Articles

Public-Private Hybrid Governance for Electronic Payments in the European Union

By Agnieszka Janczuk-Gorywoda[1]

A. Introduction

The aim of this contribution is to illustrate the evolution of the Single Euro Payments Area (SEPA) as a form of European hybrid governance. The hybridity of SEPA is found in the interaction between traditional hard law, soft law and privately produced rules. The public and private systems of rules – public in the form of European directives and regulations and private in the form of multilateral agreements among payment service providers[2] (SEPA Rulebooks) – coexist and mutually shape the structure of the European payments system. These two systems of rules have formally been produced within independent rule-making processes and by discrete rule-makers – public and private respectively. However, public actors have exercised a considerable amount of influence over the private rules. They have done so through informal yet systematized interactions with private actors and through a series of soft laws. And *vice versa*, private rule-makers and privately-produced rules substantially have affected the content of public rules.

The hybridity of European law has been discussed mostly in the realm of "new governance". The concept of "new governance" has been used to encompass a variety of "processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions," and which are "less rigid, less prescriptive, less committed to uniform

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[2] Payment service providers is the term introduced by the Payments Services Directive, *infra* note 26; it covers banks and non-banking providers of payments services. It is so used in this paper, and the term "bank(s)" is used to refer to banks with the exclusion of non-bank payment service providers. In contrast, for the sake of clarity, the terms "inter-bank" and "bank-to-customer" are used, but they refer to relationships among payment service providers, and payment service providers and customer respectively.

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outcomes, and less hierarchical in nature."[3] The main emphasis within new or "experimentalist" governance[4] has been on non-coerciveness, flexibility, diversity, experimentation, deliberation, enhanced participation of stakeholders and multi-level structure.[5] Provisionality and revisability – both in terms of problem definition and anticipated solutions, as well as through ongoing evaluation and review are crucial elements of new governance.[6]

While focusing on the mechanisms of new governance, students of these regimes have drawn our attention to the fact that they often coexist with conventional forms of law. New and conventional forms of governance can coexist in a variety of configurations. Of particular interest is the scenario when new governance and traditional law become mingled together in a hybrid form. In this scenario, the two forms of governance are complementary to each other in a sense that they operate jointly in the same policy domain and promote the same goals.[7] But the interdependence of the two modes of governance extends beyond mere complementarity; new governance and traditional law become *de facto* "integrated into a single system in which the functioning of each element is necessary for the successful operation of the other."[8] As a result, law is transformed by its relationship with new governance.[9]

The study of the European payments regime, which is described in further detail below, indicates that it largely fits the broad description of hybrid governance. The hybridity, however, does not stem from the fusion of conventional law and new governance, but rather from the fusion of public and private governance regimes. The European payments regime includes traditional law and private regulation. It is the combination of the two sets of rules that forms a governance system for payments and neither public nor private

[3] Graine de Búrca & Joanne Scott, *Introduction*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 1, 2 (Graine de Búrca & Joanne Scott eds., 2006).

[4] Charles Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, 14 EUR'N L. J. 271 (2008).

[5] De Búrca & Scott, *supra* note 3; David Trubek & Louise Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COL. J. OF EUR'N L. 539 (2006).

[6] De Búrca & Scott, *supra* note 3, at 3.

[7] Claire Kilpatrick, *New EU Employment Governance and Constitutionalism*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 121, *supra* note 3, at 134; Trubek & Trubek, *supra* note 5, at 543-44.

[8] Trubek & Trubek, *supra* note 5, at 543.

[9] *Id.* at 548-49. S*ee also* De Búrca & Scott, *supra* note 3, at 4. For other examples of hybrid governance *see e.g.* Kilpatrick, *supra* note 7; Graine de Búrca, *EU Race Discrimination: A Hybrid Model?*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 97, *supra* note 3; Joanne Scott & Jane Holder, *Law and New Environmental Governance in the European Union*, *in supra* note 3, at 211, 235; David Trubek *et. al.*, *'Soft Law', 'Hard Law', and EU Integration*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 3, at 65.

governance system would be able to achieve its final goal without its counterpart. It is neither a public nor a private governance regime but a truly hybrid one.[10]

The public-private hybrid nature of the governance regime for European payments needs to be placed within two wider phenomena. First, informal governance mechanisms have become an important and controversial issue in legal, economic and political science scholarship. Informal governance refers to governance through and by informal networks which can link, often across borders, particular categories of governmental actors, usually administrative bodies, with each other or with interest groups and/or private rule-makers. Although informal, these networks do influence formal decision-making. In fact, they have attracted considerable attention because recently many important regulatory decisions have been shifted from formal to informal rulemaking fora, what in many instances implies also a shift from national to transnational level of decision-making.[11] The activities of networks are so abundant that many have become institutionalized; intergovernmental or hybrid intergovernmental-private administrative bodies were formed, with examples being the Codex Alimentarius Commission or the Internet Corporation for Assigned Names and Numbers.[12] Increased use of soft law is also a particular form of informal governance.[13]

Informal lawmaking goes hand in hand with the collapse of the entrenched public-private divide. Numerous modes of public-private interaction in regulation have been debated in the literature. One can distinguish the following models.[14] First, in many instances public

[10] In the transnational realm, Peer Zumbansen has argued that transnational corporate governance should be conceived as neither public nor private but rather as instances of "global assemblages," as conceptualized by Saskia Sassen, or through examples of transnational legal pluralism; *see* Peer Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. OF L. AND SOC. 50, in particular 56 (2011); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2008).

[11] Relevant contributions concerning the EU include Renauld Dehousse, *Regulation by Networks in the European Community: The Role of European Agencies*, 4 J. OF EUR'N PUB. POL'Y (1997); THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION (Rainer Eising & Beate Kohler-Koch eds., 1999); INFORMAL GOVERNANCE IN THE EUROPEAN UNION (Thomas Christiansen & Simona Piattoni eds., 2003); Burkar Eberlein & Edgar Grande, *Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State*, 12 J. OF EUR'N PUB. POL'Y 89 (2005). Informal governance by networks has also been widely discussed in the field of international relations and international law: *see e.g.* David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L. J. 281 (1998); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COL. J. OF TRANS. L (2004); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[12] *See e.g.* Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L. J. 17 (2000); Tim Büthe & Nathaniel Harris, *The Codex Alimentarius Commission: A Hybrid Public-Private Regulator*, in Handbook of Transnational Governance: Institutions and Innovations 219 (Thomas Hale & David Held eds., 2011).

