Although he is focused on authority, it is possible to extend his argument to both power and legitimacy; Steven Lukes, 'Perspectives on Authority' in James Roland Pennock and John William Chapman (eds), *Authority Revisited – NOMOS XXIX* (New York University Press, 1987) 60.
[31] Barry Barnes, *The Nature of Power* (University of Illinois Press, 1988) 74.
[32] Andrei Marmor, 'An Institutional Conception of Authority' (2011) 39 *Philosophy & Public Affairs* 238, 239.

erroneous to subsume the two concepts, even if their daily use seems to suggest exactly such a possibility. Looking more closely, we can imagine instances in which power and authority do not co-exist. Fundamentally, while authority generally involves power, it is not necessarily the case that power involves authority. We can identify two examples: 1) while a judge has authority and power, a thief who makes threats with a gun has power but no authority; 2) when a police officer exceeds his or her authority, complaints may arise on the basis of the transgression but not against his or her lack of power.[33]

These examples suggest that authority can be conceived as a narrower concept than power. In the literature, this approach is typically encompassed by the idea that authority is understood as 'power plus the right to use it'.[34] This additional dimension brings us to legitimacy. The right to use power or the right to rule constitutes the conventional way of referring to the highly-contested concept of legitimacy.[35] According to this view, authority cannot exist without legitimacy; in the absence of its normative or sociological acceptance, all that happens is 'naked' power.[36] Following this line of argument, only legitimacy can determine the legal, political or moral standing of authority. However, the connection between the concepts must be understood in a more subtle way. Similarly to power, which can exist without authority, the exercise of authority can be illegitimate and still be regarded as authoritative. For example, let us take the case of international arbitral tribunals. With the rise of bilateral and multilateral investment treaties such as NAFTA, a number of such tribunals have been established. They have been criticised to a considerable extent on the basis that they undermine the sovereignty of states, and particularly, for attributing undue influence to multinational corporations. Regardless of whether these criticisms are justified, it is without doubt that these bodies have (legal) authority, notwithstanding that their legitimacy is contested.[37] The same might be said in other contexts - for example, the inclusion of choice of court (or arbitration), or indeed choice of law, agreements in contracts. A contract between a

[33] Barnes (n 31) 74.
[34] *Ibid*, 74.
[35] Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics & International Affairs* 405, 405; also Arthur I. Applbaum, *Legitimacy in a Bastard Kingdom* (Center for Public Leadership, 2004).
[36] Dennis Wrong, *Power: Its Forms, Bases and Uses* (Basil Blackwell, 1979) 39-40.
[37] This understanding of authority is influenced by Andrei Marmor's conception of 'practical authority.' To have normative power is to have the ability to impose a normative change on the status of other actors. Authority then refers to the 'ability to introduce a change in the normative situation that exists between the relevant parties, and the idea that the introduction of the change is unilateral, subject to the discretion or decision of the power-holder.' See Andrei Marmor, 'An Institutional Conception of Authority' (2011) 39 *Philosophy & Public Affairs* 238, 240.

powerful multinational corporation and a weaker party may not be deemed legitimate in a moral sense but may nevertheless be deemed authoritative.[38] While the exercise of authority can provide the basis for the alteration of the normative status of an actor, the questions of the legitimacy of that authority have to be answered separately.[39] This is not to say however that the relationship between authority and legitimacy is irrelevant; certainly, these dimensions are intertwined. Crucially, legitimacy can influence the effectiveness of authority. Thus, the existence of an identifiable legitimacy, as opposed to coercion or material reward for example, can render the exercise of authority less 'costly.'[40] As a matter of fact, many activities undertaken by different authorities tend to be discussed in terms of the legitimate/illegitimate binary; nevertheless, this should not be taken as evidence of a necessary connection between the two concepts.

Given these preliminary observations, we can now move on to our differentiated understanding of authority, which we examine through the lens of EPL development and which in turn helps us in making sense of the complexity of the latter.

III. Exploring authority in the context of European private law development

This section will set out in further detail the complexity of law making in EPL, beginning with a brief outline of how EPL has traditionally been tied to state-based law making, followed by an examination of emerging sources of norms, and of dispute resolution mechanisms that underpin our analysis of the evolving state of affairs. Within national legal orders, it has been intended and indeed, largely continues to be true, that law is made, interpreted and applied in close proximity with the state. As a result, on the basis of the political domination attributed to domestic institutions by the state, law has traditionally been promulgated by the national legislature and interpreted and applied by the national courts. The connection between private law, the emergence of the nation state, the political consolidation

[38] Of course, in EPL, the authority (and enforceability) of such contracts might be called into question in certain circumstances; for example, the EU has legislated for substantive, as well as cross-border procedural protection for certain weak parties, including consumers, employees and insured parties, in the Brussels I bis and Rome I Regulations.

[39] By normative status we intend to say that an authority can alter the position of any actor. For instance, a change in consumer protection law by giving, let us say, more leeway to producers in what they can do, alters the normative status of the consumer as it might lose certain remedies or rights.

[40] Craig Matheson, 'Weber and the Classification of Forms of Legitimacy' (1987) 38(2) *The British Journal of Sociology* 199, 200.

of private law norms[41] and the facilitation of markets[42] has always been strong, reflected in the efforts at codification, including the non-comprehensive endeavours at the codification of the general law in Sweden in 1934, in Bavaria in 1756, in Prussia in 1794, in France in 1804, and in Austria, which separated public from private law, in 1811.[43]

Linking this discussion to the notion of globalisation engaged at the outset, the term 'governance without government' is often used to capture the significant transformations in state sovereignty that result from the globalisation of economic, social and political activity,[44] and relatedly, from the devolution of authority to non-state actors via processes of deregulation and privatisation.[45] In the broadest sense, this is reflected in the reallocation of sovereignty, which undercuts the arguably long-established public/private distinction between state-based and other forms of ordering.[46] Concomitant processes of centralisation and decentralisation[47] generate a shift in the locus of authority in terms of the articulation, interpretation and application of norms,[48] from state-based entities to public, private and indeed, hybrid actors.

