Interviewing European Union

Wilhelm Meister in EU law

ARDAE

EDITURA UNIVERSITARĂ

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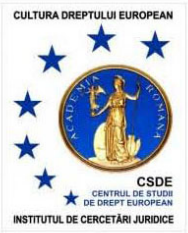

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INTRODUCTION

The present book is a challenge for its editors: it was the temptation of plain inquisitiveness that has led them, in the first place, to this form of dialogue, unusual for the legal community. Unlike many fields of humanities, lawyers are not interviewed by virtue of the legal studies themselves, but for collateral issues (holding a position, special events – winning/losing proceedings covered by media). The book was a challenge also for our interlocutors, to whom we would like to thank for their kindness supportive efforts and their positive approach to our initiative. We would also like to thank those who expressed their intention to take part in this initiative, but unfortunately did not have the time needed to take part in the interview. Their help consists of impetus to invite other personalities and to set up a mini-encyclopaedia of European Union law.

European Union law, and perhaps European law generally, is scholarly without being protracted, and is explained to the reader, without being pedant. The intellectual journey taken together with the personalities invited in this volume means an effort in inverse proportion to this kind of reading. In order to truly comprehend, one needs a culture of European law, a feeling of hunger for details that are not found in treaties, monographs or papers. We are aware of our limits, but we are proud of the boundlessness of the answers given by the interlocutors, and their openness towards new horizons of

well-tempered and fruitful inquisitiveness. We become what we are aware to be, however in our dialogues, every answer leads to a new experience, they are not words from a book masterfully assembled, but feelings of a special academic and cultural reality. This book grants us the opportunity to construe a semantic perspective of facts and concepts that otherwise seem to be limited; we are witnessing an era of European law, but also, most of the times, an era of European meta-law. Guidance offered to young researchers are in fact a sum of elements employed to clarify the boundlessness of European law – at the crossroads of national law and international law each with its own rules. The research adventure in the field of law should start with this book: here one is able to find guidance from those who succeeded, by gaining multilayered competences in both academia and practice. Our thoughts for those that contemplate studying European law are that they wish to escape a precisely determined field of a barren academic area for the European inter/multidisciplinary vastness (although itself being limited). Unlimited inquisitiveness is an issue of lack of interest, but European law offers more and more particular and surprising examples of relevant skilled research, dissimilar to that threatening and uncomfortable vision of research performed for its sake. In performing research in EU law there are no shallow types of research, but only badly drafted questions; this is why inside the legal culture of our country we have placed an emphasis on methodological issues.

Lately knowledge is a power that does not stem from its quantity, but from its quality. European law is one of the intellectual forms of a dynamic and at the same time precise spirit. Not only humans are able to interpret and apply

concepts and facts. Today, machines are by far more efficient – in terms of memory, data storage or searching facilities. Computers and programs are undoubtedly more efficient than human beings: but, despite of these challenges, the present volume proves that imagination, order and understanding are higher than any quantitative developments.

The dialogue is an initiatory cultural form for each and every age and for each and every kind of learning. Contemporary science, even legal science, is becoming more and more specialized, as skills become more sophisticated. The dialogue is rediscovered during conferences and debates. There is also another dialogue, hard to perceive, that is carried out through published studies and papers. The present dialogues are a follow-up of the human work of understating the reality.

Daniel Mihail Șandru[*]
Constantin Mihai Banu[**]

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TABLE OF CASES
(COURT OF JUSTICE OF THE EUROPEAN UNION)

LIST OF ABBREVIATIONS AND ACRONYMS

AG	Advocate General
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court of Germany)
CESL	Common European Sales Law
CFSP	Common Foreign Security Policy
(the) Charter	(the) Charter of fundamental rights of the European Union (also 'EUCFR')
CJEU	Court of Justice of the European Union
Coreper	Permanent Representatives Committee
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
CST	Civil Service Tribunal
DCFR	Draft Common Frame of Reference
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ed.	Editors' note
EEAS	European External Action Service
E(E)C	European (Economic) Community
EIB	European Investment Bank
EP	European Parliament
ESM	(Treaty establishing the) European Stability Mechanism

EU	European Union
Fiscal Compact	see "TSCG"
GC	General Court
IIA	Interinstitutional Agreement
MEP	Member of the European Parliament
MP	member of Parliament
OECD	Organisation for Economic Co-operation and Development
para.	paragraph
PECL	Principles of European Contract Law
PIL	private international law
R.R.D.E.	Revista românã de drept european (Wolters Kluwer Romania)
TEU	Treaty on European Union (Lisbon)
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WTO	World Trade Organization

RENÉ BARENTS

Born in 1951; graduated in law, specialisation in economics (Erasmus University Rotterdam, 1973); Doctor of Laws (University of Utrecht, 1981); Researcher in European law and international economic law (1973-74) and lecturer in European law and economic law at the Europa Institute of the University of Utrecht (1974-79) and at the University of Leiden (1979-81); Legal Secretary at the Court of Justice of the European Communities (1981-86), then Head of the Employee Rights Unit at the Court of Justice (1986-87); Member of the Legal Service of the Commission of the European Communities (1987-91); Legal Secretary at the Court of Justice (1991-2000); Head of Division (2000-09) in and then Director of the Research and Documentation Directorate of the Court of Justice of the European Union (2009-11); Professor (1988-2003) and Honorary Professor (since 2003) in European law at the University of Maastricht; Adviser to the Regional Court of Appeal, 's-Hertogenbosch (1993-2011); Member of the Royal Netherlands Academy of Arts and Sciences (since 1993); numerous publications on European law; Judge at the Civil Service Tribunal since 6 October 2011.

First of all we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

That was before the present 'BAMA' system. After four years of study at what is now called the Erasmus University Rotterdam (NL), I obtained my academic degrees in law and in economics (1973).

2. How would you assess your main professional periods? Which of them was the most challenging?

In other words, we would like to ask you about your professional experiences at the EU courts. For a significant period of time, you have acted as legal secretary at the Court of Justice. Therefore, you are very familiar with the EU judicature. What models do you have among the members of the EU courts?

I worked for five years for an advocate general, followed by five years at the Legal Service of the Commission and after that for nine years for a CJEU-judge. Every period was a challenging one since it allowed me to work from different perspectives on the same problems.

I have no models among members of the EU-courts; however I learned a lot from Pieter Verloren van Themaat, the first Dutch advocate general at the CJEU, for whom I worked from 1981 to 1986.

3. From your point of view, what would be the main challenges for the current European Court of Justice?

To integrate the Fundamental Rights Charter into EU-law to the extent that the rights and principles contained in the Charter become the main source of inspiration of the ECJ's case law.

4. Could you please comment on the most important recent developments concerning the EU legal order – from your point of view?

The main threat to the EU-legal order is the fragmentation caused by intergovernmental treaties (ESM, Budgetary

Discipline) and practices which, since they are concluded between less than 27 member states, risk to create distortions that in the long run might affect the unity of the internal market. The same threat is caused by the absence of effective measures to combat the euro-crisis and the shifts in the institutional equilibrium of the EU. Without an efficient economic and monetary union you cannot have an internal market. In other words, there is no alternative to a 'federalisation' of the EU, either in its present form or as a nucleus of a number of continental member states.

5. What does it mean the "Autonomy Of [European Union] Law" from the point of view of Post-Lisbon developments and more generally for the developments of constitutionalism at EU level?

Autonomy of EU-law means nothing more than that EU-law itself stipulates (through its courts) how it is to be interpreted and to be applied. Only on that condition EU-law can be applied in every Member State on the same conditions, which is a necessary requirement for its effectiveness in terms of Articles 2 and 3 TEU. Because EU-law (according to the case law) is autonomous, it is also constitutional, since it sets its own standards of effectiveness and legality. Autonomy of law reflects that in a period of globalisation, the state is no longer the sole source of law, in spite of what constitutional courts might rule. It reflects that the centuries old link between state, territory and law is coming to an end.

6. What is the relationship between EU Courts in "saying the law"? Does the "lower" EU Courts - CST and GC – follow a "self-restraint" attitude (or deference) towards the "higher authority" – the ECJ?

It seems obvious to me that you look for precedents in the case law of the superior courts. However, I have no difficulty

in defending an opposite solution if necessary. There is certainly 'respect', but no 'deference' or 'fear' (to be annulled).

7. What is the role of documentation (and more generally) of legal doctrine in EU Courts decisions?

The role of legal doctrine in EU courts decisions is very limited. The influence of the case law on legal doctrine is far greater. In my opinion, that is the way it should be. If not, we would not have direct effect, no primacy, no direct effect of directives, no state responsibility and many other things.

8. **What would be the limits – if any – concerning the academic opinions expressed by Judges? In this context, which is your point of view on dissenting opinions; is this a kind of "knowing for the sake of knowing" (as in case of concurring opinions) or could that lead to a genuine familiarisation with the ECJ as a whole?**

As far as their composition is concerned, the EU courts are international tribunals. Once you introduce dissenting opinions, it will only be a question of time before member states are trying to influence the attitudes of 'their' judges'. Do not forget that the EU is not a state or a federation.

As a member of a court you should be cautious in what you say (in public) and what you write. In my opinion you cannot defend a particular point of view which is not accepted, now or later, by the court of which you are a member since that would be incompatible with your duty to keep the secret of the deliberations.

9. A final question: Which advice/recommendation would you give to young researchers in (EU) law?

First, learn your languages, at least two.

Second, stay abroad to study or to work.

Three, keep yourself informed not only about legal developments (that is obvious), but also about political events and trends.

Fourth, when you are young, every day, week, month or year counts twice for your future.

Thank you very much.

JOXE RAMON BENGOETXEA

Joxerramon *Bengoetxea obtained his PhD in Law at the University of Edinburgh.*

Professor of Law, University of the Basque Country. He coordinates the International Master from the University of the Basque Country where he teaches Legal Theory and Sociology and Jurisprudence. Formerly, he was Scientific Director of the Oñati Institute (2005-07), Legal Secretary (law clerk) at the Court of Justice of the European Communities (1993-1998 and 2002-2003), working directly for Judges Edward and Schiemann; director of the network ELAP-The Economics of Lifelong Learning and Deputy Minister for Employment, Labour and Social Security at the Basque Autonomous Government (1998-2001).

His publications include three books: 1) the book based on his Ph. D. thesis is "The Legal Reasoning of the European Court of Justice", Oxford University Press, 1993; 2) a textbook on Jurisprudence (Sociology of Law, Comparative Law, Legal Theory and Political Philosophy) in the Basque language, entitled "Zuzenbideaz. Teoria kritiko trinkoa" (1993); 3) The last book is entitled: "La Europa Peter Pan. El constitucionalismo europeo en la encrucijada", published by IVAP in 2005.

He has published articles in law reviews, journals, collective editions and readers. These articles have mainly dealt with issues of legal reasoning and legal theory, EC law and institutions, regionalism in the EC, governance in the EU, comparative law, political philosophy (theory of sovereignty, nationalism and European integration).

First of all, we would like to thank you warmly for accepting this interview.

You are a Professor (Legal Theory, Sociology and Philosophy of Law), and you have also acted as a Legal Secretary (*référendaire)* at the European Court of Justice for certain periods of time. You have also authored a very interesting work, *The Legal Reasoning of the European Court of Justice, Towards a European Jurisprudence*[1].

You held also the position of Scientific Director of the Onati International Institute for the Sociology of Law; Universidad del País Vasco (Spain)[2]. Impressive professional career, congratulations!

1. In the beginning would you like to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

Would you like you to point out major influences during your career (concerning also methodology)?

When I studied law in the 1980s there was real massification in Spanish Universities Lectures were the basis of learning; there was little additional required reading and only occasionally would we be required to read cases. I took the habit of reading extra materials in the subjects that I liked: reading cases, and monographs. If I felt confident, I would go to speak to the professors.

2. Could you please describe your experiences acting as an *référendaire* at the European Court of Justice? What models do you have among Judges and AGs at the ECJ?

This was a great experience. You have to work on different types of cases; try to do the necessary research to understand what the case was about, read the relevant cases and go through

[1] Oxford University Press, 1993.

[2] http://www.iisj.net/.

the files and pleadings several times to make sure all the points were taken. Drafting towards a judgment that will receive consensus in difficult cases is an exercise in modesty: you cannot simply try to impose the views that you think are best, you have to negotiate your way and convince with good arguments while being coherent with the previous cases, and the solution has to be practicable and ideally acceptable to the parties as well. My model judge was David Edward, but I also thought very highly of Judge Mancini and Leif Sevon and Advocate General Leger. Later on I very much appreciated judge Rosas.

3. From your point of view, what are the most important recent developments concerning the EU legal order?

Obviously the accession to the ECHR will be the next big thing, at least simbolically. The citizenship cases would be the other big development, and for the third, I would stress the *Kadi* judgment. These cases reflect my interests more than a neutral presentation of the law as a whole.

4. A more general question: Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

The economic and financial crisis is the greatest threat. Areas like state aids and restriction of competition, restrictions to trade and protectionist temptations are one threat. The second one is the devastating effect of the culture of cuts and austerity on many Europeans. The sustainability of systems of social welfare and the support of EU law is crucial. The third is the opt out of the UK from some policies.

5. From your perspective, what would be the main challenges for the current European Court of Justice?

Sincerity in its reasoning and justifications. Clarity also, and resource management to enhance quality.

6. On the other hand, did the Court of First Instance have (had) a self-restraint attitude towards the European Court of Justice (from the point of view of a potential appeal brought before the latter)? And if so, could you please comment on the underlying reasons for that?

Or to put in other words: what would be the effects (concerning the reasoning employed the EU courts) of a potential appeal (at Court of Justice of a judgment of the General Court) concerning the reasoning of those courts (the "lower" court and the "higher" court)?

Appeals are essential in going to the heart of the reasoning. A thorough practice by the Court of Justice in controlling the quality of the reasoning of the General Court is the best way of working towards shared standards of reasoning.

7. Could you please comment on the goals of the competition among European Courts – the European Court of Justice and the European Court of Human Rights? What would be the usefulness of an adhesion to the European Convention on Human Rights as far as the European Union has already adopted the Charter of Fundamental Rights?

I already said something about that, but the key will be to bring the whole system of EU law under the same type of Fundamental Rights control as befalls on the Contracting States. No possibility for double standards.

8. Coming to legal reasoning in judgments delivered by EU courts, we would like to ask you to assess the stages of logic employed in more recent judgments compared to old judgments (of the 60s and 70s)? And also compared to (other) supranational courts, like ECtHR?

I think the European Court of Justice has comparable standards to the ECtHR, and although there are occasionally judgments that have poor or even defective reasoning, on the

whole I do not agree with the statement that things are not as good as they used to be before.

9. What is your opinion concerning the "construction" of the principles of the ECJ?

This is an area where the Court could do with a little transparency, sincerity and theory. It lacks a solid background theory on principles, but it is working on that, I believe. The academic community should be more critical towards the Court always, but also in the field of principles.

10. What is the use of national law in the legal reasoning of ECJ? And moreover which is the influence/the role played by comparative law (from a methodological point of view) in the judgment of ECJ?

National laws are the bread and butter of the Members that make up the Court. Comparative law is one of the palimpsests of the judgments, it is not recognised but it is always in the deliberation laboratory.

11. What about the public-private division in EU law? Is it still relevant (as it was *illo tempore*)? We would like you to comment briefly on that development.

The private/public distinction is only a pre-hermeneutic understanding of law. When you analyse the intricacies of the case, you then not to think in those terms and go straight to the issues.

12. On the other hand, which role does play the purposive interpretation (generally) in law and more particular at the ECJ? Are the any „malaises" concerning this interpretation in the judgments delivered by the ECJ?

At the ECJ, the purposive interpretation seems to hold a privileged place compared to other means of interpretation (systematic, literal, historical). Is this perception

grounded? And also, which might be the justification that this kind of interpretation leads finally to a new law?

When one reads the Treaties from beginning to end, one realises that they are about aims, objectives, telos and principles. There is a delicate balance to find between the objectives of integration and the principle of legality looking to the past of relationships.

13. Which might be the objective pursued by the ECJ in a case when it answers a preliminary reference relying heavily on facts? Is it still possible the division of functions between courts (the national court and the ECJ) in the system of Article 267 TFEU? And also is there still a division between law and facts?

On the other hand, are there any dangers in relying on national law in judgment of the Court (not concerning the relevant law, but in the rational building-up of a judgment)?

The Court generally manages to respect the distinction and not to decide on facts. Qualification is close to interpretation, and it is important to work on a *ratio decidendi* that sticks to the facts of a case as universally described.

14. To sum up the above questions: Would there be any risks concerning the activism of the European Court of Justice? Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

The preliminary reference is an essential instrument in the success and acceptability of the Court. It is a genuine system of cooperation. The Court replies to real cases. The activism debate is happily dated. More sophisticated approaches to justification are now called for by most scholars, and also by judges. Activism is often a term used by more politically motivated reactions to judgments the outcomes of which are disliked.

15. And a final question: Which advice/recommendation would you give to young researchers in (EU) law?

Never to forget the sociolegal and theoretical aspects of the cases they are dealing with. Never to engage in sophisticated theories without knowledge of the cases and the facts of the cases.

Thank you very much.

ELSA BERNARD

Professeur agrégé des Facultés de Droit, Institut d'études européennes (IEE) de l'Université Paris VIII (2010-).

Doctorat de droit français (2006), Université Robert Schuman de Strasbourg. Titre de la thèse: «La spécificité du standard juridique en droit communautaire»[1]*, Cotutelle sous la direction des Professeurs Guy Haarscher (ULB) et Denys Simon (Université de la Réunion), Mention très honorable avec les félicitations du jury à l'unanimité, Prix de thèse du Groupement européen de droit public, 2007, Prix de thèse de la Société des amis des Universités de l'Académie de Strasbourg, 2007.*

Doctorat de droit belge, Université Libre de Bruxelles (ULB) (2007).

Agrégation de droit public (2010).

Votre thèse de doctorat «La spécificité du standard juridique en droit communautaire», publiée en 2010 par Bruylant, a été récompensé par quelques importants prix. Vous avez apporté une contribution notable en ce qui concerne les fondements philosophiques de la législation de l'UE.

1. Vous avez fait ou, vous faites partie, d'une équipe de recherche «Force du droit»[2]; quel serait, dans l'Union

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[1] *La spécificité du standard juridique en droit communautaire*, Bruxelles, Bruylant, Collection thèse droit de l'Union européenne, n° 16, 2010, 643 p.

[2] http://forcesdudroit.wordpress.com/.

européenne, la force du droit – face au pouvoir politique/économique? Le standard juridique introduit-il un élément d'opportunité au sein des normes juridiques?

L'Union européenne est un ordre juridique. A la différence de la plupart des États qui sont le fruit d'une construction historique, souvent basée sur des éléments objectifs communs (une culture, une langue, parfois une religion) et plus subjectivement sur une volonté de vivre ensemble (qui renvoie à l'idée de Nation), l'Union européenne s'est faite par le droit. Les communautés européennes – ancêtres de l'Union – sont en effet nées de traités conclus par des autorités étatiques. C'est donc exclusivement par les règles juridiques qu'est apparu ce système original, et cela contribue à le distinguer des formations étatiques. Parce que leur souveraineté est en jeu, les États ont été – et sont encore largement – réticents à donner à l'Union la dimension politique qu'elle mérite. Le recours aux règles de droit leur permet de régir le fonctionnement de l'Union et de surmonter les obstacles, comme on le voit à l'heure actuelle avec la signature du Traité sur la stabilité, la coordination, et la gouvernance au sein de l'Union économique et monétaire (TSCG), censé apporter des solutions pour remédier à la crise économique.