[13] Keneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

[14] *See also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Fabrizio Cafaggi, *Rethinking Private Regulation in the European Regulatory Space*, *in* REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW 3 (Fabrizio Cafaggi ed., 2006).

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rule-makers rely on private advisory groups in order to inform their decisions with specific and up-to-date knowledge. Alternatively, public rule-makers frequently promulgate rules that were in fact developed by private parties. This can be the case either informally when a public regulator makes use of input delivered by private actors or it can more formally reinforce non-binding rules developed by private rule-makers to become hard law.[15] Such recognition can happen not only through a legislative act, but also through judicial enforcement of private rules.[16] Second, collaborative governance literature focuses on public-private collaboration in the provision of goods and services.[17] In particular, through the use of a variety of tools, such as contracting out, outsourcing, government corporations, and franchises,[18] governments have enrolled private actors in traditionally public sectors. The term 'third party government' has been coined to describe increasing outsourcing of public functions and responsibilities to the private sector.[19] Third, delegation to private parties concerns not only provision of goods and services, but in many instances also the rule-making power is delegated.[20] Finally, another form of cooperation between the public and private are regulatory schemes in which governance responsibility is shared by the two types of actors.[21]

All these strands of literature document and discuss various forms of interplay between public and private rule-makers. The distinctive feature of the European payments regime as hybrid public-private governance is that, while remaining autonomous, public and private regimes are so interwoven that neither can achieve its aim without the counterpart.

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[15] Julia Black, *Constitutionalising Self-Regulation*, 59 MOD. L. REV. 24 (1996); Cafaggi, *supra* note 14.

[16] Gerald Spindler, *Market Processes, Standardisation, and Tort Law*, 4 EUR'N L. J. 316 (1998).

[17] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. R. 1 (1997); MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (Beacon Press. 2002); THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester Salamon ed., Oxford University Press 2002); John Donahue & Richard Zeckhauser, *Public-Private Collaboration*, *in* THE OXFORD HANDBOOK OF PUBLIC POLICY (Michael Moran *et. al.* eds., 2008).

[18] SALAMON, THE TOOLS OF GOVERNMENT, *id*.

[19] Alfred Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND.'A J. OF GLOB. LEG. STUD. 379 (2001).

[20] Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POLITICS 1 (2003); Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 LAW & CONTEMPORARY PROBLEMS (2005).

[21] Keneth Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, *in* THE POLITICS OF GLOBAL REGULATION 44 (Walter Mattli & Ngaire Woods eds., 2009). *See also* Colin Scott, *Analysing Regulatory Space: Fragmented Resources And Institutional Design*, 2001 PUB. L. (2001); Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services.*, PUBLIC LAW 63 (2003); Fabrizio Cafaggi, *The New Foundations of Transnational Private Regulation*, 38 J. OF L. AND SOC. 20, 41-49 (2011).

This paper is structured as follows. Following this Introduction, Section B describes the fundamental elements of the European rules for payments and explains the intricate interwoven character of public and private rules. Section C, in turn, provides an overview of the trajectories of public and private interactions in the process of making the European rules for payments. Section D examines the distinctive features of the European payments regime as hybrid public-private governance, while Section E concludes.

B. The EU Payments Regime

The starting point for the SEPA project can be identified with the adoption of Regulation 2560/2001 on cross-border payments in euro.[22] The crucial provisions of Regulation 2560/2001 stipulated that "institutions" must charge the same price for cross-border payments and comparable domestic payments within the EU.[23] The principle of equal charges for cross-border and domestic payments laid down a normative milestone for the European integrated payments system but Regulation 2560/2001 was in itself not sufficient to complete it. Modern payments systems are complex and operate according to a number of detailed rules regulating virtually every aspect of a payment operation. The depth of proceduralization aims at minimizing erroneous transactions and ensuring automatic processing of payments. This is what makes payments systems swift and cost-efficient.

Thus, Regulation 2560/2001 was intended to be supplemented by another set of rules. The very reason why such rules had not been included in Regulation 2560/2001 itself was that the European legislator had expected the banking industry to fill the void. However, it never formally delegated the task nor entered into any form of agreement with the industry players. The expectations were communicated in an informal manner. For banks, in turn, Regulation 2560/2001 was a tacit threat of further regulatory intervention should they fail to act. It also suddenly rendered cross-border payments unprofitable because fragmentation of payment systems across the EU meant that costs of operating cross-border payments were substantially higher than for domestic payments.

As a result, a couple of the biggest European banks mobilized the industry to create a pan-European payments system through private regulation. In 2002 banks and banking

[22] Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on Cross-border Payments in Euro, 2001 OJ (L 344), at 13. In fact this story can be traced back much further back in history; for an overview, *see* Agnieszka Janczuk-Gorywoda, *Private Regulation and European Integration: Evidence from the Payments, Professional Services and Housing Sectors* (2012) (Ph.D. Thesis, European University Institute), on file with the author.

[23] The scope of Regulation 2560/2001 was limited to retail (up to 50,000 euro) credit transfer end electronic card transactions; Articles 1-3.

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associations from the EU formed the European Payments Council (EPC) – a dedicated association whose mission was defined as creating SEPA as an "area where citizens, companies and other economic actors will be able to make and receive payments in euro, within Europe (…), whether between or within national boundaries and under the same basic conditions rights and obligations, regardless of their location."[24]

The EPC undertook to ensure interoperability among payment service providers for cross-border payments. It elaborated uniform business rules and technical standards for two types of payment transactions: credit transfer and direct debit. These rules are contained in multilateral framework contracts (Rulebooks) and have contractual force as between participating payment service providers and as between payment service providers and the EPC.[25] They regulate mutual rights and obligations of payment service providers with regards to SEPA payments.