With the emergence of the EU as a regulatory space,[49] the Union legislature, has adopted a law-making role that reflects to a certain degree that of the national legislatures, although it also differs considerably both in procedure and policy objectives. As the Union legislature lacks an explicit Treaty-based competence in private law matters, legislative endeavours with

[41] For a more detailed examination than is possible here, see Hans-Wolfgang Micklitz and Yane Svetiev, 'The Transformation(s) of Private Law' in Hans-Wolfgang Micklitz, Yane Svetiev and Guido Comparato (eds), 'European Regulatory Private Law –The Paradigms Tested', *European University Institute Working Paper 2014/04*, 69, 82 *et seq.*

[42] See Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2008), 186.

[43] Jansen (n 21) 14. In another sense, Daniela Caruso advocates that private law facilitates the emergence of new legal orders, beyond the state, and new cores of authority therein: Daniela Caruso, 'Private Law and State-Making in the Age of Globalisation' (2006) 39 *New York University Journal of International Law and Politics* 1.

[44] Panagioties Delimatsis, 'The Enforcement of TPR - Professional Services' (Tilburg Law and Economics Centre Discussion Paper 2011- 45) 2.

[45] James Rosenau and Ernst-Otto Czempiel (eds) *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, 1992).

[46] Gregory Shaffer, 'Transnational Legal Process and State Change: Opportunities and Constraints' *University of Michigan Law School, Research Paper 10-28, 2008*, 19.

[47] Julia Black, 'Decentering Regulation: The Role of Regulation and Self-regulation in a Post-regulatory World', (2001) 54 *Current Legal Problems* 103.

[48] Shaffer (n 45) 21; R. Daniel Kelemen, 'Globalization, Federalism, and Regulation' in David Vogel & Robert A. Kagan (eds), *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (University of California Press, 2004) 270, fn.58.

[49] Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 148. While the phenomenon of private regulation is undoubtedly transnational, this analysis focuses on private law making in the European context.

a private law dimension must find their 'legitimacy basis' in the facilitation of the internal market, that is, the removal of barriers to trade.[50] National provisions which constitute trade barriers but can be justified for their protective nature have been harmonised per Art.114 Treaty on the Functioning of the European Union (TFEU), where they have 'as their object the establishment and functioning of the internal market'. Substantively, EPL retains a functionality, extending beyond 'classical' private law to 'regulatory' private law, from general contract law, to consumer protection, product safety (and significantly, food safety), environmental protection, financial and general services. Moreover, EPL has also been increasingly subject to the influence of fundamental rights protections.[51]

The law-making processes in EPL broadly illustrate our choice of area of study. Across these policy areas, the approximation policy of the EU has predominantly been one of harmonisation, realised largely in the field of EPL through regulations and directives, in respect of the scope of which we have seen a shift from minimum to maximum to targeted maximum harmonisation.[52] While the European Commission leads these endeavours, Member State representatives, civil society organisations and bodies,[53] professional organisations, as well as academics and individuals also play a role in these legislative processes, as is evident from an examination of the *travaux préparatoires* of Union legislation.[54] Moreover, as foreseen by Art.288 TFEU, the Union has increasingly made

[50] Which has been done via the CJEU's negative integration. The case law is considerable and includes, amongst others, the classical jurisprudence of the early court: for example, on measures having equivalent effect as quantitative restrictions (Case C-8/74 *Procureur du Roi v Dassonville* [1974] ECR 837) and on the examination of justified restrictions (Case C-120/78 *Cassis de Dijon* [1979] ECR 649).

[51] Study Group on Social Justice, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653 and in respect of the notion of its constitutionalisation, Micklitz (n 11).

[52] See for example, in respect of the Directive on Consumer Rights 2011/83/EU, the European Commission advanced three proposals in respect of the reach of harmonisation, making no reference to the traditional minimum harmonisation approach: 1) maximum harmonisation; 2) minimum harmonisation with a national recognition clause and 3) minimum harmonisation with a court of origin approach; European Commission, 'Green Paper on the Review of the Consumer Acquis', COM(2006) 744 final. The original proposal adopted a maximum harmonisation approach; as enacted, the Directive is of a targeted maximum harmonisation scope. The reach of the Union legislation and the Union's determination as to the scope of harmonisation – whether minimum, maximum or targeted maximum – shapes the freedom left to the Member States to provide for a higher degree of protection via national mandatory law.

[53] Olivier de Schutter, 'Europe in Search of its Civil Society' (2002) 8 *European Law Journal* 483, who advocates that the engagement of civil society in policy development at the European level might facilitate the development of forms of participatory democracy, as well as invoking bottom-up knowledge building, and the dispersal of the Union understanding.

[54] However see Marija Bartl, who criticises the lack of 'broader political debate', at the stage of public consultation, and debate within the Parliament and the Council of the EU pertaining to the Directive on Consumer Rights 2011/83/EU and the Proposal for a Common European Sales Law: Marija Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 *European Law Journal* 23.

recourse to soft law[55] instruments in line with its Better Regulation approach.[56] Soft law instruments – which also underpin the Open Method of Coordination – include non-binding recommendations, opinions and guidelines and mark a shift away from a command-and-control approach to regulation.[57] While soft law instruments are not binding but rather provide guidance for the national legislatures, the Member States are obliged to transpose Union law into the national legal system via implementation measures so as to ensure its effectiveness and efficiency.[58]

Private law is distinct in the sense that it engages private parties in identifying or establishing the rules that should be applied to govern their relationship, in line with the principles of party autonomy, efficiency and individualised justice; in certain circumstances – normally depending on the identity of the parties – mandatory rules will also apply. EPL thus introduces both optional and mandatory norms. While both optional and mandatory tend to be state-made or EU-based, for example, in the case of consumer protection or labour laws, they may also be made by, and derive their authority from, a body other than the national sovereign, or the Union legislature.[59] The private actors engaging in norm-formation tasks in

[55] Broadly understood in international law as 'normative provisions contained in non-binding texts,' Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000), 292. For EU law purposes, as 'rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects,' see Francis Synder, 'Soft Law and Institutional Practice in the European Community' in Stephen Martin (ed), *The Construction of Europe: Essays in Honour of Émile Nöel* (Kluwer, 1994), 197–225.

