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# The Public/Private Divide in EU Financial Regulation

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# THE PUBLIC/PRIVATE DIVIDE IN NATIONAL LEGAL SYETMS



## Public law

- › private parties - public authorities
- › public interests
- › distributive (social) justice:
  - socially just distribution of goods in a society (e.g. taxes)
- › public enforcement:
  - by public authorities through public law means
  - *ex ante* compliance and deterrence

## vs. Private law

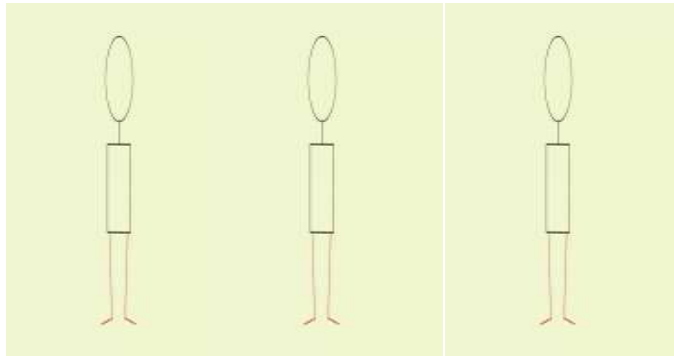
- › private parties
- › private interests
- › interpersonal (corrective) justice:
  - balance between the parties' interests through their respective rights and remedies (e.g. damages)
- › private enforcement:
  - by aggrieved private parties through private law means
  - *ex post* compensation



# Public law

vs.

# Private law





**EU FINANCIAL  
REGULATION:  
BLURRING THE LINES  
BETWEEN PUBLIC AND  
PRIVATE LAW**



# The logic of EU financial regulation: Three principal issues

1. What is the **goal or outcome** to be achieved?
2. What **standard of conduct** is required from market participants?
3. What **enforcement techniques** are appropriate to ensure compliance?

# How to regulate payment services in the EU? (1)



- › Determining the **goal or outcome** to be achieved:
  - a single payments market
  - innovation
  - competition
  - consumer protection



# How to regulate payment services in the EU? (2)



- › Setting the **standard of conduct** required from market participants:
  - e.g. authorisation as a payment institution; non-banks' access to banks' payment systems and client databases; in the case of unauthorised payment transactions, losses are generally borne by PSP, unless PSU has acted fraudulently or with gross negligence



# How to regulate payment services in the EU? (3)



- › Choosing **enforcement techniques**:
  - public enforcement through administrative law means (e.g. fines)
  - private enforcement through private law means (e.g. compensation for damage)
    - individual and collective
  - hybrid enforcement: redress through regulatory agencies