SEPA Rulebooks represent a cornerstone of the integrated European payments system but they are also not sufficient to achieve this goal. As just mentioned, the main objective of SEPA Rulebooks is to secure inter-bank operability for cross-border payments and they only harmonize rules governing relationships among payment service providers and other intermediaries. As a principle, the relationship between payment service providers and customers is not regulated by SEPA Rulebooks. However, in order to secure automated processing of payments, certain rights and obligations of payment service providers towards payment service users need also be harmonized. This is where the public regulation steps in.

The first piece of legislation enacted to complement the SEPA project was the Payments Services Directive (PSD) of 2007.[26] It complements SEPA Rulebooks by providing a harmonized set of rules governing bank-to-customer relationship. The PSD is also an expression of the European legislator's concern about the level of consumer protection and the level of competition in the payments sector. Therefore, the PSD provides also some baseline rules for these policy objectives.[27]

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[24] European Payments Council, *EPC Roadmap 2004-2010*, available at: http://www.europeanpaymentscouncil.eu/documents/Roadmap%20public%20version%204th%20April%20amended%20March%2008.pdf (last accessed: 1 December 2012).

[25] *E.g.* European Payments Council, *SEPA Credit Transfer Scheme Rulebook, Version 6.0 Approved*, Section 5.2 (Nov. 17, 2011), available at: http://www.europeanpaymentscouncil.eu/knowledge_bank_detail.cfm?documents_id=551 (last accessed: 1 December 2012).

[26] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services in the Internal Market Amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and Repealing Directive 97/5/EC, 2007 OJ (L 319), at 1.

[27] For the competition law issues that SEPA can raise, *see* Roland Uittenbogaard, *Turkeys Voting for Christmas? How Self-regulation Makes the European Payments Market More Competitive*, 1 J. OF PAY. STRAT. & SYS. 318 (2007).

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SEPA Rulebooks and the PSD were formally developed as separate legal regimes in distinct rule-setting processes. The PSD was enacted only after SEPA Rulebooks had been elaborated and it hardly mentions them.[28] On the surface, there is indeed little connection between the two regimes; whereas the PSD regulates mainly the relationship between payment service providers and their customers, SEPA is mainly a set of inter-bank and processing rules, practices and standards.

In reality, though, the three layers (bank-to-customer, inter-bank and processing) are highly dependent upon each other and regulation of one layer affects the others.[29] Suppose that a payment service provider has an obligation towards its customer to perform a payment transaction within a given amount of time (bank-to-customer sphere) – an example of an obligation imposed by the PSD. In order for the payment service provider to be in position to fulfill this obligation, adequate provisions must be included in the rules governing inter-bank relationship as well as the processing sphere (clearing and settlement). In other words, provisions regulating mutual rights and responsibilities of payment service providers and any other entities involved in the processing of payment transactions affect the commitments that payment service providers can undertake towards their customers. It follows that regulation of inter-bank and processing layers of payments is critical for the payment products that payment service providers can offer to their customers.

Accordingly, in order to achieve a coherent and complete regulation of payment transactions, certain aspects must be regulated consistently in inter-bank and bank-to-customer sphere. It follows that in order for the pan-European payments system to function, all three layers of payment transactions must be harmonized. If rules regulating only one of these layers remained fragmented, smooth processing of cross-border payment transactions would not be possible. Because the EPC covers only inter-bank and processing layers of payment transactions and the PSD, in turn, regulates only the bank-to-customer layer, only together they can facilitate the creation of a European payments system – the objective behind public and private rules.[30]

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[28] The only place in the PSD where SEPA is mentioned is in Recital 4, and it states that it "is vital, therefore, to establish at Community level a modern and coherent legal framework for payment services, whether or not the services are compatible with the system resulting from the financial sector initiative for a single euro payments area, which is neutral so as to ensure a level playing field for all payment systems, in order to maintain consumer choice".

[29] *See e.g.* Uittenbogaard, *supra* note 27, at 319.

[30] As a confirmation that the two sets of rules are factually interdependent, SEPA Rulebooks were modified after the PSD had been adopted in order to be compatible with it. What is more, SEPA Direct Debit Scheme Rulebook explicitly states that the implementation of the PSD is a prerequisite for the launch of the Scheme; *see* European Payments Council, *SEPA Core Direct Debit Scheme Rulebook, Version 6.0 Approved*, Section 1.8 (Nov. 17, 2011), available at: http://www.europeanpaymentscouncil.eu/knowledge_bank_detail.cfm?documents_id=553 (last accessed: 1 December 2012).

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Apart from the PSD, the European Union adopted two Regulations which interact with SEPA in a more direct manner: Regulation 924/2009 on cross-border payments[31] and Regulation 260/2012.[32] The interaction between these Regulations and SEPA reinforce the conceptualization of the European payments system as hybrid governance. The main objective of Regulation 924/2009 is to facilitate cross-border direct debits.[33] More generally, it aims to facilitate cross-border trade in the EU by ensuring that charges for cross-border electronic payments in euro are the same as for corresponding payments within a Member State,[34] to prevent the fragmentation of payment markets,[35] and to endorse development of an integrated market in payments.[36] In addition, Regulation 924/2009 states explicitly that it aims to "facilitate the launch of the SEPA direct debit scheme"[37] and "encourage the successful take-up of SEPA direct debits."[38] The objectives pursued by Regulation 924/2009 can be achieved only in combination with SEPA, and, what is more, without SEPA they would be meaningless.

Regulation 924/2009 supports SEPA direct debit in two major ways. First, it extends to direct debits the principle of equal charges established by Regulation 2560/2001.[39] Because operation of cross-border direct debits through the existing national systems is more costly than the new SEPA instrument, by forcing payment service providers to equalize their charges for cross-border direct debits with national charges, the European Commission (Commission) intended to create incentives for payment service providers to migrate to SEPA Direct Debit in order to increase their own profitability.[40]

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[31] Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on Cross-border Payments in the Community and Repealing Regulation (EC) No 2560/2001, 2009 OJ (L 266) at 11.