[56] European Commission, 'Communication from the Commission of 25 July 2001, European Governance - A White Paper' COM(2001) 428 final.

[57] Linda Senden, *Soft Law in European Community Law* (Hart, 2004). It is worth noting that these trends also generate issues of legitimacy. As the European Parliament has stated, soft law allows the Commission to issue directions by avoiding the Parliament; see Anne Peters, 'Soft Law as New Mode of Governance' in Udo Diedrichs, Wulf Reiners, and Wolfgang Wessels (eds), *The Dynamics of Change in EU Governance* (Edward Elgar, 2011), 21–51, 39: 'the danger of circumventing the European Parliament by reliance on soft law also touches on the issue of the democratic justification or legitimacy of soft law'. See also, David M. Trubek, Patrick Cottrell and Mark Nance, '"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity' *Jean Monnet Working Paper* 2/2005.

[58] For more on the nature of the EU's governance determinations, see Sabel (n 3) 14, and in relation to different policy areas, the contributions to Zeitlin (ed) (n 3); these include, amongst others, data protection (Abraham Newman, 'European Data Privacy Regulation on a Global Stage', 227) and food safety (Maria Weimer and Ellen Vos, 'The Role of the EU in Transnational Regulation of Food Safety', 51).

[59] A key example is the reliance in the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, 36-68) on private regulation, including in particular, codes of conduct; private regulation norms – while not binding as EU law – provide a means of implementing the norms set out in the Directive itself. At Recitals 113-115, the Directive advances that codes of conduct should be drafted and adopted in the context of regulated professions, in line with competition law rules and according to the possibility of the Member States to provide for higher standards in their national systems. The Council of Bars and Law Societies of Europe's Code of Conduct, applicable in the legal profession, can be taken as an example; see, for further explanation, Mislav Mataija, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law* (OUP 2016), 207-208.

the area of EPL are predominantly private individuals (via contract); however, this group also includes businesses (which make norms to govern their relationships and their conduct via contracts, standard terms and conditions, and regulatory codes), groups of academics and experts (which drafted, for example, the Principles of European Contract Law and the Draft Common Frame of Reference (DCFR)), regulatory associations (which have developed standards and codes of conduct to which businesses must adhere either to gain access to a certain market – e.g. the 'fair trade' market – or to be able to illustrate their adherence to a particular set of rules), as well as 'private' dispute resolution bodies, like in-house complaints departments, or arbitrators. The age-old question of whether such an approach satisfies the traditional conceptions of law continues to provoke challenges but extends beyond the remit of this article.[60] The prime example of private law-making processes is the *lex mercatoria*, which emerged as a system of custom and practice used by merchants and enforced by merchant courts. It has shown how private law in itself constitutes an example of private law-making; parties can contract to establish their legal relationship, incorporating into that contract provisions as to the dispute resolution body that should hear any dispute and the state law or non-state norms that should apply to resolve any conflict arising. As noted above, the nation states, and subsequently the EU, have nevertheless, to differing degrees,[61] played a fundamental role in the regulation of those relationships, particularly where there are policy reasons for doing so, for example, where vulnerable parties – consumers, employees or tenants, amongst others – are deemed to require protection against a naked exercise of a powerful business, employer or landlord.[62] Another key example or private law-making via academics is reflected in the now-withdrawn[63] Proposal for a Common European Sales Law (pCESL),[64] which emerged as a political incarnation of the DCFR,[65] providing an optional instrument for the governance of sales.

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[60] Jan Smits, 'Private Law 2.0: On the Role of Private Actors in a Post-National Society' (Hague Institute for the Internationalisation of Law and Eleven International Publishing, 2011), 9.

[61] The typical example is to look to the systems of the former Soviet Union, which required rather considerable change, initially following its disintegration and subsequently on their joining the EU.

[62] Brigitta Lurger, 'The "Social" Side of Contract Law and the New Principle of Regard and Fairness' in Arthur Hartkamp *et al* (eds), *Towards a European Civil Code* (Kluwer; 4th edn., 2011) 353.

[63] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' (COM(2011) 635 final).

[64] The pCESL has been replaced by proposals aimed to advance a digital single market: European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content' (COM(2015) 634 final) and European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods' (COM(2015) 635 final). See also European Parliament, 'Draft Report on 'Towards a Digital Single Market'' 2015/2147(INI) in response to European Commission, 'Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe' (COM(2015) 0192).

Lastly, in terms of dispute resolution, we can also identify trends towards the engagement of private parties. The national court typically has jurisdiction over conflicts that arise and come before it via interested parties and it is responsible for rendering a final decision on the dispute. Where these conflicts have a Union law dimension and a problem of interpretation arises, the national court should, and might be obliged to, request a preliminary ruling from the CJEU. The CJEU, a supranational court, the jurisdiction of which is predominantly invoked either on the initiative of the national courts, or on the basis of infringement proceedings launched by the European Commission, thus has exclusive jurisdiction in respect to the interpretation of EPL. At both the national and transnational level however, other – i.e. not judicial and often not state-based but rather of a private character – dispute resolution bodies, including arbitration tribunals and ADR bodies, may also have jurisdiction, either if the parties to the dispute so agree[66] or if national civil procedure law so requires.[67]

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[65] The DCFR had itself been derived in part from the Principles of European Contract Law, an academic endeavour launched in the 1990s, the United Nations Commission on International Trade (UNCITRAL) and the International Institute for the Unification of Private law (or commonly known as UNIDROIT). In the 2000s, the Commission launched an Action Plan (European Commission, 'Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law - An Action Plan' (COM(2003) 68)) with the aim of improving the quality and coherence of European contract law. It then funded a project which led to the Common Frame of Reference, and undertook a review of the consumer acquis (which led, as noted above, to the CRD). The DCFR was then advanced by a network of academics providing for principles, definitions and model rules of civil law for commercial and consumer relationships. The DCFR was published in 2009: Christian von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Sellier, 2009).