Toutefois, l'élaboration et la mise en œuvre de ces règles de droit ne sont pas aisées dans un système impliquant vingt-sept États membres. L'utilisation de notions indéterminées que sont les standards juridiques facilite ce consensus. En effet, le standard tel que je le définis dans ma thèse, est une notion intentionnellement laissée indéterminée par l'auteur de la règle de droit qui la contient. Elle nécessite lors de son application aux faits de l'espèce, une appréciation des situations et des comportements en terme de normalité, tout en favorisant le recours à des références externes au droit. Les notions de "confiance légitime", de "bonne administration", de "coopération loyale", de "délai normal" ou "raisonnable",

de “consommateur moyen”, ou encore de “subsidiarité” sont des exemples de standards juridiques. Leur insertion en droit de l’Union présente plusieurs avantage pour les auteurs des normes. Au moment de leur élaboration, tout d’abord, la présence d’un standard facilite l’accord dans la mesure où il sous-tend des valeurs unanimement admises, basées sur l’idée très consensuelle de «normalité». L’attribution du contenu précis de la norme est ainsi reportée et implicitement déléguée à l’autorité qui sera chargée d’appliquer ou d’interpréter cette règle. En effet, le fait qu’un comportement ou une situation doit être “normal”, “raisonnable” ou “équitable” par exemple, peut difficilement être contesté. Les divergences surviennent cependant lorsqu’il s’agit de déterminer pour chacun en quoi consiste le “normal”, le “raisonnable” ou l’“équitable”. Ensuite, la règle de droit élaborée au niveau de l’Union, soit par les États membres (lorsqu’il s’agit des traités), soit par les institutions européennes (lorsqu’il s’agit des actes de droit dérivé), fait l’objet d’une mise en oeuvre dans les ordres juridiques internes selon les procédures nationales propres à chaque État. L’indétermination de la norme favorise alors une application différenciée d’un ordre juridique national à l’autre puisqu’elle laisse une marge d’appréciation importante à son destinataire. En ce sens le standard juridique laisse davantage place à une appréciation en opportunité que des notions précises et déterminées qui rendent la règle de droit rigide et qui sont dès lors moins adaptées aux spécificités de l’ordre juridique de l’Union.

2. Dans quelle mesure le «soft law» contribue au développement du standard juridique dans le droit de l’UE?

La notion de «soft law» que l’on peut traduire par celle de «droit mou» en français, est ambiguë car elle fait référence au droit, c’est à dire à des normes contraignantes tout en suggérant que du fait de leur mollesse ces normes seraient faibles, ce qui pose bien sûr la question de leur caractère juridique et contraignant.

Compte tenu de ses particularismes, l'Union européenne est un terreau fertile pour l'application d'un droit mou et consensuel. Sa nature encore largement économique implique la mise en œuvre de règles souples, flexibles, relevant davantage de la régulation que de la règlementation. De plus, les importants transferts de souveraineté consentis par les États favorisent la recherche de règles, certes juridiques, mais qui soient respectueuses des particularités de chaque État et qui soient donc susceptibles d'une application différenciée dans les ordres juridiques nationaux. Dans ces conditions, le standard est, du fait de son indétermination et de la marge d'appréciation qu'il laisse à ses interprètes, l'instrument privilégié de la formulation de la règle de droit issue du "soft law" mais il n'en est pas le seul. Par ailleurs, le standard ne relève pas exclusivement du "droit mou". Son indétermination *a priori* ne peut être assimilée à la non-impérativité de la norme qui le contient. Ainsi par exemple, l'obligation de rouler à une vitesse «raisonnable», n'est pas moins impérative que celle de rouler en-deçà de 90 km/h. La règle qui contient un standard est tout aussi contraignante que celle contenant une disposition précise, si bien que ce type de norme apparaît également dans le droit qui pourrait être qualifié de "dur".

3. Quel a été le rôle de la Cour de justice de l'Union européenne par rapport au standard juridique?

La relation entre le standard et le juge peut être envisagée de deux façons en fonction de l'origine du standard. Il peut-être formulé soit dans la règle de droit dont le juge doit assurer l'interprétation et l'application, soit dans la jurisprudence. La Cour de justice peut donc être *destinataire* d'un standard dont il lui revient de déterminer le contenu lors de l'application de la norme qui le contient (ce que je qualifie de "standard textuel"), mais aussi être *auteur* du standard (que je qualifie alors de "jurisprudentiel"). C'est le cas par exemple de la notion de "consommateur moyen", à laquelle le juge de l'Union fait

référence et qui lui permet d'adapter le droit aux faits évolutifs et changeants relevant du domaine de la consommation tout en respectant les conceptions étatiques particulièrement divergentes en la matière.

Quelle que soit son origine, le standard renforce le rôle de la Cour. Cependant, s'il consolide le pouvoir du juge, la nature de ce pouvoir diffère selon que la Cour applique un standard textuel ou formule un standard jurisprudentiel.

Lorsque la Cour applique un *standard textuel*, c'est en qualité d'interprète de l'énoncé que son pouvoir est accru. Il s'agit toutefois d'un véritable pouvoir normatif si l'on considère, d'une part, que la norme est le produit de l'interprétation et d'autre part, que l'interprétation du standard se distingue de celle des autres catégories de règles parce qu'elle implique que soit attribué un contenu à la norme, en fonction des cas d'espèce.

La fonction du *standard jurisprudentiel* soulève une problématique différente. Ce n'est plus la question de la création du droit par l'interprète qui est posée, mais celle du rôle du juge en tant qu'auteur originaire de la norme. Le pouvoir normatif mis en œuvre par la Cour lorsqu'elle formule un standard dans sa jurisprudence pour l'appliquer ensuite aux cas d'espèce, résulte de la création «primaire» du droit et non, comme lorsqu'il s'agit d'appliquer un standard textuel, de la création «secondaire», c'est-à-dire d'une création de droit liée à l'interprétation d'un énoncé textuel.

La fonction du standard quant au rôle du juge communautaire est donc double. Le standard textuel accroît le rôle de la Cour par la délégation de pouvoir normatif du constituant et du législateur européens, au juge. Or, c'est parce que le juge joue un rôle particulièrement important dans l'ordre juridique de l'Union et que la Cour est un organe puissant qui a participé à l'intégration européenne et a largement contribué à l'autonomie du droit de l'Union, que des standards sont fréquemment formulés dans sa jurisprudence.

Ainsi, si le standard textuel est un facteur d'attribution d'un pouvoir normatif au juge, le standard jurisprudentiel est la manifestation du rôle important que joue l'organe juridictionnel dans l'Union européenne.

4. La subsidiarité est-elle un principe soumis au contrôle juridictionnel ou est-ce plutôt un élément à forte connotation politique?

L'un n'empêche pas l'autre.

Le principe de subsidiarité auquel les traités européens font référence a indéniablement une connotation politique, puisqu'il implique de déterminer si, dans le domaine des compétences dîtes concurrentes, une action des États membres serait suffisante pour atteindre les objectifs visés et/ou si une action de l'Union pourrait apporter une plus-value. Dans ce cas seulement, les institutions européennes pourront engager une action. La terminologie même de l'article 5 §3 TUE, fait appel à des notions floues dans leur essence. Non seulement la formulation manque de clarté, mais diverses significations et interprétations peuvent être données aux termes utilisés. Il est en effet impossible de déterminer, *a priori*, le type d'objectifs d'une action qui peuvent être réalisés «*de manière suffisante par les États membres*» ou «*mieux réalisés*» au niveau de l'Union. Ces termes expliquent que la subsidiarité fasse l'objet d'une application *in concreto*, c'est-à-dire en fonction de chaque cas d'espèce. Il n'est pas étonnant, dès lors, que l'insertion de la subsidiarité dans le traité ait été souhaitée à la fois par les adeptes d'une intégration poussée – notamment les fédéralistes – et par les partisans d'une limitation des transferts de souveraineté nationale à l'Union européenne.

C'est à la fois la nature politique du concept de subsidiarité et son caractère subjectif qui ont amené quelques observateurs à considérer que ce principe ne pouvait pas faire l'objet d'un contrôle par le juge. Cependant, le fait que les notions qui traduisent l'expression de la subsidiarité soient indéterminées

et impliquent un jugement trop politique pour permettre une application objective de ce standard, ne permet pas pour autan de le soustraire au contrôle du juge. Si ce contrôle est rare et restreint, il existe toutefois, comme en témoigne pour la première fois le célèbre arrêt *Bosman* (CJCE, 15 décembre 1995, C-415/93). La nature de ce contrôle résulte sans doute de la volonté de la Cour de se limiter autant que possible à sa fonction juridictionnelle, en n'intervenant que de manière ponctuelle et limitée dans le domaine politique.

5. Quel est le rôle du standard dans le cadre d'un renvoi préjudiciel en interprétation ?

Les standards juridiques - qui existent dans tous les ordres juridiques - ont des fonctions particulières au sein de l'Union européenne. L'une de ces fonctions réside dans la délégation par la Cour de justice au juge national du soin d'attribuer un contenu à la norme, en fonction des spécificités nationales. Cette fonction du standard se développe dans le cadre du mécanisme du renvoi préjudiciel en interprétation. Elle résulte du fait que le contenu de ce type de notion indéterminée dépend du critère de normalité. C'est la conception qu'a l'interprète de ce qui constitue un comportement ou une situation normale dans le contexte factuel auquel la norme doit s'appliquer, qui détermine le contenu du standard. Il est donc nécessaire, pour attribuer un contenu au standard, d'être «au plus près» du contexte factuel dans lequel il s'applique. C'est de ce contexte et des conceptions, des valeurs, des traditions qui s'en dégagent, que dépend le contenu donné par l'interprète de la norme au standard. Dans une Union européenne composée de vingt-sept États membres aux cultures et traditions juridiques diverses, il est dans la logique même du standard que le contenu de ces normes, intentionnellement laissées indéterminées par leurs auteurs, soit attribué par l'organe qui a la meilleure connaissance de ce qui est considéré comme normal dans le contexte factuel. Certains standards, compte tenu du domaine

exogène auquel renvoie leur interprétation, sont particulièrement susceptibles de connaître des variations d'un État à l'autre. Il s'agit surtout de ceux dont le référent exogène concerne les valeurs, la morale. La proximité de l'interprète avec le contexte factuel est alors très importante.

Le fait que dans le cadre du renvoi préjudiciel, la détermination du contenu du standard revienne généralement au juge national, implique que la Cour de justice renonce à son pouvoir d'interprétation ou du moins le limite à des indications (c'est ce qu'elle fait par exemple avec la notion de «consommateur moyen»). Elle détermine, au cas par cas, l'étendue du pouvoir normatif du juge national dans l'attribution d'un contenu aux standards par le contrôle qu'elle choisit d'exercer lors du renvoi préjudiciel.

Merci beaucoup.

PATRICK BIRKINSHAW

Professor Patrick Birkinshaw has been a professor since 1990, and has lectured at University of Hull since 1976. He is Director of the Institute of European Public Law (University of Hull), and has been Editor in Chief of European Public Law since 1995. He has written various books including Government and Information: the Law Relating to Access, Disclosure and Regulation (3rd ed 2005), European Public Law (2003), Freedom of Information: the Law, the Practice and the Ideal (3rd ed 2001), Grievances Remedies and the State (2nd ed 1995) and Freedom of Information: the Law, the Practice and the Ideal (4th ed 2010 Cambridge University Press). Professor Birkinshaw worked as a specialist adviser to the Commons Public Administration Select Committee in its enquiry into 'Political Memoirs' in 2005/2006. He has acted as a government and parliamentary adviser and has represented the UK in international legal seminars. From 1997 until 1999, he served as a specialist adviser to the House of Commons Select Committee on Public Administration in its review of Government proposals, and its Bill on Freedom of Information. Professor Birkinshaw is also on the Senior Schemes' Assessment Board for the Irish Research Council for Humanities and Social Science, which allocates public funds for academic research.

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

I started studying law in 1972, at the University of Hull. Before that I had studied an English literature degree in London but left that study after a year. After graduating in law, second in my whole year, I studied at the Inns of Court School of Law in London to become a barrister. I was called to the Bar of England and Wales in July 1976 at the Inner Temple. I commenced lecturing in law in October 1976.

2. You have a specific academic background, coming from the common law world. Could you please provide us with a brief insight of the looking glass employed in comparative law (related to EU legal order) by a professional familiar with the common law?

I came to EC/EU law rather late. I began to concentrate in English Public Law in 1977. By the late eighties I was asked to be the national rapporteur for the UK on Public Procurement at the FIDE conference in Madrid in 1990. My role on this project made me realise that if one were not knowledgeable about EC law, one's knowledge and expertise in domestic Public Law would be extremely limited. In 1994, I became editor of the newly established journal *European Public Law* (KLI) which commenced publishing in 1995. It is now approaching its nineteenth year of publication.

3. What should a professional from a new Member State of the EU learn from experiences of the UK as an older Member State?

Learn to be flexible and open minded and receptive to new ideas.

4. We are not going to ask you about the (historical) "incoming tide" on the UK legal order brought by the (then) EC law (as once put by Lord *Denning*). Instead we would like to ask you to comment on the recent developments concerning the (legal and constitutional) position of the UK in EU legal order?

There has been deep unpopularity with the EU and ECHR projects among the Conservative Party, the press and a wide section of the UK public. Much of this is based on ignorance. The European Union Act 2011 seeks to establish the primacy of domestic law via Parliamentary Sovereignty. The Act also provides for national referenda on most EU developments affecting the UK – ie Treaty ratification, etc. Ironically, the resort to referenda is likely to diminish the pristine sense of Parliamentary Sovereignty. At the moment, the British public is unlikely to approve new treaties. There is an opt-out from a referendum within the Act which may well cause legal difficulties before the UK courts.

5. On the other hand, we would like to ask you to comment on the trends pertaining the public/private law division.

It's a huge story. Public law was almost unknown in England in 1960. A revolution started in the early 1960s which is still continuing. We now have an Administrative Court of the High Court and a comprehensive tribunal system in the UK introduced by the Courts, Tribunals and Enforcement Act 2007.

6. In your opinion, what are the most important developments brought by the Lisbon Treaty, more than two years since its entry into force?

Accession to the Council of Europe will be very important. The Charter of Fundamental Rights and its recognition as a fully enforceable legal provision is crucial – the UK has not opted out of the Charter as was widely, and incorrectly, reported. Bringing the Third pillar within the Community method is very important although the UK has opted out of significant provisions. Setting out the powers of the Union and states is a clear advantage.

7. You have extensively published in the field of access to information, concerning both the UK regime and EU rules. Therefore, we would like to ask you to comment on the recent developments at the EU level, more precisely on the case-law of the EU courts (General Court and Court of Justice). Is the more recent case-law of those courts a mark of a more transparency? Or the contrary position is taking shape?

I think the case law is mixed – some good some bad. We still await the new regulation on access. The Commission had some questionable reforms that will not advance transparency. The interesting thing is how greater transparency is affecting our national judges, particularly under the influence of the European Convention on Human Rights.

8. You acted as an advisor at certain Parliamentary committees. The UK has a major culture concerning the use of professional expertise (hearings, reports and so on) in Parliamentary works. Therefore, what is the role of that expertise in the law-making and Parliamentary scrutiny concerned matters connected to EU law? What lessons should be drawn from the UK experiences in a comparative perspective (to other Member States of the EU)?

I worked on the Public Administration committee in its review of proposals for Freedom of Information legislation (1997-2000) and then maintaining confidentiality among ministers, ambassadors and civil servants and private advisers (2006-2009). The House of Lords Constitutional Committee has a full time specialist adviser who is a public lawyer and the committee may report on EU related matters affecting the constitution. However, the Commons and Lords specialist committees as far as I know do not have specialist advisers but the latter calls for evidence and I have given that on several occasions. The specialist adviser can have profound influence

on the report of the committees. It depends. If the government accepts the report, that will obviously influence legislation.

9. In the end, what is the life of an Editor-in-Chief at a major law journal (i.e. the European *Public Law, edited by Wolters Kluwer)?*

We have many submissions and life is very busy!

Thank you very much.

KIERAN ST C BRADLEY

Born in 1957; law degree (Trinity College, Dublin, 1975-79); Research assistant to Senator Mary Robinson (1978-79 and 1980); Pádraig Pearse Scholarship to study at the College of Europe (1979); postgraduate studies in European law at the College of Europe, Bruges (1979-80); Master's degree in law at the University of Cambridge (1980-81); Trainee at the European Parliament (Luxembourg, 1981); Administrator in the Secretariat of the Committee on Legal Affairs of the European Parliament (Luxembourg, 1981-88); Member of the Legal Service of the European Parliament (Brussels, 1988-95); Legal Secretary at the Court of Justice (1995-2000); Lecturer in European law at Harvard Law School (2000); Member of the Legal Service of the European Parliament (2000-03), then Head of Unit (2003-11) and Director (2011); author of numerous publications; Judge at the Civil Service Tribunal since 6 October 2011.

1. In the beginning would you like to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

Would you like you to point out major influences during your career (concerning also methodology)?

Regarding my formative years, I am assuming you have already consulted my biography on the Court's website. For further information, I enclose with this interview the text of a

talk I gave at the end of the academic year to LLM students at the University of Maastricht last December [i.e. 2011][1].

The following lawyers have most influenced me during my (long) career in EC/EU law:

- Senator Mary Robinson (later President of Ireland) taught me EC law as an undergraduate at Trinity College Dublin, and encouraged me to pursue postgraduate studies in this field at the College of Europe, Bruges (as the courses were partly in French);

- Claus-Dieter Ehlermann, who taught the institutional law course in the College of Europe; as a practising lawyer, he stressed the importance of taking a clear position on legal questions, indecision being a luxury practitioners cannot afford; I later admired his work as Director-General of the Commission's Legal Service, in his contacts with the European Parliament;

- Different colleagues in the secretariat of the EP Committee on Legal Affairs (1981-1988), notably Saverio Baviera and Dietmar Nickel, and later in the EP Legal Service (1988-1995 and 2000-2011), and particularly Gregorio Garzon Clariana (former EP Jurisconsult), Christian Pennera (currently Jurisconsult of the EP) and Johann Schoo (former Director in the EP Legal Service);

- Finally, amongst numerous academics, I would single out Professor Blanca Vila Costa of the Universitat Autonoma de Barcelona, who first invited me to teach part of an LLM programme, Professor Koen Lenaerts of the University of Leuven (now vice-President of the ECJ), and in particular his writings on constitutional and institutional law of the EC/EU and, most of all, Professor Joseph Weiler of NYU, who is a good friend and mentor.

Being a common lawyer of a pragmatic turn of mind, I do not give much thought to "methodology" (if you mean the study

[1] "Thirty Years of Community Law", see below this interview (ed.).

of methods and their employment). For the same reason, I have always sought to ground my legal analysis on close examination of the text as a whole (wording and purpose) and of the case-law in so far as this is relevant, if this is what you mean by "methodology". I approach my academic writings and teaching as a practising lawyer, which I hope helps me see the wood rather than just the trees.

2. Could you please describe your experiences acting as an *référendaire* at the European Court of Justice? What models do you have among Judges and AGs at the ECJ?

I found my time as *référéndaire* at the Court of Justice immensely valuable and professionally fulfilling.

In the first place, the working atmosphere in the cabinet of Advocate General was exceptionally good, partly because of the personality and wise management of Mr Fennelly himself, and partly because of the other staff in the cabinet, in particular the other two *référendaires* who are both talented and hardworking lawyers: Anthony Whelan is head of cabinet of Commissioner Neelie Kroes, while Noel Travers is a successful barrister in Dublin, specialising in EU law work (including, for example, acting for Ireland in the *Pringle* case[2]). I don't know if it is a record for stability of cabinet personnel, but all three *référéndaires* stayed at the Court for the entirety of Mr Fennelly's mandate.

In the second place, I enjoyed the variety of legal issues we had to consider (I say 'we' as all but the most routine matters were discussed in a collegial manner by the Advocate General and the *référendaires*), both substantive (everything from the legal basis of the first Directive on tobacco advertising via the interpretation of the Fifth VAT Directive and the protection of wild birds to the non-execution by a local authority of a contract with the Commission) and procedural (the day after joining

[2] See above (ed.).

the cabinet, I advised Mr Fennelly on the admissibility of a somewhat scanty reference for a preliminary ruling from a national first instance judge, then a very sensitive issue in the wake of *Telemarsicabruzzo*).

Thirdly, the working atmosphere of the Court itself was generally agreeable, both between the Advocates General amongst themselves and in Mr Fennelly's relations with the various judges, particularly the judge-rapporteurs. Of course, at 24 members (15 judges and 9 Advocates General), the Court was significantly smaller than it is today.

As to models, when I was a *référendaire* I had relatively few direct dealings with the judges themselves (as distinct from their cabinets), and in any case, the Court's decisions are collective, with the individual judge (even the judge-rapporteur) being only one of three, five, nine or eleven (or 15, or even 27) judges. From my few dealings with him, I found President Rodriguez Iglesias an excellent leader, while being respectful of the independence of the individual judges.