[32] Regulation (EU) No. 260/2012 of the European Parliament and of the Council of 14 March 2012, Establishing Technical and Business Requirements for Credit Transfers and Direct Debits in Euro and Amending Regulation (EC) No 924/2009, 2012 OJ (L 94) at 22.

[33] Regulation (EC) No 924/2009, in particular at Recitals 2-5.

[34] *Id*., Recital 1.

[35] *Id*., Recital 7.

[36] *Id*., Recital 10.

[37] *Id*., Recital 11.

[38] *Id*., Recital 12.

[39] *Id*., Art. 2(1).

[40] *See* Commission Staff Working Document, *Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Cross-border payments in the Community: Impact Assessment*, SEC (2008) 2598 (Oct. 13, 2008).

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The second element linking Regulation 924/2009 with SEPA is the introduction of the "reachability" requirement for direct debit transactions. Given that the use of direct debit is dependent upon the reachability of payers' payment accounts, a critical issue for the success of SEPA Direct Debit is that all payers across the EU can be reached. SEPA Rulebooks themselves provide for the reachability requirement,[41] but participation in the SEPA Schemes is voluntary. In contrast, Regulation 924/2009 sets a mandatory rule that payment service providers that are reachable for national direct debit transactions in euro must be reachable also for direct debit transactions in euro initiated by a payee through a payment service provider located in any Member State.[42] Although the Regulation does not introduce the obligation of being reachable for *SEPA* direct debits, without SEPA Rulebooks this provision would be futile because no other infrastructure for cross-border direct debits in the EU exists. In this way, certain degree of SEPA implementation was made compulsory by Regulation 924/2009.

Finally, Regulation 260/2012 makes the hybridity of the governance regime for European payments even more explicit. The Regulation states that "an integrated market for electronic payments in euro, with no distinction between national and cross-border payments is necessary for the proper functioning of the internal market"[43] It recognizes that the objective of SEPA is to develop common Union-wide payment services[44] but notes that self-regulatory efforts have proved insufficient to "drive forward concerted migration to Union-wide schemes."[45]

Because "[o]nly rapid and comprehensive migration to Union-wide credit transfers and direct debits will generate the full benefits of an integrated payments market, so that the high costs of running both 'legacy' and SEPA products in parallel can be eliminated", rules "should be laid down to cover the execution of all credit transfer and direct debit transactions denominated in euro within the Union."[46] As a remedy, Regulation 260/2012 introduces the principle of interoperability (Article 4) and provides a list of "technical requirements" that payment service providers must adhere to (Article 5). This is regarded as essential to integrate fragmented payment systems.

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[41] European Payments Council, *Resolution: Reachability of all Scheme Participants in SEPA Credit Transfer and Direct Debit Schemes*, (Nov. 1, 2006), available at: http://www.europeanpaymentscouncil.eu/documents/EPC146_06_RESOLUTION%20on%20Reachability.pdf (last accessed: 1 December 2012).

[42] Regulation 924/2009, Art. 8.

[43] Regulation (EU) No. 260/2012, Recital 1.

[44] *Id.*, Recital 2.

[45] *Id.*, Recital 5.

[46] *Id.*, Recital 6.

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Although the objective to complement the SEPA project in an effort to create an integrated payments market can be discerned in the Recitals to the Regulation, on the surface, again, Regulation 260/2012 comprises an autonomous set of rules interacting with the previous EU legislation rather than with SEPA Rulebooks. However, a careful comparison of the Regulation and SEPA Rulebooks reveals that the Regulation in effect imposes an obligation to comply with SEPA Rulebooks.

In order to ensure interoperability of any coexisting payments systems in the EU, the Regulation introduces a requirement that participants in the payment schemes shall "represent a majority of [payment service providers] within a majority of Member States, and constitute a majority of [payment service providers] within the Union"[47] and that payment service providers reachable for national credit transfers or direct debits shall be reachable for cross-border credit transfers or direct debits respectively "in accordance with the rules of a Union-wide payment scheme".[48] Currently, only SEPA schemes meet these requirements and it is rather unlikely that a new scheme of this type will emerge. On top of this, also the list of more detailed technical requirements specified in the Annex to the Regulation significantly coincides with SEPA Rulebooks and in addition currently no other payments system in the EU complies with them.

To conclude, the result of this complex mix of legal provisions and private regulation is a hybrid public-private substantive governance structure for European payments (which are sometimes called europayments). The interdependence of the two systems of rules, the public and the private one means that the functioning of each system is necessary for the successful operation of the other. Therefore, in order for the payments system to work smoothly the two systems of rules need to be coordinated and the potential for conflicts must be minimized. Thus, the two rule-makers need to collaborate – they cannot just accidentally coexist. In fact, the hybrid public-private nature of the governance regime for European payments is not an unintended result of the coexistence of public and private rule-makers but was consciously designed to be mutually governed by traditional law and a private regulatory regime.

C. The Making of European Payments Rules

Rules for europayments emerged from a lengthy developmental process involving complex interactions among the Commission, the European Central Bank (ECB), national regulators, and the banking industry, inclusive of its European payments' body – the EPC. Although public and private rule-making processes have been autonomous and independent from

[47] *Id.*, Article 4(1)(b).

[48] *Id.*, Article 3(1) and 3(2).

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each other, a variety of informal networks formed a complex governance regime for European payments ensuring that both public and private rule-makers collaborate with each other and coordinate their activities. Thus, the governance regime for European payments is hybrid in nature also from the procedural perspective.

To begin with, the formation of the EPC was stimulated by the intervention of the ECB and the Commission. Next, the two regulators closely observed SEPA rule-making process and on many occasions formulated their expectations by issuing various forms of soft law.[49] Further, several cyclic round-tables on europayments are hosted by either the ECB or the Commission. These round-tables gather a variety of various, both public and private stakeholders to discuss europayments matters.