[66] Per the EU's endeavours at regulating cross-border litigation in civil and commercial matters, the parties to a contract may choose both the court in which their dispute should be heard and the applicable law. The choice of jurisdiction can be made per Brussels I bis, Art.25 (Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) while the choice of law applicable to a contractual relationship can be made per Rome I, Art.3. An earlier draft of Rome I also explicitly invoked the possibility for the parties to choose non-state law, a reference now found in recital 13, (Regulation 593/2008 on the law applicable to contractual obligations); a choice of the law applicable to a non-contractual relationship (e.g. relationships arising from a delict or unjust enrichment amongst others), can also be made; this can be done in more limited circumstances however, that is, only after the event giving rise to damage occurs, or only before the relevant event, where both parties are pursuing a commercial activity and have freely negotiated an agreement (per Rome II, Art.14 (Regulation 864/2007 on the law applicable to non-contractual obligations)). These instruments also provide for protection for potentially vulnerable parties, including insured parties, consumers and employees, for example, and for the application of overriding mandatory rules.

[67] Thus, national civil procedure may require that the parties engaged in alternative dispute resolution before resorting to the courts. The CJEU held in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini* EU:C:2010:146, that Arts.3 and 13, Decision 173/07/CONS (the procedural rules for the settlement of disputes between telecommunications operators and end-users), which provide that access to courts is conditional upon an attempt to resolve the dispute out of court, to be compatible with Union law – Directive 2002/22/EC on Universal Service and users' rights relating to electronic communications networks and services, OJ L 108, 24.04.2002, 51-77 – and the principle of effective judicial protection per Art.6 European Convention of Human Rights and Art.47 Charter of Fundamental Rights, OJ C 326, 26.10.2012, 391-407.

Against this background of relevant trends in the making, interpretation and enforcement of EPL norms, we can now turn to McMahon's tripartite distinction of authority and examine how this multi-dimensional framework operates in this complex, multilevel construction of EPL.

IV. The three faces of authority in EPL

Having explained the emergence and broad elements characterising EPL, we can now analyse the evolving modes of authority in light of McMahon's framework. McMahon begins his account by accepting that it is possible to identify a common trait uniting different types of authority. Following Joseph Raz, McMahon recognizes preemption as the characteristic trait of all types of authority. That is, any directive issued by an authority provides reasons for or refrains from performing an action replaces part of those reasons for action.[68] However, he emphasises the need to differentiate the nature of authority according to the particular situations in which it is engaged. In particular, McMahon proposes a tripartite analytical distinction of authority, identifying: (i) authority as expertise, (ii) authority grounded in the promise to obey, and (iii) authority as facilitating mutually beneficial cooperation. Given that this division is analytical, there exists no institution that exercises authority in such clear-cut terms. Instead, institutions normally wield authority with various traits. The differentiation operates to facilitate the identification of the different elements at play in any given situation. Let us see how each mode of authority operates and how it appears within EPL.

(i) *Epistemic authority*

One area in which private actors and bodies have expanded their role in the context of EPL is that of technical standards. As Cafaggi remarks, a co-regulatory regime has been organised whereby European and national institutions focus on normative regulation whereas private European and national standardisation bodies develop the technical side.[69] The development of technical standards, in areas like food and product safety, reflects typically that which McMahon refers to as *epistemic authority*. An epistemic authority is 'someone whose

[68] McMahon (n 18) 41. For Joseph Raz's analysis see his Joseph Raz, 'Authority and Justification' (1985) 14 *Philosophy and Public Affairs* 3.
[69] Fabrizio Cafaggi, 'Private Regulation in European Private law' in Arthur S. Hartkamp et al (eds), *Towards a European Civil Code* (Kluwer, 4th Edition, 2011) 115.

assertions are taken as true by the members of a given group' in a particular context.[70] *Prima facie*, there is no reason to follow or obey an expert; however, in everyday life and equally in extraordinary situations, we do so. Take for example, the lawyer who provides legal advice on the drafting of a commercial contract between two businesses established in Europe, or the consumer association that provides information on a consumer dispute, applicable consumer rights and the most consumer-friendly approach to dispute resolution. We recognise the expert as an authority and comply with his advice because he has identified 'the truth about some matter.'[71] This invocation of 'truth' suggests that the attribution of authority, and the importance attached to it, is content-dependent. That is to say, we follow the authority because the content of the directive issued seems to be true. As McMahon notes, epistemic authority also operates inductively. Thus, in engaging an expert and deferring to his knowledge and judgment,[72] we rely on having observed his or her success in providing explanations or predictions that turn out to be true, and infer that future explanations will similarly turn out to be true. The modes by which the recognition of such authority is accomplished are varied; it might be based on the rate of success in predictions or on the citation of references confirming the advice given, amongst other factors. Crucially, and uniquely, *epistemic authority* can be rejected in the case where it is perceived to be erroneous.[73] McMahon highlights that epistemic authorities are typically stratified; that is to say, expert authorities operate at different levels such that those operating at a lower level tend to defer to those operating at a higher level. Thus, as the relative position of an epistemic authority generally depends on its capabilities and success, hierarchies among authorities are not rigid but rather fluid and informal.[74]

Above we referred to the example of food safety. In this context, we can identify an increase in the number of private actors engaged in developing these and other technical standards; these actors are experts or professional organisations specialised in particular areas of law. In transnational law broadly, and for example, in 'the fields of bankruptcy law, anti-money laundering law, intellectual property law, competition law, and the regulation of the provision of municipal water services', - key areas falling within the realm of EPL – it has been recognised that the shift towards a role for expertise in governance can lead to 'more

[70] McMahon (n 18) 86.
[71] *Ibid,* 88.
[72] *Ibid*, 87.
[73] *Ibid*, 88.
[74] *Ibid*, 91-92.

technocratic forms of governance, away from other forms of authority, such as representative government'.[75] Codes of conduct, benchmarks and technical standards have been developed by public, private and mixed actors, including firms, civil society bodies and standardisation organisations, to provide broad sets of norms[76] that can be adopted for the purposes of self-regulation, regulation of their own subsidiaries and/or regulation of access to the market, amongst others.[77]