Of the many Advocates General with whom I have come into contact and admired (both as a *référendaire* and as an agent in cases I argued before the Court on behalf of the European Parliament), along with Mr Fennelly, I would pick out (Sir) Francis Jacobs and Giuseppe Tesauro, who consistently demonstrated the independence of mind, brilliance of legal analysis and soundness of judgement which characterises *par excellence* the contribution an Advocate General can make to the work of the Court.

You will, I am sure, understand that I would prefer not to discuss, in a public forum, current members of the Court (at any level) in their judicial capacity.

3. You have acted for a long period of time in the Legal Service of the European Parliament. Are there any peculiarities for activities carried within that institution compared to other EU institutions?

Working as a legal advisor and agent for a major political institution of the EU is of course quite different from working as a judge or *référendaire*. A legal advisor (other than those dealing with administrative and other internal matters) has essentially two main tasks. In the first place, he (there are lots of "shes" of course, but I will use the masculine pronoun for convenience) assists the institution (in practice, usually the committee in charge) in promoting its position in the framework of interinstitutional contacts at all levels (between officials of the different institutions, between MEPs and Permanent Representatives, between MEPs and ministers, between vice-Presidents of Parliament and the Council Presidency ...), where legal issues are often very prevalent.

Secondly, in line with the system of representation of interests which underlies the Union's institutional system, he assists the institution in identifying and defining (along with the political bodies) any right or prerogative of the institution which may need to be defended in Court proceedings, and later engages and manages the litigation. In this second regard, the advisor may take the initiative in bringing problems (procedural flaws in the adoption of acts of the other institutions, incorrect choice of legal basis or comitology procedure ...) to the attention of the political authorities of the institution, who of course have the last word on whether proceedings should be commenced or not.

4. From your point of view, what are the most important recent developments concerning the EU legal order?

I have been working in this system for over thirty years, so for me the answer depends on what you meant by "recent"!

One of the strengths of the EU's legal order is its in-built capacity to develop organically, in function of the needs of its institutional and political system, including as regards the place of EU law in the legal orders of the Member States, as it did in a largely autonomous fashion for the first three decades of the

European Communities. Though hardly recent, one of the most important developments in my time is the take-over (rightly so) of the reform process by the Member States and political institutions (including a participation of national parliaments), rather than leaving it to the Court (on the prompting of the Commission).

That said, the political failure of the Constitution for Europe (which was a failure by a number of national governments, rather than the EU institutions; all the governments had signed up to the Laeken Declaration) and its successful implementation in the form of the Lisbon Treaty are major developments, but both were, and were intended to be, evolutionary rather than revolutionary. Thus, the so-called "communitarisation" of justice and home affairs (just when the term "Community" was abandoned), the +/- generalisation of the codecisional legislative procedure and the recognition of the legal effect of the Fundamental Rights Charter are, in my view, more in the nature of the correction of legal(-political) anomalies than great leaps forward.

Less obvious to the naked eye perhaps is the increasing judicialisation of certain sensitive decisions, such as the treatment of third country nationals in the EU (=Member States) territory, and the disintegration inherent in techniques such opt-outs and enhanced cooperations (and indeed different soft law approaches, such as the open method of coordination), though each in turn might be considered a reaction to the extension of the ambit of the Union's decision-making powers, both in terms of penetration and material scope.

5. Could you please point out the advantages of the Lisbon Treaty compared to those of the former project of a "Constitution for Europe"? We are asking this question taking into account that in 2003-2004 you served as a legal expert advising on the drafting of that "Constitution".

Many commentators would see the Lisbon Treaty as being disadvantageous compared to the Constitution for Europe rather

than having particular "advantages". To be blunt, the major advantage of the Lisbon Treaty is that it has entered into force, whereas the Constitution was abandoned by certain of the governments who had pushed for its drafting. The fact that the European project was for so long pursued by elites *without* any popular debate (see question 4), still less the possibility of a vote which would count for something (except in Ireland and, occasionally, in one or two other Member States), is regrettable and if the Constitution paid the price, so be it.

By the way, the drafting of the Constitution was very much a political process; the room for manoeuvre for "legal experts" was rather limited, though it gave me the opportunity to familiarise myself with certain Treaty provisions and explore certain legal problems I'd not encountered (much) before, and to work with some excellent colleagues from the Legal Services of the Commission and Council.

6. What is the use of national law in the legal reasoning of ECJ? And moreover which is the influence/the role played by comparative law (from a methodological point of view) in the judgment of ECJ?

For the CST (and I think it would only be appropriate for me to comment from the perspective of this court, not the ECJ or GC), national law can only play a rather small part, in that we are applying a body of rules which has been developed in legislation (staff regulations, implementing provisions) and case law over most of the history of the EU. Moreover as a court dealing essentially with the internal affairs of the institutions and agencies, our decisions do not impact national law in any significant way. That said, we are occasionally invited to take account of principles and rules of both general EU and national law on employment matters as well as national practices in new or underdeveloped areas such as friendly settlements in employment disputes or the definition of moral harassment in the workplace.

7. To sum up the above questions: Would there be any risks concerning the activism of the European Court of Justice – i.e. Is there such a thing as activism on the part of the ECJ?

Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

The so-called activism of the ECJ is a vast topic; what is clear and in my view incontestable is that the Court is increasingly being called upon to arbitrate disputes of a fundamentally political character, notably regarding the extent of European integration, such as the recent *Pringle* case (judgment last Tuesday[3]) and the pending dispute on recourse on enhanced cooperation in the area of patent protection[4]. In such circumstances, activism, like beauty, is in the eye of the beholder. It's not original, but if the reasoning advanced by a court is legally sound, then it is inappropriate to call the result "political".

8. What would be the limits – if any – concerning the academic opinions expressed by Judges? In this context, which is your point of view on dissenting opinions; is this a kind of "knowing for the sake of knowing" (as in case of concurring opinions) or could that lead to a genuine familiarisation with the ECJ as a whole?

This is a somewhat self-referential question, in that you are asking judges to provide their opinion on certain academic

[3] Judgment of the Court (Full Court) of 27 November 2012, Case C-370/12, *Thomas Pringle v Governement of Ireland, Ireland and The Attorney General*, not yet reported (ed.).

[4] Case C-274/11, *Kingdom of Spain v Council of the European Union*, action brought on 3 June 2011, pending; Case C-295/11, *Italian Republic v Council of the European Union*, action brought on 10 June 2011, pending (ed.).

matters! There is of course a statutory provision on recusal of judges from particular cases (Article 18 [of the Statute of the] CJEU) which provides some minimum guidance; there is also the 2007 code of conduct for members of the Court(s). Personally I would not answer questions on specific legal questions which are likely to come before the CST.

I have not seen a convincing argument for allowing dissenting (or concurring) opinions in a collegiate court of first instances, such as the CST, whose decisions are in any case open to appeal on a point of law. In the operation of the ECJ, the AG's opinion can, to some extent, perform some of the functions of a dissenting/concurring opinion, in providing a different, authoritative, view of the legal issues raised.

9. We would like to ask you to point out the specificities of the Civil Service Tribunal compared to those of other EU Courts. In the first place, is the system of appointment at this Court the future of EU Courts? We are referring to the fact that the selection system for the Civil Service Tribunal does not take into account the nationality of the candidates.

In other words, is a Court with a smaller number of Judges (that of the Member States of the EU) a suitable criterion of effectiveness in delivering justice at the EU level?

I have mentioned some of the specificities of the CST earlier. Your question regarding the mode of appointment is an interesting one; as you know, the Lisbon Treaty did not adopt the CST appointment procedure for the ECJ and GC, though it could have (as this was already in operation when the Lisbon Treaty was drafted). The CST is a specialist court, and specialist knowledge of EU staff law and of the operation of the Union courts are clearly prime (though not the only) considerations, while nationality is not; rather it may be a negative factor, in so far as the Council applies (as it did in 2011) a system of rotation

amongst the Member States over time, thereby excluding candidates from Member States which have already had a judge in the CST.

As long as the ECJ has one judge from each Member State (i.e. the foreseeable future), the Article 255 committee procedure seems to be highly appropriate; each Member State will more easily accept the negative rulings of the ECJ if it knows that a judge of its nationality, which it has itself nominated, is present in the Court. Moreover, in so far as it is possible to understand its workings (evaluations of individual candidates proposed by the Member States are confidential) the Article 255 committee procedure seems to be doing its job well.

Though the GC also adopts judgments which may affect directly the interests of individual Member States, it may be possible to argue for the CST model rather than the Article 255 committee procedure. The issues the GC deals with in this regard are often economic (eg State aids or agricultural payment) or administrative (most infringement actions) rather than constitutional. Moreover, if the GC were to move to a composition which no longer reflected the number of Member States, such as was proposed by the Court last year (12 extra judges for 6 years), this might be seen as strengthening the case for appointing all the GC judges by a CST procedure, while ensuring that no more than two judges of any one Member State were present at the same time. If so, however, it would be appropriate that the criteria for appointment to the GC (which would be different from those for appointment to the CST) were laid down in the Statute of the Court.

Thank you very much.

THIRTY YEARS OF COMMUNITY LAW

Kieran St C Bradley[1]

I. The world before Columbus

When the organisers invited me to today's event, they suggested that my presentation be entitled "The European Court of Justice – a View from the Inside". It is a great title, but it rather gives the idea that I would be revealing the darkest secrets of the Court in Luxembourg. However, apart from the duty of discretion which comes with the job, my two months in office have not given me access to too many "dark secrets", presuming for the sake of argument, of course, that there are any.

The title of my talk is taken instead from the very fine volume of that name, published by the Office of Official Publications in all then seven Community languages in 1982, celebrating the first three decades of Community law. The talk is essentially an overview of my own career in European Community, latterly Union, law, highlighting en route a few of the principal developments, particularly Court cases on institutional law, which have occurred during the second three decades.

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[1] Judge at the European Union Civil Service Tribunal. This is the slightly revised written version of the keynote address Judge Bradley delivered at EU Foundations Student Conference at the University of Maastricht on 8 December 2011, which was first published in *EU Law Foundations – The Institutional Functioning of the EU*, Volume II, Maastricht Centre for European Law, 2011-2012, pp.7-13. Judge Bradley spoke in a personal capacity.

Apart from different academic activities over the years, I have in effect had four different careers in European law, two at the European Parliament, two at the Court of Justice, and I would like to say a few words about each. But before I do, I would like to bring you back briefly to the early 1980s, to an epoch before email and social networking, before smartphones and Smart cars, when Europe was still divided into two blocs of States following divergent, not to say mutually incompatible, political ideologies. Thirty years ago, as Susan Vega put it in another context, was like the world before Columbus; the Earth was flat, in the sense that the Community was doing much the same things in much the same way as it had done for the previous thirty years, with not much change in immediate prospect.

Yes, there were a few hills and valleys, and even a few legal constructions, on the horizon. The Community had overcome its first major political crisis in 1965-1966, at the cost of all but abandoning majority voting in the Council as the norm for decision-making, which had been one of the most innovative features of the Communities' original institutional structures. It had too opened its arms to Denmark, Ireland and the United Kingdom in 1973, and, in 1981, to Greece. The Court of Justice had by then established the so-called pillars of the new European legal order, direct effect and primacy, and used them to build the four freedoms of the then common market.

The scope of the Community's activities was nonetheless very much narrower than that of the Union today. Apart from establishing the objectives of the free movement of persons, goods, services and capital, the EEC Treaty had only provided for a handful of common policies, in respect of external trade, agriculture and transport, and of those, only the agricultural policy could be said to be fully operational within the Community territory. There was an embryonic regional policy, an embryonic social policy, an embryonic development policy,

and an environmental policy which could barely aspire to being embryonic. In practice, this latter was limited to a directive on the protection of wild birds and a few directives harmonising Member States standards for clear air and clean water.

No foreign policy. No area of freedom, security and justice. No Euro. No European Union citizenship, no cultural or industrial policy, no youth or education policies, though a few years later the Community did come up with the first Erasmus scheme, which has proven to be a fairly spectacular success.

The institutional landscape was also pretty bare compared to what we know now. True, the big four were already there: Parliament, the Council, the Commission and the Court, while the European Council, though already extant, was outside Community institutional framework, and still changed its part-time President every six months. There was no European Central Bank, no High Representative for Foreign Affairs, no Ombudsman, no Committee of the Regions and the Court of Auditors, only a few years old, had not yet been promoted to the rank of 'institution'. The first directly elected European Parliament was still in office and was still finding its feet in the decision-making process, or rather finding that on many matters it didn't have a leg to stand on when it came to influencing policy decisively. There was also almost no institutional case-law to speak of, other than a handful of exotic judgments on the delegation of implementing powers, such as *Meroni* and *Köster*, and another handful on the proper conduct of consultation, then the only legislative procedure involving parliamentary participation.

The decision-making process of the Community was very different too. In those days, as the saying went, the Commission proposed, the Council disposed, without co-decision on legislation or a right of parliamentary veto on international agreements. Parliament enjoyed some budgetary leverage, though the lion's share of annual budgetary expenditure was

taken up by agricultural spending over which Parliament's influence was very limited.

In theory, the national parliaments could have participated in the policy process, at least indirectly by seeking to influence the members of the Council, particularly where the national governments enjoyed a veto power. For the most part in those days they did so rarely, with the notable exceptions of the Danish *Folketing* (which called their ministers in for a briefing before every Council meeting) and the Westminster Parliament, each House of which scrutinised Commission proposals more or less closely, and questioned their ministers on what they did in Brussels.

Of the institutions, it is the Court of Justice which has changed the most since then in terms of its structures. In 1982, there was one jurisdiction, with 11 judges and four Advocates General, making 15 members in all. Now there are three courts, with a total of 61 judges and eight Advocates General, making 69 members in all, with a proposal in the pipeline to add further judges to the General Court.

The most dramatic institutional change of all, however, concerns the attitude to, and practice of, Treaty reform. In the first two and a half decades of the existence of the EEC, the substantive policy provisions of the founding Treaty were not amended even once. A 1965 Treaty had merged the then three Councils and the three Commissions – one for each European Community – but this was really tidying up loose ends which could have been dealt with in 1957, while Treaty amendments of 1970 and 1975 had increased the European Parliament's role in the adoption of the annual budget and the supervision of its implementation. But the idea of substantive Treaty reform, or even the convening of an intergovernmental conference, was barely thinkable, and the best way to kill a policy initiative dead forever was to say, 'ah yes, but you'd need to amend the Treaty'.

II. European Parliament Legal Affairs Committee Secretariat (1981-1988)

This is the world I stepped into in the summer of 1981, when I joined the European Parliament as a *stagiaire*, or "Robert Schuman scholar" as we were known. I was at first attached to the Directorate General for Research and Documentation, a sort of in-house think tank at the disposal of individual members, committees or other parliamentary bodies. The very first question I dealt with was the right of environmental organisations to take legal proceedings; the questioner was considering an own-initiative report to propose such a right as a matter of Community law. Remarkably, even after all these years, the issue still has a certain contemporary relevant, in the light of the case law of the Court of Justice, the Aarhus Convention and the Lisbon Treaty reforms to the Court's jurisdiction.

I only worked in Research and Documentation for a week or so before moving on to the secretariat of the Committee on Legal Affairs. As you might know, the European Parliament meets in plenary session for four or five working days per month, and a significant part of that time is spent either on voting on legislative matters, or listening to and debating the major political topics of the day. Debating time in plenary is therefore a scarce resource, carefully divided out for every agenda item amongst the political groups in function of their size and unattached members of Parliament in function of their number.

This means that for most purposes the real legislative debate takes place, and the decisions are mostly adopted, in the parliamentary committees, subject to a possible reversal by the plenary, though this is fairly rare. There are twenty committees, covering almost all areas of European Union activity: foreign policy, the Union budget and control of expenditure, agriculture, transport, environment policy, etc. etc. The committees, of

course, comprise MEPs, with anything from about 25 to 65 members, and their political (and to a lesser extent national) composition is supposed faithfully to reflect the composition of Parliament itself. Each committee has a secretariat; when I started working in the Committee on Legal Affairs, we were just three administrators (that is, graduate-level officials), one French lawyer, one Italian and yours truly. Nowadays every committee secretariat has a minimum of six administrators, and some of the larger committees have a dozen or more. Our job in those days was first of all to organise the committee meetings – two one-day sessions per month – and secondly to advise rapporteurs and draftsmen on the possible content of the reports, opinions and working documents they would present at the meetings, or even to prepare a first draft where the topic was relatively technical or uncontroversial. I imagine that very few items go through Parliament today without intensive lobbying of members by various consultants and professional lobbyists, trade associations, unions, environmental groups, NGOs and interest groups of all kinds, big companies, even national and regional governments, including those of third States which happen to be interested in the matter at hand.

The Committee on Legal Affairs was rather special in that it did not just deal with legislative proposals and other policy initiatives, but it also acted, and still does, as the legal advisor to the institution on the political level, particularly as regards questions of institutional law and interinstitutional relations. At the time, the committee secretariat acted as a sort of unofficial legal service for the governing bodies and committees. The Committee itself raised and pursued questions of general interest which arose in the work of other committees, though only if there was the necessary political support for doing so. One of the first matters it had dealt with after the 1979 elections was whether Parliament should intervene in annulment proceedings to defend its rights in the consultation

procedure. Looking back, it may seem strange that there were serious reservations within the institution regarding the appropriateness of Parliament's getting involved in litigation at all, particularly where this had been initiated by private parties against a fellow institution, or whether Parliament should stay out of, and hence "above", legal disputes. The Committee on Legal Affairs did not share, or at least overcame, those reservations, the institution agreed, and the rest is history.

It was also largely thanks to this committee that the Court of Justice was prevailed upon to open up the possibility for Parliament to take annulment proceedings in order to defend its prerogatives in the legislative and budgetary fields. In particular, the committee was instrumental in defining Parliament's defence in *Les Verts*, where, rather than challenging the admissibility of the annulment action on the obvious ground that the Treaty did not allow such an action, Parliament actually argued in favour of admissibility on the basis of an extensive interpretation of the jurisdictional clauses of the Treaty. The Court adopted this reasoning; the committee followed up with a report saying that the Court should therefore allow proceedings *by* Parliament in order to preserve the rule of law under the constitutional charter the Court had so grandly proclaimed in *Les Verts*. In time, the Court accepted this reasoning too, in its ruling on the admissibility of Parliament's action in the *Chernobyl* case.

The committee also initiated the first ever inter-institutional proceedings for illegal failure to act, whereby Parliament challenged the absence of a proper transport policy a good 25 years after the EEC Treaty had entered into force. The Council did not even argue that such a policy existed, but contended instead that Parliament should not be allowed to use legal process to pursue its political ends. The Court threw this argument out and, sure enough, within six months or so, the Council itself was using legal process against Parliament to pursue its political ends in the budgetary field and, I might add, successfully so.

III. European Parliament Legal Service (1988-1995 and 2000-2011)

After seven years on the committee secretariat, I joined Parliament's legal service in 1988, which I served, except for my secondment to the Court of Justice (see IV, below) until late 2011. Whereas the Council and Commission have each had a legal service since the dawn of Community time, the European Parliament only set up its legal service in 1986, largely as a direct response to the *Les Verts* and the budgetary litigation of that year against Parliament, and in anticipation of greater things to come. In those days, we were ten lawyers, of whom just two of us were based in Brussels. While a certain versatility of function was required, I was especially charged with advising the environmental committee.

By then, the Single European Act was in force. This introduced a second type of legislative procedure, the so-called "cooperation procedure", which applied for some, but not all, legislation, and which had put the question of the choice of legal basis firmly on the map. As the legal basis determined both the degree of parliamentary participation and the voting rule in the Council for the adoption of legislation, overnight it became matter of some importance for all of the political institutions and the Member States, and very soon after for the Court of Justice too.

Before the Single Act, and in the absence of a specific Treaty foundation for environmental policy measures, the Council had regularly adopted uniform anti-pollution rules as common market measures, on the grounds that non-uniform rules would lead to obstacles to trade and distortions of competition between the Member States. The Court of Justice had even sanctioned this approach in two 1980 judgments. So when the Commission proposed anti-pollution rules after the Single European Act, it opted for the internal market legal basis, meaning that the new cooperation procedure (with two readings

each for Parliament and the Council) and qualified majority voting in the Council. The Council, on the other hand, argued that this was precisely the type of measure the new environmental legal basis had been designed to cope with, thereby preserving the unanimity rule which had applied for the adoption of common market rules and incidentally excluding the cooperation procedure.