The ECB hosts two round-tables for euro payments.[50] First, payments and SEPA are discussed within the Contact Group on Euro Payments Strategy (COGEPS) which serve as a discussion forum to exchange views between the banking industry and the Eurosystem on strategic issues of common concern. In addition, since 2005 the ECB has organized SEPA high-level meetings as informal meetings between high-level representatives of the financial industry and board members of the Eurosystem central banks. These two groups discuss matters concerning both European payments legislation and the SEPA regime.[51] Although not being formally integrated into either the legislative or the EPC rule-making process, the groups exert significant influence on them.[52]

The Commission, in turn, established two consultative bodies to assist it in the preparation of its policies in the field of payments: (1) Payments Committee (previously Payment Systems Government Expert Group, PSGEG)[53] composed of government experts and (2) Payment Systems Market Group (PSMG)[54] composed of market experts, typically drawn

[49] Since 2003 the ECB publishes annual progress reports on SEPA, available at: http://www.ecb.int/paym/sepa/stakeholders/eurosystem/html/index.en.html#reports (last accessed: 1 December 2012)); among many communications and other documents of the Commission probably the most influential was the *Consultative Paper on SEPA Incentives* (Febr. 13, 2006).

[50] *See* European Central Bank, *Governance*, available at: http://www.ecb.int/paym/sepa/stakeholders/governance/html/index.en.html (last accessed: 1 December 2012).

[51] *See* the list of agendas and summaries from COGEPS meetings, European Central Bank, *Contact group on euro payments strategy*, available at: http://www.ecb.int/paym/groups/cogeps/html/index.en.html#meetings (last accessed: 1 December 2012).

[52] Agnieszka Janczuk-Gorywoda, *Author's personal interview with ECB officer* (Brussels, Dec. 14, 2009), on file with the author.

[53] The European Single Market, *Payments Committee*, EUROPEAN COMMISSION, available at: http://ec.europa.eu/internal_market/payments/advisory_groups/pc_en.htm (last accessed: 1 December 2012).

[54] The European Single Market, *Payments System Market Experts Group*, EUROPEAN COMMISSION, available at: http://ec.europa.eu/internal_market/payments/advisory_groups/psmeg_en.htm (last accessed: 1 December 2012).

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from banks, corporates, retailers and associations representing interested stakeholders such as SMEs and consumers, with expertise in the payments area. These consultative groups advise the Commission on the payments-related public policies and to some extent they also serve to exchange of views on SEPA.

Further, the Commission also chairs the EU Forum of National SEPA Coordination Committees.[55] National SEPA Coordination Committees have been organized by the banking industry of each country in order to enable implementation of SEPA. Their composition varies from country to country and may include various private and public stakeholders. Within the Forum, representatives of national SEPA committees meet and exchange their perspectives and experience on SEPA migration. The Forum gives national SEPA communities an opportunity to exchange opinions also with the European public institutions and with the EPC.[56] In addition, SEPA is also discussed within the European Competition Network.[57]

Finally, in 2009 in cooperation with the EPC and other stakeholder groups, the Commission established the SEPA Council.[58] SEPA Council is a response to the dissatisfaction of certain circles with the governance of the EPC. Initially, the EPC was a sort of exclusive bank club with limited channels for other private stakeholders to either influence or monitor the EPC's decisions. Under strong pressure, in particular from the Commission, the EPC finally became more open and transparent, yet its ultimate decision-making body is still composed exclusively of banks, other payment service providers and their associations.[59] The SEPA Council was devised to be a neutral forum for dialogue on SEPA-related issues where all types of stakeholders would feel duly represented and given proper consideration. The SEPA Council formulates statements involving guidance and appeals for the EPC. These statements are fully nonbinding, and the EPC has no obligation to respond. Thus, the SEPA Council cannot issue any "hard" requirements; however, its political value should not be understated. Through the medium of the Commission, statements of the

[55] The European Single Market, *Commission's role in SEPA*, EUROPEAN COMMISSION, available at: http://ec.europa.eu/internal_market/payments/sepa/ec_en.htm (last accessed: 1 December 2012).

[56] *Id.*

[57] *See e.g.* European Competition Network (ECN Subgroup Banking and Payments), *Information Paper on Competition Enforcement in the Payments Sector*, (March 2012), available at: http://ec.europa.eu/competition/sectors/financial_services/information_paper_payments_en.pdf (last accessed: 1 December 2012).

[58] The European Single Market, *SEPA Council*, EUROPEAN COMMISSION, available at: http://ec.europa.eu/internal_market/payments/sepa/council_en.htm (last accessed: 1 December 2012).

[59] For more on this, *see* Agnieszka Janczuk-Gorywoda, *Case Study: Payments Systems* (2012) (HIIL project on the Constitutional Foundations of Transnational Private Regulation and Governance Design, unpublished manuscript) (on file with author).

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SEPA Council receive broad publicity and it would be politically not acceptable for the EPC to ignore them.

To recapitulate, European payments rules have been developed within a complex public-private governance system. The hybridity has ensured that public and private rule-makers have taken into account each other's expectations and that public and private rules are coordinated with each other. The public-private hybrid nature of the rules for europayments, required a hybrid process of their production so that the two sets of rules were aligned with each other. However, this hybrid public-private governance regime is not formalized which has proved to compromise public control over private decision-making process. Although the EPC took into account many of the public actors' suggestions, it resisted others. In particular, both the ECB and the Commission criticized the banking club-like nature of the EPC and called for more openness and transparency. Yet, the EPC long opposed any change to its governance structure. When it finally opened up its rule-making process to non-bank stakeholders, the changes came too late and fell short of expectations. Regardless of the dense networks of public and private actors discussing SEPA, the governance structure for SEPA proved not to be able to secure that new europayments are widely acceptable by participants in the payments market.