In EU law, and private law especially, it has long been possible to identify trends towards specialisation. Indeed, EPL has arguably always been fragmented and piecemeal due to the absence of a comprehensive competency basis. Thus, legislative endeavours have been made into specific areas of law in which it has been determined that action needs to be taken to facilitate the operation of the market. Similarly, grand projects – the DCFR, for example – while launched by the European Commission, have been led and shaped in their scope and substantive content by networks, groups and committees of academic and professional experts. Moreover, the Commission also adopts an expert role of sorts. As noted above, while the majority of EU laws are adopted via the ordinary legislative procedure (that is, engaging the Commission, Parliament and Council of the EU), we can identify – for example via soft law[78] – shifts in the exercise of authority from the Union legislature in its entirety to the Commission in itself.

Authority might be attributed to these sets of standards – public, private or mixed – following their acceptance or adoption by relevant actors.[79] Indeed, the Union legislature has recognised the interaction of national and European private law legislation and technical standards (often

[75] Gregory Shaffer, 'Transnational Legal Process and State Change: Opportunities and Constraints' (University of Michigan Law School, 2008) 22 (footnotes removed).
[76] For an outline see, Dagmar Schiek, 'Private Rule-Making and European Governance: Issues of Legitimacy' (2007) 32 *European Law Review* 443.
[77] It is thus important to bear in mind that transfers or re-allocations of authority, that is, shifts in its locus, may lead to shifts in the balance of power, strengthening the position held by some (already powerful) actors, while undermining that of others; Fabrizio Cafaggi, 'New Foundations in TPR' (2011) 38 *Journal of Law and Society* 20, 30.
[78] In the area of consumer protection for example, soft law mechanisms have been adopted since the 1970s, at a time when the (then) European Economic Community lacked competence in such matters; see EEC Council Resolution on a 'Preliminary Programme for Consumer Protection and Information Policy' OJ 1975, C 92/1, and more recently, European Commission, 'DG Justice Guidance Document Concerning Directive 2011/83/EU', June 2014 (Available at: http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf; Last Accessed: 21.05.2016) and European Commission, 'Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights Granted Under Union Law' 2013/396/EU.
[79] Spencer Henson and John Humphrey, 'The Impacts of Private Food Safety Standards' (FAO-WHO, 2009), 8.

developed by transnational, privately-made regimes), [80] while the Commission has consistently made reference to the notion of 'confidence in expert advice' in its White Paper on European Governance.[81] This expert advice is used as a means of influencing policy-making processes, while the Commission aims to ensure this is given the relevant support by promoting information on the origin, content, use and influence of expert advice given.[82] An example of expert groups being used in EPL development arises in respect of the work done on projects intended to provide a basis for future legislative action. For example, this would include the DCFR, which led to the drafting of the pCESL.[83] The influence attached to these documents is clear; they have been engaged (to a certain degree) by the Union and national legislatures in drafting and implementing EPL directives, guidelines and recommendations of the Commission and in the interpretations rendered by the courts, and particularly the CJEU.

(ii) *Authority as the promise to obey*

Private law relationships – whether bilateral (e.g. a contract between a consumer and a trader) or multilateral (e.g. the contracts that exist in a supply chain that leads to the production of the goods consumed by the final consumer) – have long been tied to the notion of an agreement, whether conceptualised theoretically as a (set of) bilateral agreement(s) or as a promise. McMahon's second category refers to *authority as the promise to obey*. This account of authority, as the name indicates, is based on the notion of promise. For McMahon, promises create reasons for action and generate obligations. By promising something in particular and in doing so, removes the possibility that he can consider other options that might generate consequences that are contrary to the outcome to which he has committed himself.[84] An *authority as promise to obey* then emerges from a promise to follow the instructions issued by an authority or in the exercise of an authority.[85] The pre-existing promise requires compliance

[80] For example, Directive 98/34/EC (Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.07.1998, 7-48) laying down a procedure for the provision of information in the field of technical standards and regulations, with reference to European standardisation bodies in Annex I and national bodies in Annex II.
[81] European Commission, 'European Governance' (White Paper Cm 248, 2001), 18-22.
[82] This information is available in respect of each of the EU's relevant policy areas. It also forms part of the Commission's Horizon 2020 project: http://ec.europa.eu/programmes/horizon2020/en/experts, which sets out the expert groups already established and their role in different policy areas.
[83] Commission Decision 2010/233/EU of 26.04.2010; consider also, amongst others, the work of the Expert Group on European Contract Law, established by Commission Decision 2013/C16/03, of 17.01.2013.
[84] As McMahon observes, this restriction is self-imposed, see McMahon (n 18) 97.
[85] *Ibid*, 99.

with those orders, regardless of reasons against this action that might subsequently emerge.[86] Crucially, the notion of acting on the basis of some previous deliberation is not restricted to individuals but can be extended to society as a whole, in which case, promises might be reflected in the society's legal and social norms. Thus, *authority as promise to obey* includes legal, political and private authorities operating nationally, transnationally or internationally.

In terms of EPL development, the analytical focus might immediately fall on the institution of promise, or to contract, which can be engaged as a vehicle for the exercise of promise, between two or more parties. On the one hand, classical private law is concerned with protecting individual interests – generally economic – established via private relationships and with redressing losses which are caused by the commission of wrongs. From the perspective of promise and contract, it is typically orientated towards promoting compliance with the obligations arising from the agreement reached by contract or the promise made. Where there is non-compliance, i.e. where one party to a contract, or a party who has made a unilateral promise, breaches that undertaking, private law is concerned with regulating the situation that arises therefrom. The underlying bases of the obligation, the breach of which gives rise to a right to redress are multiple and complex, having been tackled by scholars of natural law and virtue,[87] contractarianism and contractualism[88], expectation,[89] reliance[90] and so on. Regulatory private law also provides for limited exceptions to the strict obligations arising from promise in line, for example, with the protection of the consumer.[91] If the focus of the assessment is shifted to multilateral contractual arrangements, the increasingly significant role of private actors also comes to the fore. The private regulation of supply chains[92] is shaped by various factors[93] and is very often global, concerned not with territorial