This was the mother of all legal basis battles, which the environment committee was eager to join; in quick succession, Parliament intervened in the *Titanium dioxide* and *Waste Directive* cases (even though it, rightly, considered the latter a lost cause), and initiated the challenge in the *Waste Regulation* case. I suppose these arcane disputes have long since been consigned to the dustbin of legal history, but they were then the very lifeblood of institutional law. Years later, the same question of principle came round again, in the form of a turf war between environmental and commercial policy, in particular regarding the conclusion of international agreements regulating the trans-boundary movement of different types of goods, including waste; the Court's answer is rather nuanced.

The environment committee followed the adoption of implementing legislation in its field of competence too; its famous victory in the *Pesticides* litigation in 1996 left such a mark on the Council that some years later it codified the Court's ruling in the second decision on comitology procedures. Though the Court sided with the Commission when Parliament challenged a decision allowing for the presence of genetically modified micro-organisms in organic foods, this proved to be a Pyrrhic victory of sorts for the Commission, as the Council amended the organic foods legislation at the first opportunity in order to ban the presence of any GMOs in such foods, which was in fact what Parliament had wanted all along. Not long after, the Member States, many of whom simply did not trust the Commission in this area, adopted a moratorium on the authorisation of further deliberate releases of GMOs, which was kept in place for several years.

Of course it was not all environmental law. Parliament also challenged the 1990 students' residence directive, on the ground that it should have been adopted on the basis of what was then Article 7 EEC, with the benefit of the cooperation procedure, rather than the more restrictive Article 235 EEC, the legal basis of last resort. A month before the oral hearing in the students' residence case, the Court handed down a judgment providing a novel interpretation of Article 7 EEC, meaning in effect that the written pleadings were largely out of date, and that, for once, the oral hearing took centre stage. This was the first annulment action initiated by Parliament which it won on the merits.

The great thing about being an agent in Court cases, at least in the legal service of the European Parliament, is that you got to handle the case from the first smouldering of discontent right through to the final blaze of the oral hearing. The legal service lawyer following a particular committee can start the ball rolling by drawing the attention of the committee, through the chairman or rapporteur and/or the secretariat, to a particular legal problem. The committee may not be interested in pursuing the matter for sound political reasons, but if it is, it will ask the legal service for an opinion. Should the committee then want to take legal proceedings, it will refer the question to the legal affairs committee, which, as noted above, acts as a sort of juridico-political filter; the legal service will be invited to make a presentation to that committee too before the committee adopts its recommendation to the President of Parliament, who in turn almost always follows the recommendation. If proceedings are commenced, then the same legal service lawyer will draft the written pleadings, and argue the case in front of the Court of Justice or General Court.

In disputes between the institutions, the respective positions of the parties are often well known, indeed sometimes debated in public, before pen is put to paper, though this is usually not so when the litigation is started by a disgruntled Member State

or where the question arises in a request for a preliminary ruling. Sometimes, however, the Court itself comes up with surprises. In *Titanium dioxide*, for example, all the Commission and Parliament were looking for was a ruling that the contested directive was an internal market measure rather than one falling within environmental policy. Instead the judgment provided was a slightly uneasy analysis of the legal situation, concluding that the matter was both internal market *and* environmental in character, and that it was impossible to separate the two. The way out of this dilemma was to take account of the different procedures which would apply under each legal basis, and to opt for the one which best respected the democratic aspirations of the European Community, that is, the procedure which gave the European Parliament the greater influence in the policy decision.

All in all, I argued about two dozen cases before the Court of Justice, the last occasion being in the proceedings on the proposed agreement setting up a European Patent Court, as well as a handful of cases before the General Court. Pleading before the European Courts is widely considered one of the high points in the professional life of a member of a legal service, and the experience is one I found to be of inestimable value, now that I participate in court hearings in a different capacity.

IV. *Référendaire* at the Court of Justice (1995-2000)

My third career in European law starts in 1995, when I joined the *cabinet* (private office) of the first Irish Advocate General appointed to the Court of Justice, Mr (now Justice) Nial Fennelly, as *référendaire*. As you may know, there are eight Advocates General at the Court, of whom five are appointed from the traditional Big Five Member States - France, Germany, Italy, the United Kingdom and Spain - while the other three posts are occupied in rotation by the other 22 Member

States. Each judge and Advocate General at the Court of Justice and General Court has a team of three or four *référendaires* to help out in the preparation of judgments or opinions, as the case may be, and other aspects of the Court's activities. The official translation in English for this function is usually 'legal secretary', but that is rather misleading; if you look at the jobs section of some of the English newspapers, you will see advertisements for posts as a 'legal secretary', being a secretarial post in a firm of solicitors or in barristers' chambers. The American equivalent is 'law clerk', but that is also slightly misleading, albeit for a different reason. The position of law clerk to an American judge is occupied in the main by those who have recently graduated from law school, whereas most *référendaires* at the Court of Justice (including the Civil Service Tribunal) will already have several years' experience, and usually a solid track record, of practice or teaching in the field of European Union law. The rendition of the term in English which personally I prefer is one suggested at the time of my appointment by my eldest son, "judicial advisor".

An Advocate General may be asked to deal with any matter of EU law under the legal sun: the admissibility of a request for a preliminary ruling in the near-absence of any information on the factual and legal background of the national proceedings, the free movement of generic pharmaceutical products, the customs classification of the hind parts of frozen chickens, the charging of VAT on the sale of cannabis resin in so-called 'coffee shops' in a certain Member State, the legal character of the Commission proposal for financial penalties on a Member State for not complying with a previous Court judgment, the export of fruit from the northern part of the island of Cyprus, the legal basis of a Directive on tobacco advertising, and so on.

This variety did not entirely preclude a certain amount of informal specialisation. In the mid- and late 1990s, the Court had to deal with a large number of cases concerning the application of the 1979 Directive on the protection of wild birds,

and later the provisions of the 1992 Habitats Directive concerning species protection, matters in which Mr Fennelly quickly acquired some expertise. In one case, a French farmer had been prosecuted under the French for keeping a domesticated specimen of a 'black Canada goose'. On closer inspection, the Advocate General discovered that there was no such subspecies, and that the description provided by the national judge was in fact based on a typing error ('*noir*' instead of '*nain*'). This allowed Mr Fennelly to make the immortal remark that the incorrect information in the in the order for reference had led the parties on a wild-goose chase, but for the fact that the specimen was tame….

IV. Judge at the Civil Service Tribunal (2011-)

In October 2011, I was appointed a judge of the European Union Civil Service Tribunal (or 'CST'), the first, and so far only, 'specialised court' established under the arrangements established under the Nice Treaty. This Tribunal is responsible for ruling at first instance on litigation between the Union institutions and agencies, on the one hand, and their staff (and former staff) on the other, as well as by disappointed candidates in EPSO competitions for entry into the European Union civil service. If the CST was something of an experiment when it was set up in 2005, it is one which was thirty years in the making, the Court of Justice having suggested a European Community Administrative Tribunal for staff disputes in 1975. The Court's proposal was partly taken up with the creation in 1988 of the Court of First Instance, though this court also dealt then (as now) with competition disputes, and has subsequently seen its jurisdiction expand dramatically.

The thinking behind the idea of specialist courts is twofold: to relieve the courts of general jurisdiction of a discrete category of legal dispute where there already exists a well-established body of case law on the interpretation and application of the

governing legal provisions, and to allow such specialist disputes to be dealt with by specialist judges, as they already are by specialist lawyers. While 'specialist' in this respect, the CST is fully part of the institution described in Article 19 TEU, 'the Court of Justice of the European Union'; as such, it is fully bound to ensure that 'the law' is observed, including the Treaties, the Statute of the Court and the Union's Charter of Fundamental Rights, as well as general principles of EU law.

That said, the CST is 'special' too, in that it differs in a number of significant respects from the other two jurisdictions of the Luxembourg court. In particular, it comprises a mere seven judges, a number based on an assessment of its probable workload and the capacity of the judges to process this efficiently. As only a quarter or so of the Member States can have a judge in the CST at any one time, a special appointment procedure was also required; the Treaty authors opted for a sort of competitive selection, whereby a panel of senior judges and lawyers (in effect, persons who had been, or could have been, appointed to the Court of Justice or General Court) sift through the applications generated by a 'call for expression of interest' published in the *Official Journal*; any Union citizen who feels they have the necessary professional and personal qualifications may apply. The panel then interviews the candidates it judges the most suitable, and proposes to the Council at least twice as many names as there are posts available. It falls to the Council to ensure that the composition of the CST is 'balanced' in terms of the national origin and the 'national legal systems represented' (sic). Judges are appointed for a six-year term which is theoretically renewable, though in 2011 the Council appears to have opted for an informal system of rotation of the posts amongst the Member States, rather than reappointing judges for a second full term.

In form, the CST is an administrative court, similar in many ways to those of the civil law jurisdictions; its sole task is to rule on the validity of acts (and omissions) of the administrations

of the Union institutions and assimilated bodies. However, its remit is often described as litigation with a human face, in that the applicants are individuals, rather than companies, institutions or Member States. The CST therefore functions in some respects as a labour court, which may (and frequently does) seek to encourage the parties to settle their differences by means of an amicable settlement rather than via a court judgment.

The modest size of the CST helps the cultivation of a good collegial spirit and facilitates the avoidance of any unwarranted inconsistency, which is particularly important for a court of first instance. Almost all of the cases are handled by chambers of three judges, and each judge (excepting the presidents of the first two chambers) sits in two of the four such chambers. The ready and rapid exchange of information allows all of the judges to be kept well informed of the positions proposed by the Tribunal in its various formations. I always like to recall that the Court of Justice itself, when it was established in 1952, was also a specialised administrative court of seven judges.

Well, I may not have revealed any secrets of the European Court, but I hope I've given you a few ideas about the practice of European Union law in the institutions and the judiciary which is responsible for reviewing their decisions, should you too one day consider a career in this field, as I did thirty years ago.

MORTEN BROBERG

Professor, Faculty of Law, University of Copenhagen.

Education: Duke University, Summer Programme in Transnational Law (1990); LL.M. in Commercial Law, University of Bristol (1992); European University Institute, Academy of European Law (1993); cand.jur. (MA in law), Copenhagen University (1994); HD in international business, Copenhagen Business School (1996)

***Employment:** Ph.D.-fellow, Copenhagen University (1994-1997); Head of section, Danish Ministry of Justice, Law Department, EU-law office (1997-1998); Référendaire (legal secretary) to the President of the Court of First Instance of the European Community, Luxembourg (1998-2000); Head of section, Danish Ministry of Justice, Law Department, Office on Constitutional Law (2000-2001); Lawyer (parttime), Dragsted Schlüter Aros (2000-2001); Associate professor in EU-law, Copenhagen University (2001-2008); Senior Project Researcher, Danish Institute for International Studies (2007-2008); Associate professor in international development law, Copenhagen University (2008-2010); Professor in international development law, Copenhagen University (2010-2011).*

First of all we would like to thank you warmly for accepting this interview.

We have to state in the beginning that, along with Mr Professor Niels Fenger, you authored an important book

on the preliminary references to the European Court of Justice[1].

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

Also, is it possible to provide us with a description of your main teaching and research interests in EU law?

Please see CV on my web-page (University of Copenhagen)[2].

2. From the point of view of the legal order – you are coming from Denmark – are there any lessons that might useful for a comparative perspective on EU law?

I tend to believe that the Danish legal order does not make a comparative perspective on EU law more useful than do other legal orders.

3. Could you please describe your experiences acting as a *référendaire* at the European Court of Justice? What are your models among Judges and AGs at the ECJ?

Experience: Assisting President Vesterdorf both with regard to his work as judge and his work as President.

If I should mention one judge who, to my mind, stands out, it would be the late Ole Due.

4. From your perspective, what would be the main challenges for the current European Court of Justice?

I believe that the Court is presently challenged by the large number of cases and large number of judges which make it

[1] *Preliminary References to the European Court of Justice*, Oxford University Press, 2010. Translated into Romanian "Procedura trimiterii preliminare la Curtea Europeană de Justiţie", Wolters Kluwer, 2010.

[2] At: http://jura.ku.dk/english/staff/profile/?id=172830&f=2.

more difficult to attain coherence in the Court's practice. At the same time much of the Court's practice today relate to "ordinary cases" which means that it is becoming less of a 'constitutional court'.

5. Could you please comment on the goals of the competition among European Courts – the European Court of Justice and the European Court of Human Rights? What would be the usefulness of an adhesion to the European Convention on Human Rights as far as the European Union has already adopted the Charter of Fundamental Rights?

I do not find myself in a position to give adequate feedback on this question.

6. In that connection, what would be the essence of the reflection document of 2010[3] concerning the accession of the European Union to the ECHR?

Same answer as immediately above.

7. What is your opinion concerning the "construction" of the principles of the ECJ? What is the role played by preliminary reference?

Principles play an important role in EU law – perhaps the best examples are the principles of derived powers, of proportionality, and of supremacy of EU law. The Court of Justice's construction of these principles has been instrumental in the creation of the EU legal order.

The preliminary references has played a key role in attaining homogeneity throughout the European Union – and has equally enabled the Court of Justice to develop central legal principles – sometimes on the basis of very minor cases (eg. *Costa v ENEL*).

[3] http://curia.europa.eu/jcms/jcms/P_64268/.

8. On the other hand, what role does play the purposive interpretation (generally) in law and more particular at the ECJ? Are the any „malaises" concerning this interpretation in the judgments delivered by the ECJ?

At the ECJ, the purposive interpretation seems to hold a privileged place compared to other means of interpretation (systematic, literal, historical). Is this perception grounded? And also, which might be the justification that this kind of interpretation leads finally to a new law?

In my view, it is not correct to claim that today the teleological interpretation necessarily is "the main form of interpretation" of the Court of Justice. A large part of the Court's caselaw today concerns rather technical matters (interpreting 'technical' regulations and directives) and here teleological interpretation is rarely the main approach. In other areas it may be difficult to take a 'traditional literal approach' and here a teleological approach is an obvious alternative.

9. Which might be the objective pursued by the ECJ in a case when it answers a preliminary reference relying heavily on facts? Is the division of functions between courts (the national court and the ECJ) still possible in the (current) system of Article 267 TFEU? And also is there still a (genuine) division between law and facts?

On the other hand, are there any dangers in relying on national law in judgment of the Court (not concerning the relevant law, but in the rational building-up of a judgment)?

In general I find that the Court of Justice is duly observing the limits to its competence. At times it is possible to question the Court's approach.

10. To sum up the above questions: Would there be any risks concerning the activism of the European Court of

Justice? Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

In your important book on the preliminary reference system you discard the existence of any political explanations underlying the reasoning of the European Court of Justice. But still are there any political reasons behind the reasoning of the ECJ?

It is not possible to give a short answer to the above question. However see chapter II in Niels Fenger's and my book on Preliminary References.

11. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

At present the main threat to the Union – including its legal order – arguably is the extensive economic crisis that a number of Member States are suffering under. This may well spill over into the legal sphere. In such case it would seem that the solution is political in nature (aimed at the economic crisis).

12. Coming back to scholarly activities: Could you please provide us with a brief insight of your working methods in writing a book like that concerning the preliminary references? ***In other words, what means do you employ in gathering and interpreting (and also establishing the relevance of) an enormous record of judgments delivered by the European Court of Justice?***

I believe that I use the same approach as virtually all other lawyers – i.e. classical legal interpretation coupled with hard work.

13. And a final question: What advice/recommendation would you give to young researchers in (EU) law?

Probably my best piece of advice is that what you write today may 'haunt' you in many years to come if the quality is insufficient. So always be certain that whatever you publish is of high quality.

Thank you very much.

ROBERTO CARANTA

Full professor of administrative law with the Law Faculty of the University of Turin (Italy). Director of the Master on Public Procurement for Sustainable Development jointly managed by his University and ITC-ILO Turin. Co-Director of the European Procurement Law Series, DJØF, Copenhagen. Member of both the research networks Public Contracts in Legal Globalization/Contrats Publics dans la Globalisation Juridique and PLAN - Procurement Law Academic Network. Member of the Dispute settlement board of the European Space Agency -ESA. Formation activities with ITC-ILO on Green Public Procurements (GPP). Pending accession of new EU Member States, member in a number of expert groups for EU-Phare Projects, including Approximation of Legislation in the Czech Republic, and EU-Obnova Project (in Croatia - Support to the Ministry of European Integration in the process of the approximation of law). Formation projects with ITC-ILO on public procurement rules involving participants from many countries, and missions abroad (including Saudi Arabia and Bangladesh).

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, would you like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law. What place does EU law hold in your research interests?

I graduated in law in 1988 from Turin University in Italy. In those times the curriculum was still very much focused on national law and no class in EU law was on offer. However, Rodolfo Sacco, the most eminent comparative law scholar of the time had his chair in Turin. I graduated with him with a thesis on unfair contract terms, and writing the thesis I first realised legal questions could have (then) EEC aspects to them.

After graduation I started working in administrative law; the comparative approach was not considered relevant, and to keep researching non-Italian materials, I turned to (then) EEC law; it was the time of *Factortame* and *Fratelli Costanzo* and *Francovich* was soon to be decided; few in administrative law knew about (then) EEC law, but no one could say it was not relevant.

2. Among the main teaching and research interests there is the administrative law. Therefore, we would like to ask you to comment on the most significant recent developments in that field. Is there such an "EU administrative law" in its "classic" meaning? Supposing that such an administrative law does (or will) exist in the European Union, what would be the similarities and dissimilarities compared to the national legal orders?

A lot of EU law actually is administrative law because the different forms of market regulation are part of administrative law. In a narrower understanding, however, the core of administrative law is about proceedings and judicial review. When talking about European administrative law, a distinction has to be made between the law applicable to EU institutions and the law applicable to national administrations giving effect to EU law.

At the EU level, the theory and practice of judicial review is reasonably developed, even if some key concepts, like discretion, are still waiting to be properly clarified. On the contrary, proceedings are ruled in a great number of secondary

law instruments, with no coordination, while the fear of the Commission to be constrained by a rigid legal framework has so far hindered the development of clear participatory rights.

At national level, national law applies as a matter of principle. The national administrative law traditions in Europe are different enough, even if some principles are common to different Member States. EU law is bringing some elements of coordination and harmonisation (Directive 2006/123/EC being very relevant for administrative law), but differences developed in many decades cannot be easily or rapidly wiped out.

The picture of EU administrative law is therefore more complex than the one of domestic jurisdictions, and the different traditions play their influence in a complex legal order which is evolving rapidly.

3. What lessons should be drawn from the Italian legal order to the EU legal order?

Avoid dogmatism; law must be coherent enough but both the principles and the aims of the legal system must never be left outside the picture.

4. In connection to the above question, from your point of view, which role does comparative law play in the EU administrative law?

This is linked to the answer to question 2. No legal system can be 100% original and innovative; most institutions are borrowed from somewhere else and more or less adapted. This is relevant for and impacts the administrative law of EU institutions. Any time choices are made, they end adopting and adapting some national model and rejecting others (the grounds of judicial review in the TFEU are from France; ombudsman and right of access from Scandinavian countries, and so on). In this case comparative law is relevant both for choosing the models more appropriate keeping in mind the missions of the EU and for understanding their inner logic and how it needs to

be adapted to the same missions. Concerning EU rules whose application is the task of national authorities, comparative law is even more relevant, since some Member States will have more problems than other to adapt to 'foreign' concepts and institutions; comparative law provides the knowledge necessary to adopt new rules and to adapt to them.

5. What would be the current meaning and evolution of the public/private law division (taking also into account the EU administrative law)?

The distinction does not make much sense today. Public authorities use tools from both sides of the traditional distinction. Private entities enjoy relevant regulatory powers. Globalisation is shifting powers away from nation-states. The same developments take place at the EU level, but EU law is rather at the receiving end of the evolution and does not contribute to it with original ideas.

6. Concerning the issues related to public procurement, we would like to ask you to comment briefly on the role played by the European Court of Justice in that field.

Concerning public procurement but the same is true at a more general level, the ECJ has been pivotal in developing EU law. Secondary legislation is often unclear, and in the main the ECJ has managed to develop general principles capable of providing the soul to a very technical area of the law, at the same time pointing the way to reading of the same law which are in the main consistent. Unsurprisingly, newer directives take stock of the case law when procurement rules are redrafted. This of course does not rule out the existence of less fortunate judgements.