D. The Distinctive Features of New European Payments Regime

The most significant feature of the new EU payments regime is that it is an intentionally designed public-private hybrid governance regime. SEPA leads to a true transformation of law; the objective behind the legal rules cannot be achieved by the sole application of law but only when the two systems, public and private, are applied simultaneously and when they are aligned with each other. The two systems of rules, the public and the private one, "are integrated into a single system in which the functioning of each element is necessary for the successful operation of the other".[60]

Seen through legal pluralist lens,[61] SEPA develops as a co-evolutionary process, where the law – which encompasses regulations and directives – is both shaping and being shaped by the norms evolving outside of its framework. In order to decode the full content of new europayments – both mutual rights and obligations of payment service providers towards each other, as well as mutual rights and obligations of payment service providers and payment service users – we need to analyze European law and its implementation in

[60] Trubek & Trubek, *supra* note 5, at 543.

[61] On the understanding of private rule making from the perspective of legal pluralism, *see* Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

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Member States as well as SEPA Rulebooks, their implementations in individual states and by individual payment service providers.

SEPA also provides a perspective on our understanding of a-territorial scope of norms. While SEPA Rulebooks and European payments law are complementary to each other and jointly determine the legal content of European payments transactions, the scope of their application is different. On the one hand the scope of SEPA as a private regulatory regime extends to payment service providers who have signed the adherence agreements. Based on this, the geography of SEPA is cutting across national and political boundaries. On the other hand, the scope of European payments law applies to all payment service providers in the EU regardless of whether a particular payment service provider has joined SEPA or not. In addition, European payments law is of relevance for the European Economic Area (EEA) so also the three EEA countries undertake to implement it. Finally, by joining SEPA Schemes, payment service providers from countries where the European payments law does not apply oblige themselves to comply, to the extent possible, with the bulk of the PSD and certain other European provisions.[62] Thus, SEPA provides an illustration as to how public rule-makers can rely on private ones to extend their authority beyond formal territorial borders.

Importantly, in order for the payments system to work smoothly the two systems of rules, public and private, need to be coordinated. In fact, the hybrid public-private nature of the governance regime for European payments was intentionally designed and the two categories of rule-makers have collaborated with each other. The decision of the European legislator to collaborate with private actors in the creation of the European payments system can be explained by several rationalizations.

From the perspective of choosing the right regulatory approach, it can be posited that centralized and detailed legislation was seen as unsuitable for this regulatory field. The operation of payments requires meticulous and sometimes very technical inter-bank rules which because of this level of precision and technicality are probably best elaborated by payments' providers themselves and which in Member States have indeed been mostly governed by multilateral contracts among banks. An attempt to elaborate inter-bank payments rules would probably also put too much strain on the EU's limited capacity both to issue rules and to secure compliance with detailed legal rules.

The task of regulating payments at European level has always been complicated due to the great differences among the systems of the various Member States and the divergent use

[62] European Payments Council, *supra* note 25, at Sections 5.1 and 5.15; European Payments Council, *supra* note 30, Sections 5.1. and 5.16; European Payments Council, *SEPA Business to Business Direct Debit Scheme Rulebook , Version 4.0 Approved,* Sections 5.1. and 5.16 (2011), available at: http://www.europeanpaymentscouncil.eu/knowledge_bank_detail.cfm?documents_id=555 (last accessed: 1 December 2012).

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of various payment instruments. It was becoming even more complex due to increased prevalence of electronic systems, their sophistication and relevance for the sound functioning of the economy. Therefore, securing appropriate level of quality of payments rules was considered crucial. Informal delegation of rule-making authority to a private banking association was aimed to allow this highly technical field to benefit from expertise of sophisticated market participants. It was also intended to generate a new payment standard, overcoming existing fragmentation and acceptable to all participants in the payments market.

Finally, from the political economy perspective, securing the commitment of Member States to develop a pan-European payments system might have been tricky. The still existing national payments systems are highly diversified and agreeing on a uniform model inevitably generates winners and losers:[63] participants in the payments industry from some Member States face higher adaptation costs than from the others. A fierce battle over the uniform model could have been expected as well as the subsequent opposition from the "losers".

Banks perceived Regulation 2560/2001 as a demonstration of the EU's political power to develop EU-level rules for payments; they saw it as a tacit threat of further regulatory intervention in this field. However, it is not so certain that the EU would have been able to develop a complete regulatory regime for a European payments system without the collaboration of the banking industry. In fact, proposing Regulation 2560/2001 can be seen as a strategic move by the Commission. It was a very concise regulation the main object of which was to introduce the principle of equal charges for cross-border and domestic payments. This was a straight-forward proposal and it was not particularly difficult to convince Member States to agree on it. Had the Commission tried from the outset to propose a complete regulatory regime for a European payments system, this would have been much more difficult.

What is more, a general opposition from the payments industry could have been also expected. As already mentioned, in most Member States payments systems have been governed by some form of private regulation, mostly multilateral contracts managed by a national banking association with a different degree of public involvement. Enactment of a comprehensive European payments law would implicate a shift of regulatory power from private to public and could have been expected to be opposed by the payments industry and in particular by the powerful banks. Further, the need to adapt to new payments standards generates proportionally higher costs for smaller actors than for the bigger ones. Accordingly, opposition to new European payments law could have also been expected

[63] *Cf.* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011); Fabrizio Cafaggi & Katharina Pistor, *Distributional Effects of Transnational Regulation*, REG. & GOV'CE. (2012, forthcoming).

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from their side. As a matter of fact, small banks have argued against the adoption of Regulation 260/2012 which *de facto* makes the transition to SEPA mandatory.[64]

Informal delegation of rule-making authority to a private banking association was intended to win the support of the payments industry for the project of payments integration. Having elaborated SEPA rules, the majority of the banking industry strongly supported the PSD and further payments regulations;[65] especially as these legal acts were adequately coordinated with SEPA Rulebooks. In this way, a harmonization project which could have been expected to be met with a considerable opposition was successfully pressed through.

Collaboration of the EU with private rule-makers or even their integration into the public rule-making process is not a new development. Although various illustrations can be provided, probably the best one is that of technical standardization.[66] The New Approach harmonization directives specify only essential requirements concerning safety, health, environmental and consumer protection to be met by products placed on the market.[67] The task of specifying in detail how to comply with the essential requirements is delegated to European standardization bodies.[68] Standards developed by European standardization bodies are mandatory for Member States, that is Member States must assume that products adopting European harmonized standards meet the essential requirements. Yet, producers are free to choose if they want to adopt harmonized standards produced by the European standardization bodies or whether they prefer to meet the essential requirements in a different manner.