[86] *Ibid*, 101.
[87] For an overview, see James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press, 1991), and in particular, 1-10
[88]Including Thomas Hobbes, *Leviathan* 1651 (Richard Tuck Cambridge ed, 1991) (CUP, 1991) xiii–xv and differently via contractualism, by John Rawls, *A Theory of Justice* (Harvard University Press, 1971).
[89] Thomas M. Scanlon, 'Promises and Practices' (1990) 19 *Philosophy and Public Affairs* 199.
[90] Lon L. Fuller and William R. Perdue, 'The Reliance Interest in Contract Damages' (1937) 2 *Yale Law Journal* 373 and Charles Fried, *Contract as Promise* (Harvard University Press, 1981), chapter 4.
[91] Thus, mandatory rules of national and European private law allow the consumer to withdraw from a contract without incurring liability. See for example, Art.9 of the Consumer Rights Directive (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, 260-284) which provides a right of withdrawal for the consumer in respect of distance or off-premise contracts, to be exercised within 14 days, with no requirement for any kind of redress.
[92] In different fields including food, technological equipment, garment production and so on.
[93] It is not possible to go into significant detail here but the literature is considerable; it includes the failure or anticipation of public regulation ((consider, for example, the failure of the 1992 discussions in Brazil on forestry protections, following which the first private regulatory schemes emerged), public criticism of poor working conditions or accountability standards, shifts in the balance of power between producers and retailers and so on.

regulation but with functional regulation; as such, private regulatory bodies are often specialised.[94] Indeed, we can see that the private actors engaged in regulation are not only producers, manufacturers or traders who are party to one specific contract (or indeed, series of contracts that exist) but also private (or hybrid private/public) regulatory bodies,[95] resulting in a mix of private, contractual and state-based governance sometimes in the form of a standard contract.[96]

We can also look beyond contract and promise as private law institutions to consider the notion of authority as the promise to obey from the perspective of the institutional bodies that facilitate the creation and operation of EPL. The CJEU can be taken as an example. When a case comes before a national court and concerns an issue of EU law, the national court can – and indeed might be obliged under Art.267(3) TFEU if it is a court of last resort from which there is no judicial remedy – refer a question for a preliminary ruling on interpretation or compliance to the CJEU.[97] A judgment of the CJEU is binding, can be enforced[98] and has the force of *res judicata* in all Member States and not only in that of the referring court. However, the courts – and especially the lower courts not bound by the obligation to refer – have a discretion as to whether to do so, in line with the CJEU's own guidance.[99] As such, the preliminary reference procedure, and its effects, by virtue of which the CJEU has self-engineered a role in making private law, is reflective of the national courts fulfilling their obligations established via their national governments to follow the Treaties, not only as to their text but as to their broader objectives. Could this be understood as reflective of this notion of authority based on promise? The promise to obey from this perspective would be

[94] They are numerous and diverse in their foundation, character and role.
[95] Consider for example, the California Transparency in Supply Chains Act (SB-657), which requires that some companies operating in California identify the efforts they are making to eradicate forced labour. The law requires that the company provide information to consumers and to identify the due diligence they are taking with regard to its supply chain management. Recent cases of this nature have been dismissed in the courts; see *Barber v Nestle* SACV 15-01364-CJC(AGRx) in the US District Court, Central District of California, Southern Division.
[96] See the European Coffee Report of the European Coffee Federation (Available at: http://www.ecf-coffee.org/index.php?option=com_content&view=article&id=35&Itemid=94; Last Accessed: 24.06.2016), which engages the private standards developed by the Coffee Federation. International coffee trading is governed by the International Coffee Organization, of which the EU is a part. See also, for an overview of European and global contract chains and the role of private actors: Kaisa Sorsa et al, *Transnational Private Regulation, System Level Innovations and Supply Chain Governance in the Coffee Sector: Evidence from Brazil, Italy and Finland* (Turku University of Applied Sciences 2016).
[97] Art.267(2) TFEU, OJ C 326, 26.10.2012, 47-390.
[98] CJEU Rules of Procedure, Art.91(1), OJ L 173, 26.6.2013, 65 and per Arts.260, 266, 280 and 299 TFEU, OJ C 326, 26.10.2012, 47-390.
[99] Case C-77/83 *CILFIT* [1984] ECR I-1257 and more recently, Case C-60/14 *Ferreira da Silva e Brito and Others* EU:C:2015:565.

said to constitute the basis on which the national courts understand themselves as required (albeit this does not necessarily always happen in practice[100]) to refer and follow the directions of the CJEU, the power of which is reflective of an institutional power derived from its Treaty basis, its own procedural rules, and the cooperation of its promissory partners.

(iii) *Authority as facilitating mutual beneficial coordination*

EPL has essentially been developed through mechanisms of coordination, a reflection of McMahon's third dimension of authority. We can explore this idea in more depth, following a brief outline of his understanding. McMahon's third dimension of authority is *authority as facilitating mutual beneficial coordination*. As the name suggests, this type of authority exists because, by solving problems of coordination, it provides benefits to the members of a group: by acting jointly and setting up an authority, the members of a group 'can produce an event or state of affairs that each values but that none of them could have produced alone'.[101] Law, broadly speaking, can be taken as an example of this type of authority. As Mattias Kumm remarks:

> [l]aw is an effective instrument that enables and fosters the establishment of welfare-enhancing cooperative endeavours between various actors. Law can help reduce transaction costs for setting up trans-border cooperative schemes. It is a tool that helps build trust between international actors and thus facilitates engagement in mutually beneficial cooperative endeavours, thereby enhancing global welfare. Law then can be a tool that helps foster the development of transnational communities, internalize externalities, prevent prisoner-dilemma-based misallocation of resources, realize efficiency gains, etc. . . .[102]