7. Are there significant divergences concerning application of national legislation in the field of public procurement as perceived by the European Court of

Justice? In that connection, how would you assess the role played by the preliminary references?

In many jurisdictions, EU rules on public procurement are quite diverging from the pre-existing rules. Moreover, the different national legal cultures orient differently the interpretation of those EU rules. As usual, the preliminary reference is the indispensible tool to counter divergence.

8. How would you assess the chances of success of the new proposals of amending the legislation in the field of public procurement originating from the European Commission?

A compromise text has been agreed among the institutions. It is diverging in some points from the proposal, but it has good chances to be approved sometime next spring.

9. To sum up: could you please comment on the relationship between EU administrative law and EU public procurement legislation?

Public procurement law is possibly among the most developed areas of EU administrative law. What is missing is a more consistent and systematic approach to related areas, such as services of general economic interest. The proposal on concessions goes some way into the right direction, but lot of work still needs to be done.

10. You have an interest in researching US legal system. We would like to ask you what are the US (legal) lessons for the EU legal order?

Actually I'm not an expert in US administrative law. In general terms, I would say we should steer clear from thinking of the EU as the US of Europe. The US has a very peculiar take on both constitutional and administrative law which diverges markedly from the European traditions. Before borrowing

anything, we should do our comparative law research and be sure we really understand what is that is peculiar to the US and what could be borrowed and adapted.

11. In the end, would you like to point out your major influences concerning methodology during your career? Which advice/recommendation would you give to young researchers?

Comparative law is best antidote to (wrongly) believing the law is static. It is not, it is evolving all the time, and knowing different traditions is the only way to understand why it is moving in one direction or the other. Young researchers should try working on the main lines of change, not bothering on trivialities.

Thank you very much.

VALERIUS M. CIUCĂ

Born 1960; Degree in law (1984), doctorate in law (1997), Alexandru Ioan Cuza University, Iași; Judge at the Court of First Instance, Suceava (1984-89); Military judge at the Military Court, Iași (1989-90); Professor at Alexandru Ioan Cuza University, Iași (1990-2006); Stipended student specialising in private law at the University of Rennes (1991-92); Assistant professor at Petre Andrei University, Iași (1999-2002); Lecturer at the Université du Littoral Côte d'Opale, Dunkirk (Research Unit on Industry and Innovation) (2006); Judge at the General Court from 12 January 2007 to 26 November 2010; Visiting Professor at the University of Ottawa, Faculty of Law, January term, Common Law Section, 2013

1. What do you think is the essence of the European judicial system? Has this system suceeded in coming out the tutelage of different borrowings? Is this system functioning autonomously, from an institutional point of view? In this framework, and from the point of view of relationships with the other institutions, how would you label the reflection document of 2010[1]?

It is said that the judge is defined by the "normative food" which he consumes in the Pantagruelian feast of his great work - the adjudication in itself. For this reason, when we define a judicial system, we should observe its ontological, principial sources. Under this angle, the spirit of the European judicial

[1] http://curia.europa.eu/jcms/jcms/P_64268/

system is rich and organic built, being the result of works carried during 2000 years of continous acculturation, and having axiological and nomothetical peaks in Roman law, Canon law and Civil law. Those peaks are supplemented, starting with the 20th century, by the principle of pluralism of sources (of Justinian origin), which is however hidden in the hypostasis of the today's common law. I am starting this way in order to contextualize my answer, and to avoid your surprise to find out my belief that the European law is very integrated, (and sometimes it is even more integrated than what we have expected within the states that form the Union). By taking into account that, due to the fundamental principle of primacy of European law, ipso facto, all judges within the Union are European judges before they are national ones, well, the system is more than homogenous from an ontological perspective. But if we consider this system from a phenomenological point of view, we could assess that the system might be improved.

I made few proposals in a speech that I have delivered in front of representatives of the European institutions, and I limit myself to present some of them: our legal system needs a process of codification (following the *Pandectae*-pattern) for a relative uniform understanding of the huge body of legal norms that fertilize legal spirit of the Union; the architecture of the judiciary might be improved by dissipating the courts called to solve cases concerning European substantive law and by setting-up a network of "circuit" courts, following the American model; the training the European judges might be included too, so those judges might benefit from a common academic basis, and not only from a formal one, for forging the legal reasoning following the spirit of Roman law, civil law or European competition law (the greatest nomothetic fields that forge the intellectual profile of the European judge). The foundations of the historicist thinking, proper to common law should not be neglected, taking into account the open spirit towards novelty detail and peculiarity that the former stimulates.

As far as the reflection document of 2010, what I think is important is the triadic principle foreshadowed in the legal relationships based on human rights: "national" courts, European Court and ECtHR respectively. It is a "pyramidal" vision that obviously moves the ECtHR towards an "international" construction with a greater lift than the ever-more "internal" integrated Court of ours, the Europeans within the Union. In fact, by that, the principle that should be our guidance, the federative principle of an Althusius-inspired subsidiarity, is favoured. I would like to see in the future European courts of human rights dissipated in the deep texture of the Member States, so that Justice "follow the people", and come closer to them in space terms, not only as value.

2. The protection of fundamental rights is a rather new issue in the European Union. What do you think of the European Union adhesion to the ECHR and in the same time adopting the Charter of fundamental rights of the European Union?

This is just apparently a new issue. Europe is that hosts the essential roots: *Londonium*, through *Carta Libertatum*...; Nantes, through the Edict of toleration of Henry IV the Great…; *Lutetia*, through the Declaration of Human and Civic Rights….

Of course, the internalization of fundamental rights, realised also by setting-up a Union jurisdiction in such matters has a remarkable political significance. It is natural for the European citizens to know that their high standards, their enhanced requirements in that field find the protection, foremost in a Union court.

3. From your point of view, what are the changes brought to the ECJ following the coming into force of the Lisbon Treaty?

The Lisbon Treaty (which we sometimes label as the "little Constitution", the great one still waiting for its genesis, in a

more profund European spirit, one that should not forget either roots or soul, jus-naturalist ideals of fraternity in equality and dignity, values recognized for all 500 millions citizens), well, on the plan of organization of the European judiciary it does not bring important changes. The new, organic and close to the European citizen architecture is still in its gestation period. Everything, however, will depend on the transformation of the European democracy in a fundamental value, so that the Parliament would become the genuine legislator of the Union, the Commission would govern, even in a minimalist style, and would not only manage, and the Presidency of the Council would become the European presidency, with an elected President, as is the case in the US, if not, even more democratic, relying on a complex apparatus, employed for democracy, mediation and equilibria of a federal type.

4. What is your opinion on the (possible) dissenting oppinions within the ECJ?

Until the perfect adaptation of the European Parliament with its role of fundamental legislator of the Union, a certain role of quasi-nomothet (*le gouvernement des juges*...) will still be played by the Court. That being so, I think the negotiated solutions resulted from deliberations will be more opportune than the hermeneutic adjudication specific to the usual judicial environment. It was not bad al all that those binding norms (*per aspera ad astra*...; *ad Augusta per angusta*...) prompted the European judges, those exceptional creative personalities, to a polemical and argumentative dialogue and to an intellectual availability in finding out of a third and the most important element of dialectics, the synthesis: *conjuctio oppositorum sive concordantia discordantium*...

5. From you point of view, how important is the concept of "public policy" in shaping the European private law? Does the European private law retain the traditional shapes of private law?

Within the Union, the private law has the chance of a rebirth after two centuries of fall, uniformity, etatism and functionalism, totalitarianism more or less disguised in socio-centric and ultra-communitarian obsessions of many despotic spirits. In fact, I think that now it is the only chance that the private law might become even an offspring of that old spirit when Justinian was dreaming of to give the human the governance of its own destiny, even if, in his chest the heart was beating "more to the left", the solidarity being more important for him that the absolute anthropocentrism. That is the subject-matter of a book. I do hope that wise lawyers of the future to be able to provide the Europeans with something comparable, in the field of private law, with *Corpus juris civilis*. *Dum spiro spero*, as Cicero says...

6. How would you briefly describe the "more economic approach" of the General Court? What are the political means followed by the European Commission in order to influence the judicial activities of the General Court?

My fellows, the judges of the General Court are perfectly independent. They might not be subject to influence, even if, as everyone, the have also an emotional thinking and idiosyncrasies. The reason and good-faith, the reasonable and the science govern the Tribunal's life, from its first moment until today. Everyone is a genuine professional, a fact that led to constant praises for this court for its overwhelming standing. Cases of planetary coverage have been adjudicated in the most serene atmosphere and there was not any degree of suspicion concerning the sound judgment of those remarkable judges.

In the same time, do you think that there are consequences of the political economy concerning judgments of the General Court in the field of competition?

Without a doubt, the spirit in which a case is adjudicated, especially that with an economical nature or more precisely with a commercial nature, has a multidisciplinary nature. But

this is an organic and sapient multidisciplinary approach, fathered by judges-philosophers and not by formalist judges, in which their judicial hermeneutics research all the explanations and place the conflictual legal phenomenon in context. Due to the working methods within the General Court, the reductionism is abandoned for the sake of justice. The competition law, this motor of perpetual peace, which Kant did not have the chance to observe and that was given to Europeans as a gift by Americans after a Second World War, was very well acclimatized within the "court" of the General Court. Not only for that reason, I "see" in the General Court the future Supreme Court of the Union.

7. An "usual" question: What are, from your point of view, the most important novelties brought by the Lisbon Treaty, assessed after two years since its entry into force?

It is premature to assess the virtues and insufficiencies of this Treaty of congruencies, one less innovative. Even if this effect will be perceived after 2014, I value especially from the viewpoint of strengthening of the Union the fact that the in the Council of Ministers the principle of unanimity was replaced by the qualified majority vote. In the same direction, and from the point of view concerning the consolidation of democratic guarantees, I value the right to citizens' initiative (under the condition of one million signatures) liable to prompt the Commission to promote a proposal. As for the external and rather symbolic, for the moment, external representation, seen as road towards an autonomous institution, I value the suggestion of stability brought by the institution of the Presidency of the European Council compared to the six-monthly Presidency. As I am attached to the miraculous Treaty of Maastricht, which brought about a revolution for the European law with the adoption of the philosophical and legal concept of "European citizenship", giving us thus a common

formal identity, "for some of us", after 1800 years […], even if, a subsequent identity for the moment, I was happy that in the wake of this great Treaty, the office of symbolic unity in the political and legal imaginary, that of the High Representative for Foreign Affairs and Common Security Policy was provided with "fences" at Lisbon, as I valued that the three pillars of the Communities merged, expressing the stage of the Union for our construction.

8. What do you think of the limits – if any – imposed to judges for expressing their opinions in academic studies?

During the UNESCO Conference for bicentennial celebrations of the Paris Bar, I discussed at length, especially with my panel fellow, the Judge Stephen Breyer from the United States Supreme Court, two issues of concern for European citizens: the creativity of the judge, liable to lead to a biased transgression, and the issue of revealing the inner forum, liable to lead to the predictability of personal options respectively. Both hinder the feeling of trust in justice, which is a fundamental feeling in the unification work of human communities. I am saying that because, apart from the ideal of justice, which is the king, the judge serves the second great ideal of humankind, that of unity (another manner of naming the primordial instinct of any being, that of security). The judge, who performs in fact a fundamental royal attribute, answers the royal brevity with a duty of reservation. Scientific, philosophical or humanist opinions do not prejudice in themselves this sacred duty as long as they are not connected to the particular case adjudicated. The judge does not reveal anything, not even literally, that is liable to reflect his own judicial work, he is not an ipsedixitism, but a lively institution. He does not reveal absolutely anything except the judgment arguing the solution taken. His scientific works, if any, are created whether *in abstracto*, with deep ontological and principled overtones, or by research on cases of his fellows, without connections to his pending cases. He

will never be his own reviewer. I recall here a good American provision, that of receiving the doctrine as a formal source of law on condition that the author has passed away… And the judges does these in order to discard the fear of fickleness, appropriateness, political opportunism, not if of dreadful, unspeakable deeds, like corruption or getting rid of the absolute independence.

9. On the occasion of setting up this Autumn[2] at Iași of a research center, we would like to ask you about the "hidden value" of the proposed theme: "The natural lineages between European culture and case-law of the European courts"?

We have conceived that the Faculty from Iaºi, the oldest in the country, and working within an environment traditionally open towards Europeanism and good European causes, in a city bearing an unique magic, liable to generate feelings of unconditional adhesion, like Bologna, Cracow, Oxford or Florence, might host a first Center for studies in private law, *ROBERTIANUM,* employing a symbol of good legal fundaments from the European odyssey, the effigy of Robert Schuman. Two inherent reasons are of great importance in choosing Schman effigy: his avant-gardist legal thinking, manifested in his sociologist direction, which marked (at least in the beginning) the entire European nominalist case-law, places him, in our eyes, among the great illuminates of law, and his Charlemagne-style generosity, respectively the fact that he was one of the few (I am thinking here only at Marshall), if only not the only who wished, confessed and prophesised the association of "Eastern Europe" to this bi-millennial work of European construction, full of historical tribulations and mazes.

Otherwise, we have started our journey of setting-up of a doctoral school and then, in modesty and natural spirit, and we

[2] 2012 (ed.)

started from the doctrinal reality of the School of Organic Law, as one of our sections of legal hermeneutics, from the pathos of graduates elites, in order to give substance, not just symbolic value to this challenge. Certain first-rank personalities in Europe have supported us, showing friendly feelings, and that strengthened us. In fact, in Iași there are many brilliant minds that treat in a philosophic way the European odyssey, and our enthusiastic students amazes us by their sagacity and their deep European sensibility.

10. What is your point of view concerning the "construction" of principles of the Court of Justice of the European Union?

By these principles, the Court raises at the status of nomothet, and not just of a nomologist or a simple hermeneutist. By constructing these principles, the Court has already entered the royal way of the universal history of law. If there was something which attracted me to the European law, after the fascinating and imperial Roman law, then it was that ontological set, in which great gifted judges of the Court have played the most praiseworthy role in the legal evolution of Europe, that of creators of CRITERIA. Criteria are like the night stars, are intellectual hypostases of an essential vademecum. To be in a position to associate your name with a criterion means that you have already been blessed by Heaven. Those people, their principles and criteria join together, so admirable, 500 million persons…

11. Which role does play the purposive interpretation (generally) in law and more particular at the ECJ? Are the any "malaises" concerning this interpretation in the judgments delivered by the ECJ?

The judge respected in any register, be it even extra temporal, is the one that starts a hard and winding road of justice from the sovereign principle of equity. *Ne varietur*. You

are never supposed to do injustice relying on weapons of the law. That is also a principle of the Equity Law. Let's forget tough the erudition. I have already answered you, indirectly. I do not start from but arrive at the ultimate goal of the law. By then, the last hermeneutical (literal, logical, contextual) resources are exhausted. You may not perform divination before you heal. If the opposite would be performed in the field of obligations, then, *mutatis mutandis*, we might solve everything using a single principle, that of unjust enrichment or we might rely on the Talmud, Confucian or Ulpian golden rule. Would that be justice? Even I. Kant would not accept this metaphysical absolutism. Before one starts to interrogate the soul of the dead legislator, he has to listen to the lively voices of the case, to the specific legal relationships, with their endless plethora of norms under the poor conflict voice feels almost suffocated. But that is another subject-matter, extremely intriguing: the legislative inflation that leads to a hermeneutical chaos that makes me understand those judges that evoke before everything, like shamans and whirling dervishes, the purposiveness and the souls of departed nomothets…

11. In the same direction, the purposive interpretation seems to hold a privileged place at the ECJ compared to other means of interpretation (systematic, literal, historical). Is this perception grounded? And also, which might be the justification that this kind of interpretation leads finally to a new law?

This perception is not grounded. The creativity of the Court's judge is not transgressive and it is not searched at any price. It is not *contra legem*, but it is always *propter* or *secundum legem*. The purposive reading is, if you like, just the nomothetical pneuma, a mean by which the reason springs out from the shell of precariousness of the moment generated by the norm's specific expression. The judge undercover what everybody's reason (the reasonable) is not capable of noticing;

then, his reasoning becomes a valuated common good, which becomes consubstantial part with the norm, with the law (even if Kelsen would be upset with me, but Hart would complicit smile at me …).

12. Concerning the Courts' system of the EU, we would like to ask you to comment on the possible deference of the General Court towards the positions expressed by the European Court of Justice (concerning also a possible appeal against a judgment rendered by the General Court)?

Thanks Heaven, I have not got any feeling of apprehension, our judgments, even bearing novel value, not being quashed. But that is a common feeling, a trivial remark. When I think of a judge, I bear in mind his function, not his vanities. The judge has to report only to equity and truth. There is not any "instance" above him. It is only he and his God. *Punctum*. Society, control, trust, all those are external forms to him and his adjudication and there are of course levels of proceedings. The far you go, the more bureaucratic they become. That is the reason I restate something that I have said once: the judge hearing the substance of the case (first instance judge) is fundamental. He is the explorer and also the architect of the case. He starts the construction and he also should close it in a magisterial way. When a judge thinks that other persons could suffer of headaches because of a certain case, he is already shifting responsibility, he signals desertion, and that is **villainous for the mission he should perform.**

13. Does not the "soft law" reside in a paradox of the legislation? What role does the "soft law" play in developing a legal standard in EU law and what is its role in protecting the human rights?

Every court of law is creating a so-called "soft law". Observe this in Bucharest, at the district courts... *Quod capitiis*.. But that is not a proper law. It is, following Carbonnier,

an apparatus, small stoned alleys, allowing reaching an intermediate common point, and not at all the principled solution awaited by everyone. *De minimis non curat praetor*...

14. A last question: what would be the research methodology you would recommend to young researchers in EU (private) law?

Much Roman law, lots of Roman law. Then the subsequent sources of civil law: Canon law and *customary* law. Third, comparative private law, with long stages in common law, capable to accommodate us to pluralism and hierarchy of formal law sources, with the methodology of European courts in Luxembourg and with Gèny's principle of free research in a pool of culture of British equity. Fourth, the public law principles generated by the case-law of our Union Court. Finally, everything should be immersed in a sea of solid philosophical reflection and knowledge or at least empathically to this Grail of ours which is the "European soul" or at least the "European dream"...

Thank you very much.

THOMAS COTTIER

Professor of European and International Economic Law at the University of Bern and Director of the World Trade Institute (WTI) and the Institute of European and International Economic Law, University of Bern. He directs the national research programme on trade law and policy (NCCR International Trade Regulation: From Fragmentation to Coherence) located at the WTI. He is an associate editor of several journals. He was a visiting professor at the Graduate Institute, Geneva, and also currently teaches at the Europa Institut Saarbrücken, and at Wuhan University, China. He was a member of the Swiss National Research Council from 1997-2004 and served on the board of the International Plant Genetic Resources Institute (IPGRI) Rome during the same period. He served the Baker & McKenzie law firm as Of Counsel from 1998 to 2005.

Prof. Cottier has a long-standing involvement in GATT/WTO activities. He served on the Swiss negotiating team of the Uruguay Round from 1986 to 1993, first as Chief negotiator on dispute settlement and subsidies for Switzerland and subsequently as Chief negotiator on TRIPs. He held several positions in the Swiss External Economic Affairs Department and was the Deputy-Director General of the Swiss Intellectual Property Office. In addition to his conceptual work in the fields of services and intellectual property and legal counselling, he has also served as a member or chair of several GATT and WTO panels.

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

I was exposed to continental European law during my studies in Bern which I completed with the bar exam. Subsequently, I was strongly influenced by the Anglo-American law traditions and methods of teaching during my studies at the University of Michigan, and later in Cambridge, UK.

Would you like to point out major influences during your "formative years" (concerning also methodology).

I was exposed to European Law in Michigan by the late Erich Stein. He was one of the founding fathers on scholarly writing and teaching on the EEC, and later the EU. It is telling that he was a European refugee in the US. He, John H Jackson both in Ann Arbor and Joerg Paul Müller in Bern strongly influenced my thinking. I owe them much. In particular, I learnt about the importance of case law, and of linking it with theoretical work and development, taking into account other disciplines.

2. Even if you have an impressive professional background in an international field, you are familiar with the international (public) law. How would you asses the consistency of the international action of the European Union – especially concerning the WTO?