The New Approach has been praised as a successful governance strategy both from the perspective of launching a functional approach to harmonization as well as initiating a

[64] Even the key member of the EPC, the European Saving Banks Group, despite the official position of the EPC to support end-date for SEPA migration, used a vague language in its response to the Commission's consultation on SEPA migration end-date and refrained from supporting it; *see* CIRCA, *Responses*, available at: http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/financial_services/sepa_migration_end-date&vm=detailed&sb=Title (last accessed: 1 December 2012).

[65] *See* responses to the Commission's Consultation on possible end-date(s) for SEPA migration, *id.*

[66] *See e.g.*, Jacques Pelkmans, *The New Approach to Technical Harmonization and Standardization*, 25 J. OF COM. MKT. STUD. 249 (1987); ELLEN VOS, INSTITUTIONAL FRAMEWORKS OF COMMUNITY HEALTH AND SAFETY LEGISLATION: COMMITTEES, AGENCIES, AND PRIVATE BODIES (1999); MICHELLE P. EGAN, CONSTRUCTING A EUROPEAN MARKET: STANDARDS, REGULATION, AND GOVERNANCE (2001); Christian Joerges *et. al.*, *The Law's Problems with the Involvement of Non-governmental Actors in Europe's Legislative Processes: The Case of Standardisation under the 'New Approach'*, 99/9 EUI WORKING PAPERS (1999); HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS (2005).

[67] Council Resolution of 7 May 1985 on a New Approach to Technical Harmonization and Standards, 1985 OJ (C 136) at 1.

[68] Annex of the Council Directive 83/189/EEC of 28 March 1983 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1983 OJ (L 109) at 8.

mode of cooperation between public and private rule-makers ensuring both effective standards creation and adherence to the basic principles of good governance.[69] Could the same be said of the European payments regime? While the full evaluation is beyond the scope of this paper, some remarks are in order.

From the perspective of public-private governance, at first sight the new hybrid governance for European payments can be perceived as resembling the New Approach to technical harmonization. In particular, if we were to give a synchronic look at the European legal regime for payments, a familiar scenario might appear to us: the law sets general principles – here the principles of equal charges, reachability, interoperability, open access and others perhaps more specific ones – and leaves it to the actors having the necessary expert knowledge – here the EPC – to specify the details. A diachronic analysis reveals, however, that it was quite not so. The EU first pressed industry actors to set the detail rules while engaging in only informal and rather opaque monitoring of private rule-making process. The bulk of the European formal legislation for payments was elaborated only after the private rules had been laid down.

The European regime for payments differs from the New Approach strategy also in other important ways. First, harmonized technical standards are just one possible way to meet essential requirements specified by directives. The New Approach strategy could achieve its goals, albeit presumably in a less effective manner, also without harmonized standards. Thus, in the case of technical harmonization we can talk about public-private symbiosis rather than fully-blown hybridity. In contrast, European payments law would not be able to achieve its objectives without interrelation to SEPA Rulebooks (unless alternative pan-European standards existed), and *de facto* mandates migration to SEPA.

Second, the task of elaborating standards compliant with the essential requirements was formally delegated to the European standardization bodies and the principles they must meet were specified in considerable detail by the public regulator (the Commission).[70] In addition, the information directive[71] sets out an operational coordination mechanism between public regulation in the form of directives and private regulation in the form of harmonized standards.

On the contrary, in the field of European payments no explicit coordination mechanism between formal public law and privately produced rules exists. Similarly, the task of

[69] *See* in particular, SCHEPEL, *supra* note 66.

[70] *See* General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association (March 28, 2003), 2003 OJ (C 91) at 4. It substituted the previous agreement of 1984. For details, *see id.* at 104-07, 242-46; Fabrizio Cafaggi & Agnieszka Janczuk, *Private Regulation and Legal Integration: The European Example* 12 BUS. AND POL. 10-12 (2010).

[71] Directive 83/189, *supra* note 68.

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developing a pan-European payments system was never formally delegated to the EPC. Rather, delegation had an implicit character and informal co-regulation ensued. The hybrid public-private governance structure for payments (on its procedural plane) was mainly based on numerous informal networks among various public and private players.

What is striking is that the European governance for payments is rather at odds with the recent trends in the European governance. Following the BSE crisis and the scandal surrounding the resignation of the Santer Commission, the EU instigated a fundamental reform of its regulatory practices turning not only to governance as a regulatory strategy but also to "better governance".[72] Starting with the "White Paper on European Governance",[73] the European institutions, and the Commission in particular, have issued numerous documents declaring their commitment to the principles of transparency, openness, stakeholder involvement, accountability, coherence and effectiveness in the European rule-making process.[74] Many governance practices and institutions were reformed in this spirit.[75] In this context, the governance regime for payments stands out as a relic of the past.

First, the governance regime of the EPC – the private rule-maker in this hybrid scenario – deviates, or at least deviated over the critical period of drafting the initial versions of the Rulebooks, from the governance structures of the European and other established standardization bodies. More established standardization bodies have elaborated a fairly consistent set of "global principles of internal administrative law".[76] These principles include a balanced involvement of various stakeholders and acceptable level of transparency including public notice and comment.[77] In contrast, the EPC was long a single-stakeholder body composed solely of industry players. What is more, it comprised only one

[72] *See* Angelina Topan, *The Resignation of the Santer-Commission: The Impact of 'Trust' and 'Reputation'* 6 EUROPEAN INTEGRATION ONLINE PAPERS (2002), available at: http://eiop.or.at/eiop/texte/2002-014a.htm (last accessed: 1 December 2012); Beate Kohler-Koch & Berthold Rittberger, *'The Governance Turn' in European Studies*, 44 J. OF COMM. MKT. STUD. 27 (2006); David Bailey, *Governance or the Crisis of Governmentality? Applying Critical State Theory at the European Level*, 13 J. OF EUR'N PUB. POL'Y 16, 27 (2006).