McMahon further divides this type of authority. In its first incarnation, an individual participates in the cooperative endeavour because their personal benefit from the good that is provided by the authority exceeds the cost of their contribution. In this situation, authority merely serves as a coordination device. In the second, the benefit that an individual receives

[100] Consider the recent case of the *Bundesverfassungsgericht*, 2 BvR 2735/14, Order of 15.12.2015 (English press release available at: http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html;jsessionid=A1235A9967C58FC4EC86960E0E430AD2.2_cid392); Last Accessed: 21.05.2016).
[101] McMahon (n 18) 102.
[102] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalists Framework of Analysis' (2004) 15(5) *European Journal of International Law* 907, 918; see also Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Harvard University Press 2015).

from their participation does not outweigh the cost of their contribution.[103] As McMahon states, this type of situation typically arises in the context of public goods, which by definition cannot be restricted to a limited group but are rather enjoyed by all. Even at first glance, the scope for problems of collective action and free riding are identifiable.[104] In such situations, it is necessary to give the 'members of the community sufficient reason […] to contribute to a cooperative scheme contribution';[105] this incentive might exist for example in the ability of the authority to impose a punishment or to take on a coercive role, the presence of which would lead to a situation whereby the group as a whole ends up in a more favourable position than they could achieve by acting individually.[106]

Returning to the EPL example, we suggest that the very means by which it has been developed by the EU and national legislatures, interpreted and applied by the CJEU and the national courts, and utilised by private parties, are reflective of mechanisms of coordination. Firstly, EPL is predominantly a body of harmonised norms: national rules that constitute a potential, yet justifiable, obstacle to the facilitation of the internal market, are identified and harmonised. On the one hand, this mechanism of legal development might seem to be one of hierarchy, in which the EU legislature imposes rules on the Member States. However, it also encompasses and reflects the understanding of authority as coordination; EPL constitutes a regime in which the Member States coordinate their national rules with the aim of promoting their own individual and common interests in the common market (as well, increasingly, in social and fundamental rights protections). We can identify two more specific examples, as McMahon's concept of authority as coordination brings to the fore the significance of the relationship that exists between a group of individuals or entities. The first is that of collective redress.[107] At the EU level, without harmonising national law and civil procedure, the Commission has aimed to construct a framework that can be implemented on a voluntary basis by the Member States and be used to allow mass claims to be resolved, particularly by consumers who might otherwise be reluctant to engage in individual litigation. Their

[103] McMahon (n 18) 105.
[104] See generally Mancur Olson Jr., *The Logic of Collective Action – Public Goods and the Theory of Groups* (Harvard University Press, Revised ed 1971).
[105] McMahon (n 18) 107.
[106] McMahon equally notices that whenever there exists a *de facto* authority, an authority that operated before the public good appeared, individuals are ready to follow its orders and directives without the need for coercion or the provision of rewards. It is the case that because the authority is already well-established within a community, there are sufficient grounds for believing that everyone in the group will follow the orders; see *Ibid*, 107, 117.
[107] European Commission, 'Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law' 2013/396/EU.

submission to the action, the lead party, and willingness to coordinate is successful because all the parties recognise the significance of the collective, and the incentive to accept the authority of a particular decision or assertion based on that collectiveness. The parties submit to the authority in order to coordinate the distributional effects with other parties; it becomes less costly for them, both in terms of actual costs and in terms of the unexpected consequences of the relationship, to follow the decision or assertion, based on the collective.

Secondly, and more broadly, in terms of law-making processes, EPL has long been understood to have a coordinating role that engages various actors. Authority may then be allocated and reallocated in different ways including by express transfer, by delegation (or conferral in domestic, European or international law), and by co-regulatory agreement.[108] The nature of this shift is shaped by various considerations, including the type of authority,[109] the identification of the relevant actors by whom it is facilitated[110] and the context and level at which it arises.[111] The relevant entities – whether public, private or mixed actors – are not necessarily uniform; that is to say, their interests, preferences, [112] the way in which they act and so forth, may diverge.[113] Moreover, the shifts are complex, and do not simply lead to straight reallocations of authority. They might lead to dispersed structures, including, for example, networks,[114] resulting in multiple modifications to the institutional system. In terms

[108] Fabrizio Cafaggi, 'New Foundations in TPR' (2011) 38 *Journal of Law and Society* 20, 39-40.
[109] One particularly controversial approach arises in respect of the delegation or outsourcing of certain powers, inherent to tasks understood to be 'inherently governmental'. An example can be taken from the international context, the UN Draft Convention on Private Military and Security Companies (See most recently, the UN Draft Convention on Private Military and Security Companies, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Self-determination, 2 July 2010, A/HRC/15/25 at Annex; PP.9, and Art.1(1)(b), Draft Convention, A/HRC/15/25. Available at http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf, (Last Accessed: 23.10.2015). The Draft, which ultimately focuses on the regulation of PMSCs themselves (PP.9, and Art.1(1)(b)) as well as on the doctrine of state responsibility (PP.11 and Art.1(1)(c)), proposes a prohibition on the outsourcing by states of tasks that are 'inherently governmental'.
[110] Regulatory bodies might be deemed to be autonomously powerful, see Fabrizio Cafaggi, 'New Foundations in TPR' (2011) 38 *Journal of Law and Society* 20, 20-21.
[111] That is to say, the way in which authority is re-allocated within the state – even if between public and private – may not necessarily constitute an appropriate model at the transnational level; see Sabino Cassese, `Administrative Law Without the State? The Challenge of Global Regulation' (2005) 37 *Journal of International Law and Politics* 663, 670 *et seq*.
[112] Indeed, actors have diverse, and potentially unexpected, interests; Fabrizio Cafaggi, 'Private Law-Making and European Integration – Where Do They Meet, When Do They Conflict?' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (Oxford University Press 2010) 206. Thus, as Fransen has noted, businesses engaged in regulation do not necessarily promote a solely neoliberal agenda as might be expected, Luc Fransen, *Corporate Social Responsibility and Global Labor Standards: Firms and Activists in the Making of Private Regulation* (Routledge 2012), at 41.
[113] This reflects the determination of 'the potential for different types of actors to control the procedure of implementation and enforcement'; *Ibid*.
[114] Errol Meidinger, 'Private Import Safety Regulation and Transnational New Governance' (Buffalo Legal Studies Research Paper 2009) 4-5.