The EU clearly is a major player in the WTO – thanks to a common external trade policy ever since 1957. For many years, the EU and the USA were able to shape the negotiations. Today, this no longer is the case in a multipolar world. But there is no doubt that the EU seeks promoting the goals of the WTO. The exception to this ever since has been the Common Agricultural

Policy (CAP) which used to be inconsistent with GATT law, but increasingly moved towards convergence. The EU was willing to make major concessions in agriculture in the Doha Round, and we still hope that they will materialise to the benefit of many developing countries depending upon agricultural exports.

3. Could you please provide you opinion concerning the evolution (if there is so) of interpretation of WTO law in the EU legal order.

While the European Court of Justice continues to deny direct effect, WTO law plays a role under the doctrine of consistent interpretation and often informs the Court informally without taking WTO precedents officially into account in its judgements. Politically, the EU generally implements WTO rulings except a small number of politically sensitive cases (genetic engineering, hormone treated beef).

4. A rather "common" question: In your opinion, what are the most important developments brought by the Lisbon Treaty, more than two years since its entry into force? More specific, what would be the impact of amendments brought by this Treaty in the matter of foreign direct investment of the EU?

I should think that the reinforcement of the European Parliament, the new presidency of the Council and the extension of powers in external relations, and the introduction of a legally binding Human Rights Charter amount to the most important elements.

5. Mentioning the fact that you have studied both European and comparative law, we would like to ask you what do you think is the link between those two from a methodological point of view. Also, how does comparative law influence EU law?

Much of European law emerges out of comparing and synthesizing different European legal traditions, in particular the Latin, German and English traditions. In the field of private, much harmonization is actually left to scholarly comparative work and efforts made by different professors, rather than governments.

6. On the other hand, we would like to ask you to comment on the trends related to the public/private law division. In other words, what about the public-private division in EU law? Is it still relevant (as it was *illo tempore*)? Would you like to comment briefly on that development?

The distinction between private and public law is largely outdated, in particular in the field of economic law and regulation. From the point of view of international law, the distinction has never existed, and I think it is the same for European law. The distinction is still strong in outdated Law Schools and the heads of professors. But in reality, a lawyer needs to be able to deal with horizontal and vertical relations at the same time, and in an integrated manner.

7. How would you asses the relationship between the WTO and EU in the field of intellectual property? Also, what about the legal basis (of the EU legal order) in that field compared to TRIPS?

It is a pity that the European Court of Justice deals with all WTO law in the same way and denies direct effect. The TRIPs Agreement would be most suitable to be given direct effect in European law and would thus assist in reinforcing the effectiveness of international law in the process of globalization.

8. Would you think the nowadays fashionable discussion concerning the EU accession to ECHR would positively influence the international business field?

There is a risk that accession to the European Charter of Human Rights may lower levels of protection in the long run

as the Court accommodates countries not having a strong tradition in human rights. The European Court of Justice will increasingly use the EU Charter and this may again influence the work in the Strasbourg Court, as much it is influenced by powerful constitutional courts.

9. As a final question, we would like to ask you to asses certain potential consequences brought by the Opinion of the Court concerning a unified patent litigation system (Opinion 1/09 of 8 March 2011).

I think that the case law of the Court is key to research in EU law. Also, to use a broad approach taking into account the results of other disciplines, in particular political science, history and economics, and increasingly also the results of research in empirical psychology.

Thank you very much.

BILL DAVIES

Dr. Bill Davies is an interdisciplinary legal historian whose work draws upon the fields of history, law and society, government, and public policy. Focused on the transnational aspects of legal ideas and systems, his more recent scholarly endeavours examine the construction and evolution of a constitutional practice of law in the European Union. More specifically, much of Davies' research tracks the consolidation of European public law since WWII, with an emphasis on the European Court of Justice, its subtle promotion of a supreme European legal framework, and the reception of this framework in various Member States, like the United Kingdom and Germany. Such research serves as the crux of Dr. Davies' first book, "Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949-1979", published in June 2012. While much of Davies' scholarship explores the relationship between the federal constitutional ambitions of the European court and national courts in the European Union, his research and teaching interests extend beyond modern-day constitutional politics into the realm of Western legal history from ancient Greece onward. In the future, Davies hopes to embark upon research that embeds the supranational project of the European Union within the larger historical context of Western legal history.

Recent publications

• *Why EU Legal History Matters – A Historian's Response, in American University International Law Review, forthcoming 2013;*

• *From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950-1979, Publications of the European Union Liaison Committee of Historians, Nomos-Verlagsgesellschaft: Baden-Baden, Accepted, Forthcoming 2013;*

• *Toward a New History of European Law: An Introduction in Contemporary European History, 21, 3, August 2012 (Co-author: Morten Rasmussen);*

• *Pushing Back: What Happens When Member States Resist the ECJ: A Multi-Modal Approach to the History of European Law in Contemporary European History, 21, 3, August 2012;*

• *Dealing with the Fallout: West Germany's Response to the Solange Decision (1974) in American Consortium of European Studies Working Paper Series, July 2011, http://transatlantic.sais-jhu.edu/ACES/index.htm;*

• *The Incoming Tide: Britain's Struggle with the Supremacy of European Law 1970-1990: An Introductory Survey in American Consortium of European Studies Research Seed Grant Series, July 2011, http://transatlantic.sais-jhu.edu/ACES/index.htm;*

• *Bipartisanship in 20th Century Europe, Bi-Partisan Policy Center, http://bipartisanpolicy.org/news/idea-gallery/2010/06/14/bipartisanship-20th-century-europe, June 2010;*

• *Meek Acceptance? The West German Ministries' Reaction to the Van Gend en Loos and Costa Decisions in Journal of European Integration History, 14, 2 January 2009, pp 57-76.*

Forthcoming

• *The Incoming Tide: Britain's Ongoing Struggle with European Integration, book manuscript examining the enigmatic reception of EU law in the UK, which as a Member State is at once both a reluctant political partner and also one of the most compliant states to EU law;*

• *The Failure of the European Constitutionalism: The German Case. Book Chapter in forthcoming collection: Constitutionalisation in Question: Alternative Theories and New Interpretations;*

• *From the Cell to the Courtroom: The Remarkable Life of European Jurist Walter Much. Journal article piece to be presented for first time at EUSA 2013 conference in Baltimore.*

First of all, we would like to thank you for agreeing to have this interview.

1. In the beginning would you like to provide a short description of your formative years in law, which would be certainly very useful to "apprentices" in law.

Would you like to point out major influences during your career (concerning also methodology)?

Thank you for considering me for this interview.

To begin, I should be quite clear - I do not have a law degree. Instead I have a PhD in European Studies, with a particular legal historical focus. I do write about law as an outsider, which, as I am sure you realise already, has both advantages and disadvantages. In my favour, I am able to keep a broader context and perspective in mind, which may remain potentially unseen to those 'inside' the law. On the other hand, I must learn and be comfortable with the technical language of the law without the formal education in it that others likely to know. This means I have to work much harder on that aspect, but in the end, I see this equally as a strength and as a weakness.

As a historian, I have been deeply influenced by my doctoral supervisor, Prof. Jan Palmowski, who is a German historian and guided me through my Bachelor degree and doctorate. There is the origin of my continued focus on Germany, before even my native Britain. Secondly, my continuing interest in the history of European law was initially sparked by readings of the works of Joseph Weiler, Eric Stein, Karen Alter, Andrew Moravcsik and Mark Pollack. As these are all fantastic scholars in the political science and legal scholarship disciplines, I suppose my desire to test their sophisticated models against the empirical reality emerging from national and European

archives has been a driving force for my methodology as a historian.

2. You have an impressive record of professional mobility. Could you please provide researchers with certain lessons drawn for your personal experiences? What would be the gains and (potential) shortcomings of legal students and professionals' mobility in EU?

I was born and raised close to London in the United Kingdom, where I studied for my Bachelor degree. I subsequently spent a number of years in Berlin, Germany both as a student and as a researcher. Just over five years ago, I took my first academic position in Washington, DC. It has been a lot of moves in quite a short period of time, so yes, I have certainly been 'professionally mobile'! I have found this mobility to be hugely beneficial to my understanding of legal history in general and EU law specifically. One key way, for instance, has been justifying the purpose and need for my research in the radically different contexts provided by the UK, USA and Germany. For example, in the UK, the questions I get are in some way or another related to why the EU exists at all, as that particular audience seeks answers to that question. Why create the Treaties? Why give them the distinct legal personality they have? When in Germany, the 'why' question is rarely raised as the EU is considered an integral part of the German state. There questions revolve much more around how to constructively improve the legal system, particularly at a constitutional level in terms of democracy and rights protection. In America, I must answer much more fundamental questions like what the EU is anyway!, These all benefit me as an academic in that I am forced to provide a broad base of justifications for my work.

One can easily translate the same lessons to legal students and professionals seeking to look to move around in the EU. They will necessarily have to look at the EU from the varying

national perspectives. Each Member State has its own justification for integration and its own fixation with a particular aspect of the project. The more multi-facetted your understanding of this is as a student, the much better you will be as legal professional working in that environment. This is particularly important in EU law because knowing the cultural and historical context of when and where the cases arise can be pivotal.

3. On a more personal note, we would like to ask you to assess the value of English, US and German alike professional background as it is your case: you are familiar with those legal environments. In brief, what might be the gains from each system?

Not having a legal background in those countries, some of the idiosyncratic things I've noticed as an outsider, is for instance in Germany, there is a belief in hierarchy of law in that constitution comes before everything and sets the tone and values for the entire legal system. Although the US has an equally strong fascination with the Constitution, there is a very different and much more dynamic sense of the law, which must be effective and purposeful. Results and outcomes of legal processes seem to matter more in the US. In Britain, it is of course a little less dynamic, a little more pragmatic with much more awareness of the age and idiosyncrasy of the common law system. My initial research for my new project on the British reception of EU law indicates that there was long lasting and genuine concern in the British legal academy that British lawyers and judges trained in the Common Law style would be at a significant disadvantage against their European counterparts. The first British judge, MacKenzie-Stuart apparently went to great lengths to familiarise himself with the Continental Civil Law approach during his appointment. The significance of the differences in approach of these legal systems within the European context is a question that I would like to spend some time on in my future research.

4. Could you please describe the Transatlantic perspective over the EU from a US point of view? What lessons should the EU learn from the US experiences?

My sense is very much that the US is broadly supportive of European integration, but equally with some frustration in that Europe still remains a disparate entity. We only need to think about Kissinger's famous question about who he would call when he needs to talk to Europe. I think a similar feeling remains and often the Americans are forced to call on their bilateral relations with particular Member States at particular times for certain goals. To a certain extent, this could enable the Americans to 'divide and conquer', but equally, I think there is general support for a united Europe that looked something similar to the US and which most Americans could relate to.

At the same time, you would have to think that American concerns about their relative decline in influence in world vis-a-vis developing Asian states would actually be exacerbated by a unified Europe. The European GDP is, as far as I know, already bigger than the American and European trade with China considerably higher. Would America see the EU as a rival in the future? I think only if we also saw a politically unified Europe as well.

Coming back the other way – what could the EU learn from the US? Well, the historian in me would probably give you a different answer that you would expect. Perhaps the most interesting legal narrative I've discovered since coming to the US is just how hotly and consistently the federalisation of government actually was (and in some cases, remains). My superficial understanding of US history before I moved here led me to believe that their was the Constitutional Convention in Philadelphia, which created the institutions we know today, a Civil War about the nature of federal government, and from there, continual and rapid growth to the superpower we recognise today. But I quickly learned that this exactly not what

happened! The constitutionalisation of American federal and democratic governance was an extremely slow and often times painful process considering the Civil War, the Civil Rights movement, unified it. The US Supreme Court barely featured in the Constitution and had to outline its own importance and powers much like the CJEU has done. The United States remains even today a very fragmented government, with the States remaining important and influential actors in American government. I suppose one of the key motors in the development of US federal governance has historically been the Supreme Court, which is why it is tempting to look at the CJEU in a comparative perspective.

5. You have devoted a significant interest in studying the history of EU legal order, mainly from the point of view of the German reception of EEC (now EU) law. Therefore, what are the means you do employ in research? In other words, which piece of advice would you give to a researcher in EU law from the point of view of the methodology to employ?

A large part of our understanding of the relationship between national courts and the CJEU has been documented by lawyers and political scientists, who have provided sophisticated answers, but have never really tested their models against the reality of what was going on historically at that time. I don't believe that law happens in a vacuum, that judges make decisions without reading the newspaper in the morning, or that lawyers are oblivious to debates in the academy or in the media. All of those things play a role in our understanding of why cases are decided in certain ways. Tapping into this 'extra-legal' world is integral to my historical understanding of EU law. I think my research on Germany has proven this point well – with the Bundesverfassungsgericht's Solange decision put into the context of a surprisingly negative reception of the CJEU's key doctrines in the 1960s and the reluctance of

the German political elite to voice any opposition to European integration in the 1970s. Only with this context can we understand why the BVerfG felt empowered to speak up on behalf of those against the developments in EU law at that point. So, I go into European and national government and media archives, as well as historical academic debates to look at what was really going on behind the scenes as cases were being decided.

6. Talking also on the German legal world: the Lisbon decision delivered in June 2009 by the *Bundesverfassungsgericht* is already a "classic" case in the field of EU (and national alike) constitutional law. Yet, is there a "hidden" meaning in that decision? What place does it hold in a history of reception of EU law in that national legal order? Or is quite soon to draw even provisional conclusions?

My historical analysis of the first Solange case revealed that the BVerfG's main impulse was to articulate concerns from broader German society about the relative lack of human rights protection and democratic control in European governments. The BVerfG of that time felt they were in a unique position to articulate those concerns because the German government was not yet in a political position where it could be advertently critical of the European project. Yet, a surprising amount of hostility toward the CJEU emerged in German academic and media debates that had to be voiced by someone. The BVerfG step in to fill that gap and to a large extent, plays the same role today. As the most supported institution in Germany, the BVerfG has a unique position in that it can articulate German discontent with Europe but without raising the red flags that German political dissent might. So, you could say that Lisbon carries on from Solange in that very real sense.

At a more substantive level, another key finding of my research was that the European institutions and the German government took the actions of the BVerfG very seriously

indeed. They feared an actual disintegration of the Community in what was already a difficult period in the 1970s. As an aside, one of the most memorable moments for me in the archives was finding a memo when looking at a German government file on the Solange decision, in which there was extreme concern that the BVerfG's actions could fuel British Eurosceptics and influence the British referendum on membership the following year. The very next document thereafter was a letter from a group of British Eurosceptic MPs asking to come to Germany to learn what they could about the BVerfG's position! In any case, German and European officials took the BVerfG's demands very seriously and this resulted in direct action taken by the European institutions to address them, even though it was not sold to the public as a direct response. For instance, I've documented and proven that the Joint Declaration of 1977 of the Parliament, Commission and Council affirming the ECHR and the CJEU's Hauer decision in 1979 were both direct responses to the Solange jurisprudence. These steps took care of the first part of the first part of the BVerfG's concerns, namely the human rights issue and you can see the positive response of the BVerfG shortly thereafter in the second Solange decision in 1986. But the second problem - of democratic control - was only partially dealt with by the first direct elections to the European Parliament in the same period. This never became the powerful institution it was hoped to become. So, the subsequent a line of cases from the BVerfG is - in my humble historical perspective - a continuation and expansion of that original Solange logic, which called for greater democratic accountability in European governments. The Maastricht decision and the Lisbon decision were the next attempts in trying to constitute a form of democratic control in Europe, the latter ultimately through the participation of national parliaments.

7. A rather "common" question: In your opinion, what are the most important developments brought by the Lisbon Treaty, more than two years since its entry into force?

And also: From your point of view, what are the most important recent developments concerning the EU legal order?

If we think about Lisbon as a continuation of the failed constitutional discussion, I think it has clearly failed in what a constitution was supposed to do: bring European governments closer to the people of Europe. The EU remains hovering somewhere between unimportant and deeply unpopular across the Member States. This on-going malfunction means that one of the most interesting innovations of Lisbon - the clarification of the exit requirements - might well get tested by Britain in the near future. So in terms of recent developments in the EU legal order, I think Cameron's promise of a referendum might well see a fleshing out of the exit criteria in both professional and academic circles.

8. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

In connection to the above issues, could you please describe the recent trends concerning the nature of EU law?

It is important not to overestimate the strength and cohesiveness of the legal system. It's dependent on the Member States, especially in enforcement and policing and my historical research on the formation of the system really tries to bring home just how resisted the development of the EU was and how it is today. It is a fragile system that has ambitious and worthy goals, but faces many challenges. First and foremost, the system requires that Europeans use it and give the CJEU something to do. Without the impetus of interested national litigants, the CJEU could not have issued any of its key

decisions. If the national interest dries up, so will the whole system.

At a second, more obvious level, one of the biggest challenges that faces the EU system is what to do with countries like Britain and other Euro-sceptic nations that threaten to leave and resist the European legal system.

9. Coming to legal reasoning in the judgments delivered by the EU courts, we would like to ask you to assess the stages of logic employed in more recent judgments compared to the old judgments (of the 60s and 70s)? And also compared to (other) supranational courts, like ECtHR?

The short answer is that I believe that if you talk to any of the judges, they would argue that the Court has always reasoned in the same way. That is, it is generally faced with two options in any case and it usually supports the one favouring integration because that's what it is asked to do. It's relatively straightforward! But of course, it's not as well. The Court is aware of the political impact of its decisions, even if the judges claim not to pay too much attention to that. An interesting and somewhat counterintuitive example of this is found in the *Van Gend en Loos* Court. The presumption in your question is that the Court in the 60s and 70s was more activist and teleological in its interpretation, but historical research by my good colleague, Morten Rasmussen strongly suggests that the Court was quite hesitant to set out the doctrine of direct effect at that time and the Court was pushed into it in large part by the Commissions Legal Service under Michel Gaudet and pro-European elites in high positions. Even then, Rasmussen suspects, the outcome of the decision was probably 4-3. The Court remains equally aware today and retains a consciousness of the delicate balancing act it must do between the right decision given the context of potentially hostile Member State reactions.

10. What is your opinion concerning the "construction" of the principles of the ECJ?

I think the doctrines of direct effect and supremacy – or their equivalents – are possible answers to inevitable questions that will have to be asked in federal-like entities. The US Supreme Court faced similar questions in the early Republic, which is why cases like Marbury vs. Madison and Maryland vs. McCulloch are so important. So in this sense, the European Court was always going to be faced with these questions at some point, so I would caution with the usage of the term "construction" which at some level implies a certain amount of artifice. Of course, the decisions are important, whatever their outcome.

At the same time, once they've been made, one of the big paradigms that my research seeks to engage with is the findings of the Integration of Law scholarship, which some people consider to be a constructed foundational myth legitimating the CJEU. In this sense, some of the mystique around the Court could be considered constructed by this particular academic discourse. Initial historical findings from scholars in my field have tended to point to the Integration through Law story as not quite being the complete picture in terms of the construction of EU law.

11. What is the role of comparative law in EU law?

From a historian's perspective, research done by Francesca Bignami has shown the importance of comparative law through comparative legal studies undertaken by the Commission's Legal Service in the early period of integration to identify what doctrines or decisions would be accepted in the (majority of) Member States. My research in the Legal Service's archives led me to finding and reading at one of those comparative studies from the very early 1960s. It was truly fascinating. At a different level, many of the officials of the early Community

were also comparative lawyers by training, not least the Advocate General, Maurice Lagrange. Research by Morten Rasmussen and Alexandre Bernier has shown this to be a crucial part of Lagrange's early understanding of European law. So we can see that comparative law and methodology was a powerful constituent force in the early Community. After the key doctrines were delivered and expanded, the idea was propagated that the Community had its own unique legal personality, after which comparative law went a little more into the background. I would say, historically again, that it re-emerged in a different sense due to the resistance of the national systems to the continued expansion of the European legal structure in the late 1960s and 1970s, so that European officials were forced to take into account national traditions and particular issues from those traditions, which I have argued played a more influential role in shaping EU law than most people imagine.

12. A final question: What would be (from your point of view) the most important German experience (and influence) concerning the EU institutions and also its legal order?

I think the emphasis placed on the human rights issue and how German resistance to European supremacy over the national constitution brought about the Joint Declaration I mentioned earlier. This is actually a drama still being played out with in the most recent period with the EU's accession bid to the ECHR.