[73] COM (2001) 428 final (July 25, 2001).

[74] *E.g.* COM (2002) 278 final (June 5, 2002); COM (2002) 275 final (June 5, 2002) and in particular, Interinstitutional Agreement on Better Law-making between European Parliament, the Council of the European Union and the Commission of the European Communities, 2003 OJ (C 321) at 1. For the list of key documents, *see* European Commission, *Key Documents*, available at: http://ec.europa.eu/governance/better_regulation/key_docs_en.htm (last accessed: 1 December 2012).

[75] *See e.g.* Michelle Everson, *Control of Executive Acts: The Procedural Solution. 'Proportionality, State of the Art Decision-Making and Relevant Interests', in* THE EU CONSTITUTION – THE BEST WAY FORWARD? 181 (Deidre Curtin *et. al.* eds., 2005).

[76] SCHEPEL, *supra* note 66, at 6.

[77] *Id.*

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category of industry players, first only banks than also other providers of payment services, in a market occupied by a variety of commercial interests. Although it finally opened it rule-making process to other stakeholders, final decisions are still taken solely by payment service providers. Further, over the critical period of drafting the Rulebooks, the operation of the EPC was largely non-transparent.[78] Thus, it is impossible to say, for instance, what was the relationship between technical and political decisions in its decision-making process and whether some national or other interests did not exert too much weight.

Second, also the interrelation between the public and private governance regimes transpires as rather obscure. While it could be argued that promulgation of the formal public legislation complementing SEPA by the European legislator in the official legislative process – thus not merely by an executive body – lends the governance regime for europayments its legitimacy, the ambiguous relationship of the European legislator towards SEPA sows the seed of doubt. It is particularly troubling that the European legislator appears to be leaving the option for any of the private payments regimes that meet its legislative requirements to operate, while the fact is that only one payments regime meets these requirements – it is SEPA. What is more, it seems that the aim of Regulation 260/2012 was not only to increase migration to SEPA but also to weaken the power of the EPC. The involvement of rather detailed "technical requirements" in the Regulation means that the EPC or any other payment scheme is no longer free to develop technical rules of the Rulebooks without restraint. This makes the attitude of the European legislator towards SEPA even more ambiguous.

E. Conclusion

The integrated European payments market was consciously designed as a public-private hybrid governance regime. The European payments regime includes traditional law and private regulation which mutually shape the structure of the European payments system. It is the combination of the two sets of rules that forms a governance system for payments and neither public nor private governance system would be able to achieve its final goal without its counterpart. It is neither a public nor a private governance regime but a hybrid one.

The public-private hybrid nature of the rules for europayments, required a hybrid rule-making process so that the two sets of rules were aligned with each other. The public and private systems of rules have formally been developed in independent rule-making processes and by discrete rule-makers – public and private respectively. However, public actors have exercised a considerable amount of influence and oversight over the private rules. They did it through informal yet systematized interactions with private actors and

[78] For more on this, *see* Janczuk-Gorywoda, *supra* note 59.

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through a series of soft law. And *vice versa*, private rule-makers and privately-produced rules substantially affected the content of the public rules.

SEPA calls our attention to the manner in which the EU is experimenting with the roles performed by private actors in the business of regulation. In the case of SEPA, public regulators – the Commission and the ECB – have pushed private actors from the banking industry to self-regulate in order to create the European payments system. Public regulators have monitored the process of setting private rules, yet without having a satisfactory level of control. In particular, public regulators were only partially effective in persuading the EPC to change its governance structure. Yet, although private rules for SEPA were set in the process raising concerns as to its democratic nature, the European legislator enacted laws which endorse private rules and in practical terms even make them mandatory.

Not having the necessary technical expertise in-house, it is not surprising at all that the Commission has turned to experts in the field. Indeed, the use of expert knowledge is said to be a typical feature of governance arrangements.[79] It has been long recognized that the "demand for economic and scientific expertise to oversee technical regulatory convergence in the internal market has far outstripped the administrative capacities of the Commission, and has consequently witnessed the growth of a vast *ad hoc* European administration."[80] Legal and political scientists have long struggled debating whether the comitology, formation of the European agencies and new modes of governance are legitimate forms of European governance.[81] The case of SEPA offers yet another perspective to this debate.

While the complexity of the payments sector explains the need of the European legislator to resort to expert knowledge, the *modus operandi* chosen is difficult to justify. Indeed, this form of informal co-regulation by public and private rule-makers may raise questions whether the Commission has not gone too far in its search for novel, flexible modes of rule-making.

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[79] *See* Christian Joerges, *Integration through De-legalisation?*, 33 EUR'N L. REV, 291, 295 (2008).

[80] Michelle Everson, *A Technology of Expertise: EU Financial Services Agencies* 3-4 LSE 'Europe in Question' Discussion Paper No. 49/2012, available at: http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper49.pdf (last accessed: 1 December 2012).

[81] *E.g.* Dehousse, *supra* note 11; Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes*, 3 EUR'N L. J. 273 (1997); Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. OF PUB. POL'Y 139 (1997); GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET (Christian Joerges & Renauld Dehousse eds., 2002); Graine De Búrca, *The Constitutional Challenge of New Governance in the European Union*, 56 CURR. LEG. PROB. 403 (2003); Sabel & Zeitlin, *supra* note 4; Colin Scott, *Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU*, 15 EUR'N L. J. 160 (2009); Martin Shapiro, Independent Agencies, *in* THE EVOLUTION OF EU LAW 111 (Paul Craig & Graine de Búrca eds., 2011).

Finally, SEPA faces enormous challenges in terms of legal certainty and strategy. It is difficult to see how the hybrid nature of European payments regime and the spotty application of its various elements are going to achieve the uniform legal area and bring about a high degree of legal certainty which, according to those involved in the development of the European payments regime, is indispensable for a safe and efficient payments system.

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