of EPL, this coordination relates predominantly to the promotion of integration via the facilitation of the internal market and the harmonisation of legal norms across the Member States via private and public entities, whether via legislation efforts or practice.[115] Against this background, we have advanced that authority must be understood in a multidimensional way in order to fully grasp the shifts that are occurring between the public, private and mixed institutions responsible for the EPL development. Drawing from transnational regulation discourses, in this context, it is becoming increasingly clear that there does not exist a single regulatory body but rather a 'constellation' of parties,[116] each contributing to the development of a context of regulatory pluralism. By working together in a process of institutional complementarity as opposed to individually, these bodies might enhance their legitimacy,[117] depending on the number of participants involved, the different roles that they adopt and the way in which they coordinate and interact,[118] while also generating a 'multi-polar distribution of power',[119] reflecting a shift from hierarchy to one of network. An example of specific reference to EPL development has been set out above, concerning the scope for coordination in relation to the emergence and promotion of new modes of governance, including soft law[120] and the Open Method of Coordination.[121]

IV. Concluding Thoughts

[115] In particular, private actors are not limited by the Treaty structure in the same way as public bodies and might operate to extend the impact of Union law beyond those areas in which the Union has explicit competence, thus generating further integration. This might arise, for example, where the collaboration between domestic markets for the purposes of the facilitation of the internal market, has resulted in 'increased international interdependence and thus created strong incentives to coordinate on common technical solutions'; Thomas Büthe, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011) 5-6. Consider however, that this role might also generate disintegration; Cafaggi (n 111) 201.

[116] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 143.

[117] Fabrizio Cafaggi and Agnieszka Janczuk, 'Private Regulation and Legal Integration: The European Example' (2010) 12 *Business and Politics* 6, 19 *et seq*, citing Thorsten Hüller and Beate Kohler-Koch, 'Assessing the Democratic Value of Civil Society Engagement in the European Union' in Beate Kohler-Koch, Dirk De Bièvre and William Maloney (eds), *Opening EU- Governance to Civil Society: Gains and Challenges (CONNEX Report Series No 05)* (Mannheim Centre for European Social Research, 2008).

[118] In respect of the scope for legitimacy and accountability, see Black (n 115) 143.

[119] Charles F. Sabel and Jonathan Zeitlin, 'Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms' Paper presented at the panel on 'Global Governance in Transition', Annual Conference of the International Studies Association, Montreal, March 16-19, 2011, 1.

[120] Inter-institutional Agreement on Better Law-Making, 2003 OJ C 321/1.

[121] The Open Method of Coordination was introduced in the 1990s in the area of employment policy (European Employment Strategy, Luxembourg European Council, 12-13.12.1997 (Available at: http://www.europarl.europa.eu/summits/lux1_en.htm#human; Last Accessed: 07.11.2016); it is now used across a number of policy areas (see European Parliamentary Research Service, 'The Open Method of Coordination', PE 542.142 (European Parliament, 2014). In particular, the OMC shapes the relationship between Union institutions and private actors, and especially civil society bodies – and the basis for its reconceptualisation – derives from the new governance approach of the Commission; see European Commission, 'European Governance: A White Paper' (COM(2001) 428, 28).

In this article, we begin from the premise that legal developments unfolding across diverse areas of law and the shifts in the basis and nature of various types of authority held in domestic institutions as well as in supra and transnational ones (whether public, private or mixed in their nature) have challenged the conventional understandings of law, power and authority. We take EU legal development, and in particular, EPL as a particularly important example, engaging the broad body and diverse character of the institutions responsible for its formation, interpretation and enforcement. In light of the way in which authority has typically been treated in the literature, we have argued that there is scope for its conceptualisation to be broadened in order to allow for its multiple dimensions to be engaged. Many scholars have attempted to understand and explain these developments; indeed, building on these insights, we have tried to provide a more nuanced and differentiated understanding of authority. Drawing on McMahon, we also categorise authority in a way that reflects three dimensions of the concept: authority as expertise, as the promise to obey and as having a coordinating role. Each dimension offers a distinctive perspective on how authority unfolds. In adopting this perspective, we have aimed to engage with legal development in EPL, using its emergence and evolution, in substance and character, as a means to examine the multidimensional analytical framework engaged.

A final point which opens up a path for future research relates to the notion that this differentiated analysis of authority can equally be discussed hand-in-hand with a differentiated understanding of legitimacy. For reasons of space, our focus has been on authority; however we are aware that the impulse for a reconsideration of the concept of authority is closely connected to the discourse surrounding legitimacy. The fact that private actors and organizations are accruing authority, and that concomitantly they have the ability to alter the normative and factual situations of many actors, has raised concerns about the impact of their actions, bringing to the fore the question of their legitimacy.[122] Our argument for a differentiated framework of authority necessarily engages with the suggestion as to the existence of several types of legitimacy. Recalling Bodansky's remarks, set out at the

[122] The literature is quite vast, see *inter alia*, Fabrizio Cafaggi, 'Rethinking Private Regulation in the European Regulatory Space,' in Fabrizio Cafaggi, *Reframing Self-Regulation in European Private Law* (Kluwer, 2006), 3; Dagmar Schiek, 'Private Rule-Making and European Governance – Issues of Legitimacy' (2007) 32 *European Law Review* 443; Richard B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 *American Journal of International Law* 211; or Peer Zumbansen, 'The Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy,' in Michael A. Helfand (ed), *Negotiating State and Non-State Law: the Challenge of Global and Local Legal Pluralism* (Cambridge University Press, 2015), 83.

beginning of the article, not every authority needs to be justified in the same way; indeed, each exercise of authority will have a different strength or pull.

All in all, we hope that this article might spur a better understanding of authority in all of its dimensions, and developing further interest in the engagement of authority, its comprehension and utilisation in divergent levels of law making, whether national, European or transnational.