Thank you very much.

GARETH DAVIES

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He was previously a lecturer at the University of Groningen (2000-2007), and a barrister in London. He also teaches at Amsterdam University College. He has taught EU law as a guest or visiting lecturer at various universities in Europe and Canada, and has been a visiting scholar at New York University. His research interests are in European integration, European constitutional law, and the relationship between trade law and non-economic interests.

He is the co-author, with Damian Chalmers and Giorgio Monti of EU Law (2nd edn, Cambridge University Press, 2010).

First of all, we would like to thank you for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law. What were (are) your models (in law)?

I initially trained as a barrister, after having graduated in philosophy and then done a year of law studies – a way into the legal profession that is possible in the UK, and used by many graduates – and although practice never really interested me I was very influenced by the way of thinking of the common law practitioner: law is a tool, to be used to play whatever game one wishes to play, whether understanding the world, changing

it, or just serving a client. It is not to be treated as sacred, and certainly not as something certain, for we make it, change it, and throw it away according to our collective wishes, whims and democratic accidents. Almost any point of view can be argued, and the question of which is right is largely beside the point – judges come and go, and social mores change. Knowledge of the law can be useful, but is also easily acquired as necessary, and in general a background in some other discipline is far more useful. Studies such as history, languages, sciences and mathematics provide an intellectual training and ability to manage ideas which is easily transferable to the law, and on the whole prepares better for practice or research than does the learning of the law itself.

2. A „common" question: What are the most significant changes brought by the Treaty of Lisbon, more than two years after its coming into force? Or, if you like, what are the most important recent developments concerning the EU legal order?

I doubt whether Treaty texts have a great influence on the future of the EU. I would tend to see them as symptomatic rather than causal, at least as regards the larger scheme of things. Lisbon, like the Constitution, was primarily a tidying up exercise more than a rethinking of the function of the EU, and to that extent has been rather bypassed by events – the economic crisis. The abolishing of the (aesthetically catastrophic) pillar structure and the increased incorporation of criminal matters in particular within a more democratic process – their normalisation, one might say – will probably have quite a significant impact on the development of EU criminal law and policy, which I suspect will grow into a fully-fledged and sophisticated policy area, with the same kind of troublesome and sometimes useful interaction and interference with national criminal law that we have become used to in other overlapping policy areas, notably within the internal market.

However, in general it is the economic situation which is currently giving impetus to thought about the future direction of the EU, and it is striking that that almost universal reaction until now has been to call for far more supranationalism and deeper integration – EU control of budgets and spending and so on. I think this is often a rather shallow and panicky reaction to things which probably will not survive the end of the crisis, and while it seemed at one point as if the collapse of southern states was going to trigger the biggest step in EU integration since its formation (for spending is the heart of modern government, and of sovereignty, what possession of an army once was), the next few years will probably see a certain moderation of this first enthusiasm – not least because of the continued cool-headedness of Germany and its Constitutional Court.

3. You are concerned about the issue of subsidiarity; you have also written about its limits. Therefore, what is the true meaning of subsidiarity?

In fact, after more than two years since the Lisbon Treaty came into force, a persistent lack of legal (and judicial (?) alike) relevance of that principle seems to be obvious, in spite of abundant political references made to it. Would you please describe briefly your perspective on that? What should be done to enforce the legal and judicial relevance of subsidiarity? Or is subsidiarity (in the context of EU) "doomed" to remain a mainly political principle? What would be the means to employ in order to strengthen that principle?

What is the relationship between subsidiarity and proportionality?

And also, concerning the European Court of Justice: is the recent case-law of the ECJ a "clue" in the direction of consolidating the judicial review concerning subsidiarity?

It is possible to make careful and finely tuned textual and legal arguments about the meaning of subsidiarity and

proportionality, and I am in favour of that: I think that the task of lawyers and judges is to fit their preferences as persuasively and precisely as possible into the language and form of the text and the case law. I have made some of such arguments elsewhere[1], and won't repeat them here. However, there are worse things in life than woolly judgments, and the fundamental policy need continues to be for a better way of balancing and taking account of interests, whether this is done via a particular approach to subsidiarity and proportionality (my favoured path) or some other legal technique.

The real issue is that there are two separate questions which are relevant. One is the question of the extent to which the EU should detail its policies, and the extent to which it should confine itself to a broad-brush approach and let Member States fill in the details to suit their own national environment. That question matters, but the answer is complex, since an apparently decentralising approach cuts both ways – if much discretion is left to the Member States, then they end up spending a lot of their time and resources on implementing EU rules, and become essentially agents of the EU. This is infantilising, and prevents adult policy-thinking taking place at national level, as well as serving to bring large amounts of national rule-making under the supervision of the EU. On the other hand, if the EU dictates everything down to the last detail the Member States can simply cut and paste, and set their civil servants to more intelligent work, but there are of course other disadvantages, not least the inability to take account of specific national circumstances.

The question above is addressed and debated in law and scholarship, but the second question, below, has been less discussed, while it is at least as important. This is whether EU policies and rules should always and automatically take precedence over competing national policies and rules. It is

[1] 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 Common Market Law Review 63-84 (ed.).

about how interests should be balanced, and it requires conceding that there are conflicts of interest between levels, something that is usually only admitted by the more rabid sort of politician. Doctrines such as supremacy make the issue appear more black-and-white than it is, for Treaty derogations, mandatory requirements, and other legal nuances are in fact such policy balancing (limited supremacy, one might even argue) in a discreet and non-confrontational form. The question is whether legitimate national concerns have enough voice, a systematic enough voice, within the EU legal system. I think they are structurally under-represented, which is partly to do with the top-down origins of the EU, and its partial alienation from vested national legal systems, which have encouraged it to take an assertive and all-or-nothing approach. On the contrary, in a mature federal system one needs a sophisticated set of tools to determine how conflicts of interests should be balanced, and the current EU set is under-developed, not least thanks to a consistent reluctance by the European Court of Justice to address these issues in its judgments.

4. You have also an interest in the single market. Therefore, we would like to ask you to comment on the recent developments at the European Court of Justice in the field of fundamental freedoms? In other words, what are – from your point of view – the most significant cases delivered by ECJ lately?

While every so often there is an exciting case – *Zambrano*, *Mickelsson and Roos*, or the far-reaching assertions of the Court on free movement of capital recently – these often have less impact in practice than a first glance would suggest, and I think the striking story about the internal market is its long-term stability, now over a period of decades. Through crises and criticisms the Court sticks to its guns, and continues taking small, and occasionally slightly larger, steps towards greater

economic and social openness. There is however something depressing about this story; why is it necessary to repeat everything so often? How can it be that references still reach the Court which concern situations which are essentially about the application of *Dassonville* or *Cassis*? There is clearly quite a serious problem in at least some national legal systems with internalising EU law, and I think that the next phase of the internal market will not so much arise through new developments in its conceptual basis – however much fun it is for academics like me to write about *Mickelsson* and even *Keck* – but if and when the Court, or the EU legislator, take effective steps to improve the understanding and use of EU law within the Member States. One might think here of tightening the requirements of the effectiveness principle, harmonising some limited aspects of legal procedure, making damages more easily accessible for violations of enforcement of EU law, or even addressing legal education. All highly controversial, but things that could make a difference.

5. On the other hand, which might be the "cure" to solve the issue of purely internal situations (as limits of judicial scrutiny of national measures) in the fundamental freedoms?

Who needs a cure? If they really are internal, then there is no need for anyone outside that Member State, including the EU, to worry about them. The tricky issue is deciding what actually is internal, and where a situation or rule or application of a rule does, or could have, some cross-border impact. That is both legal, empirical, economic and philosophical. Upsetting people is also a form of externality! The 'answer' to the internal situation may be something similar to that suggested in an old Catholic joke: a boy goes to his priest and says 'father, I have such difficulty believing that there is a hell, a place of eternal damnation, and then also believing in the existence of a loving God. Surely such a God would not allow such a place?' 'My

son, says the priest, every good Catholic must believe in Hell, but nobody has to believe that there is anyone there'.

6. Is the recent case-law of the ECJ concerning EU citizenship fulfilling the promise of a "*Civis europaeus sum*" (following the great words of AG Francis Jacobs)?

I think *Zambrano* takes us a significant step further. It does seem to me a reasonable suggestion that a citizen should have a right to live in the territory of which she or he is a citizen, and if the price of protecting that right for a child is allowing their parents to stay too, then this seems to me a price that a civilised society should be happy to pay.

7. From your perspective, what would be the main challenges for the current European Court of Justice?

Getting national judges to use EU law properly and effectively. The ECJ needs to give more and clearer instructions in this regard, even though it may sometimes be in tension with the 'co-operative' relationship within the reference procedure, the lack of precision concerning the degree of discretion that national judges have when applying open EU norms (such as proportionality) and the lack of detail on the extent to which they are supposed to turn their national legal systems upside down and rewrite their own competence in order to protect an EU right (think effectiveness and *Comet*, etc.) is a hindrance to optimal use of EU law. There is a time for creative ambiguity and a time not to speak about difficult things, but I think this is probably a time for dull and useful clarity.

8. On the other hand, which role does play the purposive interpretation (generally) in law and more particular at the ECJ? Are there any „malaises" concerning this interpretation in the judgments delivered by the ECJ?

At the ECJ, the purposive interpretation seems to hold a privileged place compared to other means of

interpretation (systematic, literal, historical). Is this perception grounded? And also, which might be the justification that this kind of interpretation leads finally to a new law?

Well, it's all in the Treaty. If a judge reads the preamble and takes it seriously then he or she hardly has any room for any other approach. It always amazes me that the rhetoric of integration remains at such a hifalutin' level after each Treaty rewrite, not because I don't agree with it, but because most states manifestly don't. I think that given the text of the Treaty the far-reaching jurisprudence of the Court can broadly be understood in terms of textual loyalty.

9. Which might be the objective pursued by the ECJ in a case when it answers a preliminary reference relying heavily on facts? Is the division of functions between courts (the national court and the ECJ) still possible in the (current) system of Article 267 TFEU? And also is there still a (genuine) division between law and facts (as it was once)?

On the other hand, are there any dangers in relying on national law in judgment of the Court (not concerning the relevant law, but in the rational building-up of a judgment)?

I don't have anything to add here to what I have published elsewhere[2].

10. To sum up the above questions: Would there be any risks concerning the activism of the European Court of Justice? Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

[2] 'Abstractness and concreteness in the preliminary reference procedure: implications for the division of powers and effective market regulation', in Niamh Nic Shuibhne (ed.), *Regulating the Internal Market*, (Cheltenham, Edward Elgar 2006) 210-244 (ed.).

Judges are human, and there is always the risk of alienation between the levels. Yet being too careful not to upset national judges would not be a very effective or desirable path. The trick for the Court must be to balance its view of the ideal law against what it thinks it can get away with, and the fact that the system has not imploded after decades of often radical case law shows that they are doing quite a lot right.

11. Would you like to point out your major influences concerning methodology during your career? Which advice/ recommendation would you give to young researchers?

Methodology is not something that lawyers had to worry about until recently, and is a side-effect of changes in financing, and our need to explain to the broader community of academics what exactly we do and why it is worthwhile. On the one hand, there is no real method to the overwhelming majority of legal research projects or publications, unless one considers 'read, think, write' to be a method. What we do when we read cases and articles and add our own comments to the pile is akin to theory-forming in some other scientific branches, and to speak of 'method' there is largely misguided. This term is really appropriate for empirical research, which most lawyers do not do. On the other hand, in a less technical sense, methodology can be understood in a common-sense way just to mean 'this is how I am going to approach my problem, and this is why my approach makes sense' and it never does much harm to think about that question for a while. So while methodology in law is the language of the bureaucrat, not the academic, and I, like most lawyers, cannot see it without having a reaction similar to Trotsky when he heard the word 'culture', a practical and sensible reaction, for those who have the evenness of temperament to achieve it, is just to make sure that one always has some kind of answer to the questions 'how am I going to answer this question' and 'why am I going to answer it that way'. That answer may be necessary within the publication

itself, if it is destined for the more self-consciously inter-disciplinary kind of journal, or for the proposal, if one is at the begging-for-money stage of the year.

So perhaps they can make us have a methodology, but I hope they cannot make us take it seriously: doing something well is not the same as being able to speak well about what one is doing. The best footballer is not the best football critic, and the best artist is not necessarily the best analyst of art. The art of the legal academic is to analyse and criticise, and I worry that if we have to spend too much time thinking about what it is that we are doing we will have less time to actually do it, and, even worse, that we will become less good at doing it. Many a performer has noted that too much thinking about what one is going to do does not always improve performance. The lawyer should make her argument as sharply as she can, put it on display for others to look at, and leave it to others to try and describe what kind of argument it is.

Thank you very much.

BART DRIESSEN

Member of the Legal Service of the Council of the European Union.

Author of "Transparency in EU Institutional Law. A Practitioners Handbook - Second completely revised edition", Kluwer Law International, 2012.

First of all, we would like to thank you for accepting this interview.

Thank you![1]

1. We would like to ask you to describe your main landmarks in your professional career. How did you arrive at EU law?

As a student of law I always wanted to work for an international organisation. And I loved Constitutional law. I studied EC law and wrote my Master's thesis on separation of powers in the EC institutional system. Then I spent a few years studying totally different things – international relations theory in Canterbury, international law in Budapest – before I returned to EC law by joining an American law firm, where I did trade law and WTO law. Luckily all 'off beat' questions and problems tended to come my way, which forced me to keep a broad interest in different parts of EU law. After seven years of private

[1] Dr Bart Driessen is a member of the Legal Service of the Council of the European Union. This interview represents only the views of the interviewed. It does not bind, nor may it be attributed to, the Council or to its Legal Service.

practice I spent one year working for the Commission working on international aspects of government procurement. Since 2001 I work for the Council of the EU. In the Legal Service I first dealt with institutional matters (including transparency). Since 2008 I work in the External Relations Team.

2. You have defended your PhD thesis with Professor Koen Lenaerts, one of the most well-known names in EU law history. How is it to work with him? On more generally, what is the role of a master-disciple relationship nowadays?

Unlike most people, I wrote my thesis whilst I was working. Prof. Lenaerts at the time spent most of his time as Judge at the General Court. I was very lucky that he was willing to take me on as a Ph.D. student. In fact, we had most of our meetings in Luxembourg whenever I had to be there and I hardly saw the University of Leuven before I defended my thesis.

Academically, it was an extremely interesting and stimulating experience. Koen Lenaerts is a walking library on EU law. It was also a bit of a challenge: if there are two hundred issues in a text, he will spot two hundred. I really enjoyed the discussions and certainly, the interaction greatly improved both the final result and my understanding of EU law. Some of the best academic education I've had was in small groups. To have the chance to debate institutional law on a one-to-one basis at that level is a great privilege.

3. Concerning the subject-matter of your PhD thesis – interinstitutional agreements in EU law: could you please comment on the developments in EU law concerning those instruments since the Lisbon Treaty came into force? What is the meaning of providing an express legal basis in the TFEU for those agreements (i.e. Article 295 TFEU)?

First, in my view, the name of the interinstitutional agreement does not matter. Sometimes such texts are called interinstitutional agreements, sometimes joint declaration

(although, conversely, not every joint declaration is an interinstitutional agreement), modus vivendi, exchange of letters, or what have you. What matters is the content.

There are many interinstitutional agreements, some of which are clearly not intended to be legally binding. For example the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation explicitly provides so. Other interinstitutional agreements are, in my view, partially binding (e.g. the IIAs on the budget which implied an agreement under the old Article 272(9), last para EC) or wholly binding. What matters, in my view, is 1) whether there is a legal basis for the interinstitutional agreement in the Treaties or secondary law and 2) whether the participating institutions intended the text to be binding.

Speaking strictly personally, I doubt whether Article 295 TFEU is a legal basis. It says that '[t]he European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature'. The key word in the provision is the second 'may'. The provision was inserted with the Budget IIAs in mind, but even there it will depend on the question whether there is a legal basis and whether the parties intended the IIA to be binding.

4. More generally: could you please assess the main developments of the EU legal order brought by the Lisbon Treaty?

That is a very broad question. There are so many developments brought about by the Lisbon Treaty that many books have been written on that. I will mention two developments, which are perhaps not the most 'photogenic' ones but may turn out to be the most important in practice.

First, the introduction of a clear hierarchy of norms is significant. Before the Lisbon Treaty there was no clear

distinction between legislation and implementation in EU law. That has now been clarified. The legislator sets rules of general application, the Member States and the Commission implement them. That means that the roles of the different institutions have become much clearer. In addition, and not the least important change, the ordinary legislative procedure has been extended to agriculture, trade and other important fields of EU competence.

The ways and means of the EU's action in external relations have been rationalised. The Lisbon Treaty has combined different strands of external policy into one coherent whole with an institutional set up to match. Now there are external action objectives in Article 21 TEU that apply across the board and the scope of external 'sectoral' policies (trade, development, etc.) is better defined. In addition, the organisation for implementing external relations has been rationalised by joining the Commission's external action DGs with the CFSP units of the Council into the EEAS. It has taken some time for all of this to congeal and for people to get used to it, but now it starts to work.

5. You have extensively published in the field of access to information at EU level. Therefore, we would like to ask you to comment on the recent developments at the EU level, more precisely on the case-law of the EU courts (General Court and Court of Justice). Is the more recent case-law of those a mark of a more transparency? Or the contrary position is taking shape?

I do not think it is correct to approach all developments in transparency solely from the 'more v less' transparency angle. That is the point of view of people who, axiomatically, work on the basis that 'more transparency' is always good and 'less transparency' always bad. That is, in my view, too simplistic. Often 'more transparency' is, of course, beneficial but one should keep in mind that transparency is a means to an end. It

is also something that can be abused: there was a tendency in the last years for law firms to attempt to block unwelcome Commission decisions by filing spurious public access requests under Regulation 1049/2001. This clearly had nothing to do with the original purpose of the Regulation, which is to promote democratic accountability.

What we are seeing is that the Court of Justice is filling in some of the blanks left by the legislator. In 2001 one very contentious issue was the relation between Regulation 1049/2001 (the Public Access Regulation) with obligations on access to the file and confidentiality elsewhere in EU law. In 2010 the Court of Justice issued its first rulings on the issue *TG Ilmenau*[2] and *API*[3]), where it accepted the existence of a general presumption of confidentiality if and when rules on privileged access would restrict access to the file. In June 2012 the Court extended these principles from state aids and court documents to mergers in *Odile Jacob*[4] and *Agrofert*.[5] I believe we may now safely infer that the general presumptions logic can be applied to pretty much any other field where access to the file is regulated or limited. That is a very important improvement.

For the remainder the case law is slowly clarifying the remaining issues. In 2010 the relationship between Regulation 1049/2001 and Regulation 45/2001 (the Data Protection Regulation) was resolved by the Court in - what I think - an excellent judgment.[6] In other areas, where no concurrent rules

[2] Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-5885.

[3] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *API v Commission*, [2010] ECR I-8533.

[4] Joined Cases C-553/10 P and C-554/10 P, *Commission and Lagardère SCA v Éditions Odile Jacob SAS*, Judgment of the Court (Grand Chamber) of 6 November 2012 (not yet reported).

[5] Case C-477/10 P, *Commission v Agrofert Holding*, Judgment of the Court of 28 June 2012 (not yet reported).

[6] Case C-28/08 P, *Commission v The Bavarian Lager Co.*, [2010] ECR I-6055.

on access to information were at play, the Courts have shown a line more in favour of increased transparency (i.e., *MyTravel*,[7] *API* as regards closed court cases). That is not in principle illogical.

5. On the other hand, would you like to comment briefly on the issues connected to enhancing transparency in the legislative decision-making process. What would be the limits of that transparency? And also, what about the positions expressed in the case-law of EU courts?

We would also like you to assess the changes – if any – the Lisbon Treaty brought in the field of transparency of the (former) co-decision procedure.

Let's start with the logical limits of legislative transparency. Clearly, a very large measure of openness in decision-making is a good thing and the point does not need elaborating. However, I believe there are practical limits that make it impossible to achieve 100% transparency in decision-making.