*(PSD2; ADR Directive; Representative Actions Directive)*



## A functional approach of EU law (i)

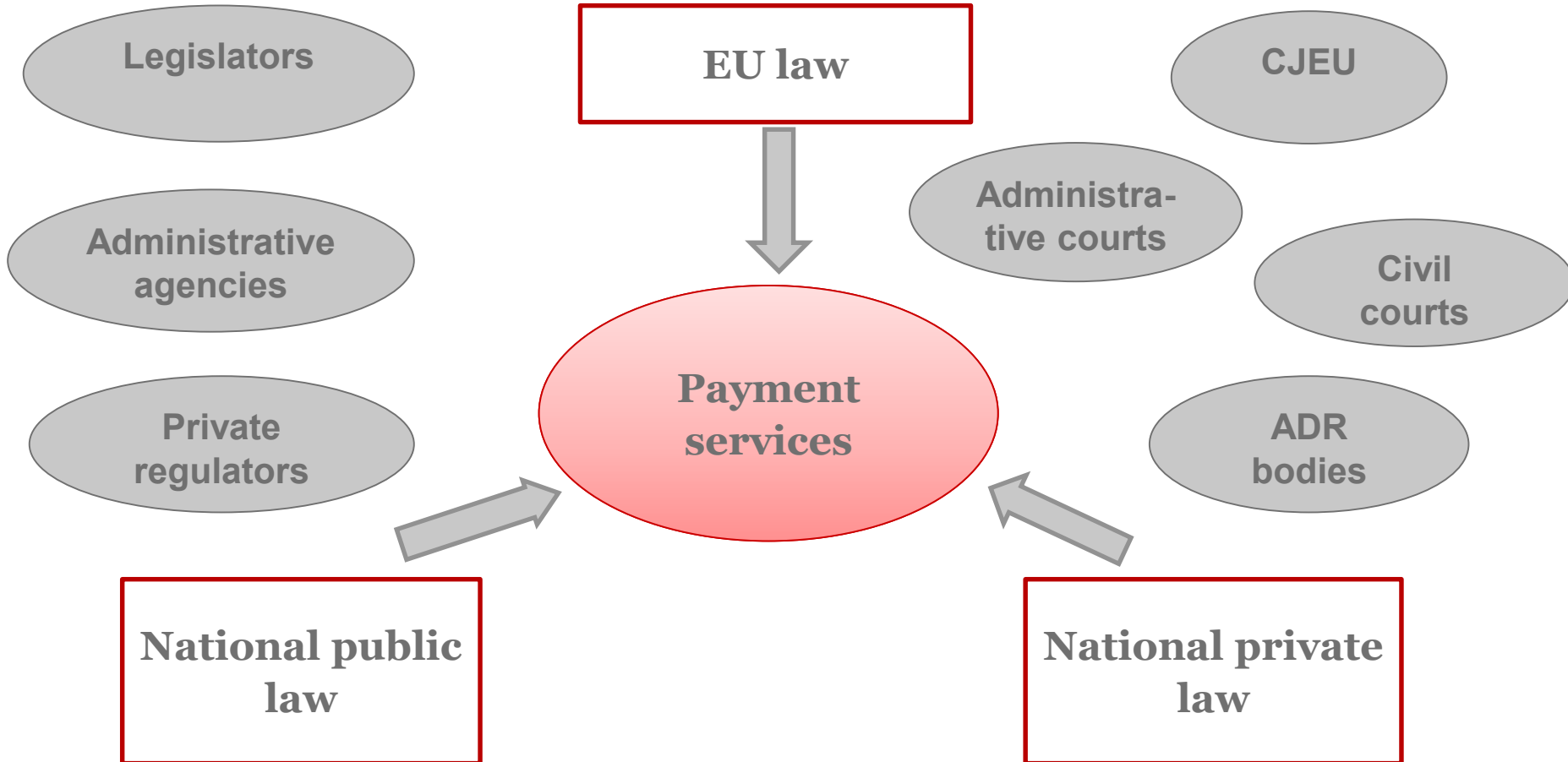
- › The EU legislator's task in the context of market integration is viewed as **problem-solving**
- › The distinction between public and private law is **not recognised** as such
- › Public law and private law concepts are used as **regulatory tools in novel combinations**

## A functional approach of EU law (ii)

- › The EU's experimentation with regulatory tools in regulating the markets has led to the emergence of **legal hybrids**
- › Legal hybrids **combine elements of public and private law**: e.g.
  - 'European regulatory private law' (Micklitz, *YEL* 2009)
  - 'European supervision private law' (Cherednychenko, *ERPL* 2014)



# The legal matrix





# REDISCOVERING THE PUBLIC/PRIVATE DIVIDE IN EU FINANCIAL REGULATION



## Payment Services Directive (PSD) 2



## Markets in Financial Instruments Directive (MiFID) II



## PSD 2

- › Authorisation & operating conditions for PSPs / public supervision of PSPs
- › Ensuring the balance between the interests of PSP & consumer:
  - transparency / parties' rights & obligations in relation to payment services
- › Individual consumer redress:
  - detailed liability rules allocating losses PSPs & PSUs / PSPs
  - rules improving the procedural position of consumers (e.g. with respect to the burden of proof)
  - pro-active CJEU (e.g. Case C-337/20, *CRCAM*)

*'Public & private law' grammar*

## MiFID II

- › Authorisation & operating conditions for ISPs / public supervision of ISPs
  - a high level of harmonisation of supervisory powers and administrative sanctions
- › No individual investor rights and private law remedies:
  - principle of civil liability ultimately not included
  - reluctant CJEU (e.g. Case C-604/11, *Genil*)
  - harmonising effects on national private law vary across the EU

*'Public law' grammar*



# TO CONCLUDE



- › EU financial regulation has blurred the public/private divide
- › The rise of legal hybrids (e.g. PSD2)
- › But the conceptual distinction between the categories of public and private law has not entirely lost its significance in EU and national law:
  - useful to analyse the interplay between EU and national law in regulatory standard-setting and enforcement

(See further Cherednychenko, *MLR* 2021; Cherednychenko, *YEL* 2021; Cherednychenko, *ELJ* 2020; Cherednychenko/Andenas, *Financial Regulation and Civil Liability in European Law*, Edward Elgar 2020)



# What is a hybrid car?