Firstly, I believe that when everything is public, deals will be made in restaurants, corridors, wherever, but not in the limelight. This is why even the European Parliament, when it needs to co-ordinate its negotiation position vis-à-vis the Council, resorts to '*huis clos*' (closed doors) meetings where the public (and the Council) are excluded. In the Council a decision was taken by Coreper soon after the adoption of Regulation 1049/2001 to have a horizontal policy on this: in short, before the Council decides on a legislative matter, the documents concerned will be public with the exception of the names of the delegations. People are entitled to know what arguments are used by delegations, but the identity of the delegation will not be made public until the moment the Council has reached an agreement. Once the Council has reached a

[7] Case C-506/08 P, *Sweden v Commission (MyTravel)*, Judgment of 21 July 2011 (not yet reported).

decision, the document becomes public (if, at least, no other exception applies, which rarely is the case in legislative files). The rationale of this policy lies in the necessity to keep a small space for delegations to retract from their initial position, something which is much more difficult under outside pressures.

Secondly, if everything is public, people have a natural tendency not to note down everything anymore. This is what in Sweden is known as the 'empty archives problem'.[8]

In the *Turco* judgment[9] the Court of Justice took the view that transparency in the legislative sphere: 'contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights'.

However, even in that judgment the Court held a door open for the Council not to release legal advice which is 'of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question'[10].

The General Court has gone a few steps further. In *AccessInfo*[11] it declared the above-mentioned Council policy illegal. However, this judgment is currently under appeal[12].

[8] Eriksson, Fredrik and Östberg, Kjell, 'The problematic freedom of information principle', in Flinn, Andrew and Jones, Harriet (eds), *Freedom of Information - Open Access, Empty Archives?*, Routledge, Abingdon 2009, 113-124.

[9] Joined Cases C-39/05 P and C-52/05 P, *Turco v Council*, [2008] ECR I-4723, para. 46.

[10] *Ibid*., para. 69.

[11] Case T-233/09, *Access Info Europe v Council*, Judgment of 22 March 2011 (not yet reported).

[12] Case C-280/11 P, *Council v Access Info Europe*, pending (ed.).

As regards the changes brought about by the Lisbon Treaty, the biggest one in practice is that the Council must now legislate in public. This provision was already included in the draft Constitutional Treaty and thence it influenced the practice of the institution, so that one can say that much of that had already been implemented before the Lisbon Treaty entered into force. The other legal change consists of the broadening of the Treaty legal basis for public access to documents to all institutions and bodies of the EU. In practice almost all institutions and bodies had already adopted rules identical or very similar to Regulation 1049/2001, so that the practical impact is more limited than seems to be the case at first sight. In any event, this change will only have practical effect once Regulation 1049/2001 has been amended.

6. Also concerning an interesting issue of transparency: what is your opinion concerning the possibility of making public the entire file of a case brought to the EU courts? Would this be possible? Would this be feasible? And also would that be desirable?

The Court made it very clear in *API*[13] that 'pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission'. The Treaty of Lisbon in fact excludes the judicial activities of the Courts (as well as certain activities of the ECB and the EIB) from the general rules of transparency. There is therefore no obligation on the Courts to making case files public, although the Court of Justice accepted in *API* that, once a case has finished with a decision by the Court, 'there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court'.[14] However, even if this means that the *other* institutions

[13] *API*, para. 77.
[14] *Ibid.*, para. 131.

no longer can automatically deny requests for public access to Court proceeding documents held by them, this is not the case for the Court itself.

Does this mean that it is impossible for the Court to go beyond the Treaty of Lisbon? The ECB and the EIB are only covered by the Treaty provision on public access to documents 'when exercising their administrative tasks' yet the Banks do consider documents concerning their cases as covered by their public access rules (even if they apply special exceptions when needed). It thus comes down to the justification for the confidentiality of the case files. Apart, of course, that there may be aspects of data protection, commercially or otherwise sensitive information, the Court bases the need for confidentiality on the need for court proceedings to take place 'in an atmosphere of total serenity'[15]. On the basis of that logic, I don't expect the Court to change its line soon and, frankly, I would agree with it.

Thank you very much again.

[15] *Ibid*., para. 92.

MARIOLINA ELIANTONIO

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Assistant Professor at Maastricht University (2007-) and Legal Advisor at Milieu Ltd (Brussels, Belgium) (2012-).

Her research at Maastricht University is focused on the relationship between European law and national administrative law, in particular the role of national administrative courts in the enforcement of European law.

At Milieu Ltd, she carries out conformity checking for EU Directives, mostly in the field of environmental law, prepares proposals for study for the EU institutions in the field of environmental and administrative law, and manages multi-country projects on EU law.

First of all, we would like to congratulate you for your impressive academic achievements. You have also published your PhD thesis ("Europeanisation of Administrative Justice? The influence of the ECJ's case law in Italy, Germany and England"[1]), a worthy example of comparative methodology employed in the field of European legal studies.

[1] Europa Law Publishing, Groningen, 2008.

1. We would like to ask you to describe the main elements of a European Union administrative law. Is there such a branch of law as European Union administrative law? Which is the perspective of the European Union to impose/create such a law?

First of all, it must be clarified that, when one speaks about "European Administrative Law", two different concepts are referred to and must be distinguished. In a narrower sense, European Administrative Law can be considered as the administrative law which regulates the direct and indirect execution of European Union law, i.e. the administrative law of the European Union. In a broader sense, European Administrative Law can be considered as the process of harmonization of the national legal standards for administrative action carried out by European legislation and the case law of the Court of Justice of the European Union. This process is also often referred to as "Europeanization of administrative law".

Concerning European Administrative Law in the first sense, it should be said that only some parts of the administrative law of the European Union, are laid down in the written sources of European Union law. Even today, more than fifty years after the first Community Treaty entered into force, there is not such thing as a "European Code of Administrative Procedure", and the European Union still lacks a coherent and comprehensive set of codified rules of administrative law.[2] Given this fragmentary nature of written law, the case law of the Court of Justice of the European Union (CJEU) played the main role in the development of European Administrative Law and, specifically, of legal principles governing administrative activity

[2] J. Schwarze, *European Administrative Law*, revised 1st edition, London 2006; J. Schwarze*, Europäisches Verwaltungsrecht*, 2nd extended edition, Baden-Baden 2005; J. Schwarze*, Droit administratif européen*, 2nd completed edition, Bruxelles 2009.

in European Union law. The landmark decision in the case of *Algera*,[3] concerning the question of revocation of administrative acts constitutes the starting point for the development of European Administrative Law. From that point on, the Court of Justice started to shape and develop European Administrative Law on the basis of unwritten general principles of law common to the constitutional traditions of the Member States.

Also concerning European Administrative Law in the second sense, the main driving force behind the process of Europeanisation of administrative law is the CJEU. After having been developed by the CJEU, the unwritten general principles of law started to reverberate back into the law of the Member States. In this way, national administrative laws become increasingly "Europeanised" since Member States have, as a consequence of the duty of loyal cooperation laid down in Article 4(3) of the Treaty on European Union (TEU) (ex-Article 10 TEC), the duty to apply the case law of the CJEU whenever they are acting within the scope of application of EU law. This has consequences, for example, for the English administrative law system, which absorbed the "European" principle of proportionality which was unknown until that point to English courts.

Having highlighted the role of the CJEU in the development of European Administrative Law (in both of the meanings discussed above), it should not be forgotten that also written law has been playing an increasingly important role in this process of development.

As far as the administrative law of the European Union is concerned, European competition law presents the most prominent example for codified standards of European Administrative Law, especially with Regulation (EC) No 1/2003 which determines the procedure in antitrust matters and creates

[3] Joined Cases 7/56 and 3-7/57, *Dineke Algera and Others. v Common Assembly*, [1957] ECR 83.

a system of cooperation between the Commission and national courts. In the area of indirect execution of EU law, an early example of codification is the European Customs Code from 1992. As far as the process of Europeanisation of national administrative law, one notable example in the field of procedural law are the Directives concerning public procurement, which partially harmonise the rules applicable before national courts in claims concerning public works contracts.

2. Which are in your opinion the major judgments delivered by the European Court of Justice in the field of European Union administrative law?

Again here a distinction should be made between the two meanings of "European Administrative Law" mentioned above.

As far as European Administrative Law in the strict sense is concerned, certainly the *Algera* case should be mentioned where the CJEU started to develop unwritten principles of law on the basis of the common constitutional traditions of the Member States.[4] Since then, the Court has acknowledged a large number of such general principles, such as the principle of legality of administrative action,[5] the principle of proportionality,[6] of legal certainty[7] and the protection of legitimate expectations,[8] to name just a few.

As far as the Europeanisation process of national administrative laws is concerned, one cannot but start from the

[4] *Ibid*., 83.

[5] Joined Cases 42 and 49/59, *S.N.U.P.A.T. v ECSC High Authority*, [1961] ECR 101.

[6] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

[7] Case 13/61, *Bosch and Others*, [1962] ECR 45.

[8] Case 111/63, *Lemmerz Werke v ECSC High Authority*, [1965] ECR 716; Case 81/72, *Commission v Council*, [1973] ECR 575.

Johnston[0] and *Heylens*[10] cases, where the CJEU for the first time recognized that the principle of effective judicial protection is binding for the Member States. Of equal importance for this Europeanisation process is the *Factortame*[11] case law which has significantly changed the system of interim relief against the actions of the public authorities in the United Kingdom, and which is often used as a clear case of spill-over effect of European standards into purely national situations.

3. Please describe the significance of the Lisbon Treaty and also of the Charter of Fundamental Rights of the European Union from the point of view of the European Union administrative law? And also more specifically from the perspective of human rights protection.

As a general introductory remark, it must be pointed out that the Treaty of Lisbon did not bring any significant change in the traditional forms and instruments of action of European Administrative Law. In fact, the Treaty of Lisbon reinstated and codifies the already existing principle of administrative autonomy of the Member States (in Article 291 paragraph 1 TFEU), according to which it is generally for the national bodies to execute EU law according to their national institutional and procedural rules. The European institutions are only competent in specific fields such as the area of competition policy where the Commission has the power to execute the relevant rules in the form of direct administration.

While the overall distribution of competences is left untouched by the Treaty of Lisbon, some perspective for development of the administrative law of the European Union

[9] Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECR [1986] 1651.

[10] Case 222/86, *Unectef v Heylens*, [1987] ECR 4097.

[11] Case C-213/89, *The Queen v Secretary of State for Transport, ex parte Factortame*, [1990] ECR I-2433.

is offered by the newly introduced Article 298 TFEU. This provision commits the Union's administration to the principles of openness, efficiency and independency. However, while paragraph 1 mainly codifies the principle of "good administration" which had already been developed by the CJEU, paragraph 2 of the provision mandates the Parliament and the Council to lay down a legal framework establishing the further requirements for the European administration.

Furthermore, the right to good administration has now been embedded in Article 41 of the Charter of Fundamental Rights and is binding upon the EU as well as the national administrations when they are acting within the scope of application of EU law.

Paragraph 1 of the provision creates an individual right that all proceedings must be subject to the rule of law and that everybody's affairs have to be handled impartially, fairly and within a reasonable time. Paragraph 2 guarantees the right to be heard as well as an access right to documents and places an obligation on the administration to give reasons for its decisions. Paragraph 3 provides a right to claim damages which is in accord with the non-contractual liability of the Union for any damage caused by its institutions or by its servants enshrined in Article 340 TFEU. Finally, paragraph 4 stipulates every person's right to communicate with the institutions of the Union in an official EU language of choice.

What needs to be pointed out concerning the right to good administration is that, prior to its incorporation into the Charter, this right was already part of the general principles of EU law recognized by the CJEU. The Charter, however, now gives it clear written constitutional basis. This could be seen as an evidence of the tendency to codify the case law of the CJEU in the area of European Administrative Law.

Concerning the process of Europeanisation of administrative law, the only significant change is that of the introduction of a new Title XXIV on Administrative

Cooperation. Within this Title, Article 197 TFEU is of special relevance.

Its first paragraph affirms that the "effective implementation of Union law by the Member States [...] shall be regarded as a matter of common interest". The Union can ultimately achieve its character as a community based on the rule of law only if its law is applied as consistently as possible in all Member States. This provision is however only of symbolic significance, since it does not create any obligations. At the same time, in its third paragraph, Article 197 TFEU states that its provisions are without prejudice to the obligations of the Member States to implement Union law. The limited impact of these provisions can be seen also in the fact that the Union only possesses supportive competences in this field, notably excluding any harmonisation of Member States' laws or regulations. Article 197 paragraph 2 TFEU contains the Union's offer to support the Member States in their efforts to improve their administrative capacity to implement European Union law. This support may include facilitating the exchange of information and of civil servants as well as supporting training schemes. Article 197 paragraph 2 clause 3 TFEU stresses, however, that no Member State is obliged to avail itself of such support.

Given therefore the fact that the Lisbon Treaty has not brought significant changes in this area, the question of whether European uniform (or at least harmonized) rules and principles for national administrations and courts are desirable remains open. Jürgen Schwarze, one of the most prominent scholars of European Administrative Law, has recently advocated that "it might be suitable to codify at least the basic principles of European administrative procedures on the basis of a yet to be established competence in the Treaties".[12] However, in his own words, a Treaty competence is not present as of today and only

[12] J. Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon', *European Public Law* (2011), p. 285-304.

a future Treaty might tell us whether Member States are ready for such step.

4. Please explain briefly your perspective on the interplay between the judgments of the European Court of Justice in *Rheinmühlen* and *Elchinov*. Have the lower national courts been brought in the front line of the dialogue between courts in the preliminary rulings system? Which is, from your point of view, the main reason behind such (if there) a development.

As is well known, the *Rheinmühlen* case law[13] established that the capacity of lower courts to ask preliminary questions cannot be curtailed by a rule of national law whereby a lower court is bound to the rulings of a higher court. The rationale behind this ruling was to ensure, through the preliminary ruling procedure, the uniform interpretation of European law. In order words, the conflict between, on the one hand, the national rules concerning the legal force of higher courts' decisions and, on the other hand, the principles of primacy and effectiveness of EU law, was decided in favour of the latter.

In the *Elchinov* case,[14] Advocate General Villalón questioned the necessity to maintain this case law: he suggested to restrict of the role of the CJEU as sole interpreter of European law, grant more of this interpretative power to the national highest courts and thus restrict the possibility for lower national courts to ask preliminary questions where they disagree with the binding rulings of their higher courts on the interpretation of European law. He based his opinion on the argument that, in the last years, a number of instruments have been developed to correct court decisions allegedly breaching EU law, such as

[13] Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] ECR 33.

[14] Case C-173/09, *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, Opinion delivered on 10 June 2010.

the possibility for the Commission to bring infringement proceedings because of judgments breaching EU law, and the *Köbler* liability for judicial acts, making it no longer necessary to by-pass national procedural autonomy to ensure the effectiveness of EU law. Furthermore, in the AG's view, the increased workload the ECJ makes it pressing for the ECJ to share the task to provide the authoritative interpretation of EU law with the national courts.

These arguments have been completely ignored by the ECJ, which, by simply restating its settled case law, held that national procedural rules binding a national lower court (which is called upon to decide a case referred back to it by a higher court hearing an appeal) to the ruling of the higher court which the lower courts considers to be inconsistent with European Union law, are contrary to EU law.[15]

This judgment seems to confirm the CJEU's view of national courts as "EU courts of general jurisdiction", in charge of the application of EU law, while it does not pick up the AG's proposal to establish a stronger partnership with national *supreme* courts in the task of *interpretation* of EU law. This is a situation which, in my opinion, should not be changed.

With the enlargement of the EU and the growth of the number of courts within the EU already posing great challenges for the functioning of the EU court system in general and, more specifically, for the Article 267 TFEU procedure, the need to ensure legal unity and a uniform interpretation of EU law has grown and not shrank. To entrust at least 29 courts – i.e. 2 EU courts and at least 27 supreme courts in the Member States – or, in fact, many more, because most Member States often have more than one supreme court, with the task of supplying an authoritative interpretation of EU law which cannot be questioned, seems to be an unacceptable perspective. Such a

[15] Case C-173/09, *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, [2010] ECR I-8889.

situation does not provide legal certainty and makes legal unity within the Union impossible. The idea of dividing the power to provide the authoritative interpretation of EU law between the ECJ and the national supreme courts has, therefore, correctly been rejected.

5. On the other hand, in your PhD thesis you have extensively assess the depth of Europeanisation of the administrative justice in certain Member States of the European Union. Which are, since the completion of thesis, the main developments that has occurred in that field?

Specifically in the procedural fields which I have analysed in my PhD, the cases *Pontin*[16] (concerning time limits) and *Asturcom Telecomunications*[17] (concerning the ex officio application of EU law) have confirmed the previous, balanced approach of the CJEU vis-à-vis national procedural rules, whereby national procedural autonomy is respected and national procedural rules are to be measured against the standards of equivalence and effectiveness.

On the standards to be respected by national procedural rules, and in general on the influence of the CJEU's case law on national procedural law, certainly one of the most relevant cases issued in the past years is *Alassini*,[18] which has somehow brought clarity on the relationship between the principles of effectiveness and effective judicial protection. Until recently, the two principles have been used somewhat interchangeably by the CJEU.[19] In *Alassini*, the Court made clear that the

[16] Case C-63/08, *Virginie Pontin v T-Comalux SA.*, [2009] ECR I-10467.

[17] Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, [2009] ECR I-9579.

[18] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini and Others v Telecom Italia SpA and Others*, [2010] ECR I-2213.

[19] See on this point. S. Prechal and R. Widdershoven, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', *Review of European Administrative Law* (2012) p. 82.

principle of effective judicial protection is additional to the principles of equivalence and effectiveness. The Court additionally clarified what is the standard for the principle of effective judicial protection to be met and, in doing so, used very clear human rights, and, specifically, ECHR language.

Another case which is definitely worth mentioning is *DEB*[20], where the CJEU recognized for the first time that the right of access to legal aid should be recognized also to legal persons. This case is important because, while recognizing the principle of national procedural autonomy, the CJEU relied on Article 47 of the Charter which grants the right to an effective remedy and the case law of the European Court of Human Rights in order to its statements. A question which will surely arise in the future is whether there are several different principles of effectiveness and what the implications of the entry into force of the Lisbon Treaty are for the principle of effective judicial protection.[21]

6. In your works, you do extensively rely on a comparative method in studying European law. We would like to ask you to describe the tools you do employ. More precisely, are there any constraints in choosing/assessing the relevance of a certain case or line of case-law from a certain European State?

The constraints in the use of the comparative method in legal research are numerous and have been highlighted by many scholars. For example, one may not be familiar with a foreign legal system as one is with one's own, or may run the risk to take the legal institute or doctrine under examination out of its

[20] Case C-279/09, *DEB Deutsche Energiehandels - und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, [2010] ECR I-13849.

[21] See on this point J. Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty', *Review of European Administrative Law* (2011), p. 53.

overall context. Moreover, a general hurdle is constituted by the language, since most of the legislation and case law is still only available in the national language.

Specifically with regard to the use and analysis of foreign case law in a comparative investigation, one should not forget to take the different judicial traditions of the legal systems under examination into account. For example, one should not overlook the differences in drafting styles of rulings between the United Kingdom, Germany and France. The issue of access to the relevant cases is also one which should not be overlooked. As of today, there are several databases which contain national case law, such as the Beck database for Germany, or the Dalloz database for France or the website Rechtspraak.nl for the Netherlands, but not all may contain all rulings. From a more methodological point of view, it is important to find a systematic way to select cases to be analysed, for example a systematic search into a specific time span or with specific keywords. For my PhD, for example, I made systematic searches into the rulings which mentioned the name and/or case numbers of some relevant, previously selected, CJEU's rulings. Of course the limitation of this method is that it does not (because inevitably it cannot) take into account cases in which national courts used the principles established in the CJEU's ruling without mentioning the name or case number of the relevant European case law.

7. In the end, we would you like you to point out your major influences concerning methodology during your career? Which advice/recommendation would you give to young researchers?

Certainly it has been essential to have written my PhD at Maastricht University. Here, I have had the chance to follow the training programme organised by the Ius Commune Research School, which provides the possibility to young researchers to receive classes on legal research, comparative

law and legal methodology, and to present their research and obtain feedback from senior researchers in their fields.

To young researchers I can say that comparative legal research is certainly a challenging, yet rewarding exercise, and that they should not shy away from it. Moreover, I would advice, in whichever area they plan to write, to always keep the influence of the EU into account: there is hardly an area of law which has not been touched by the EU as of today, and it is essential, in order to have a full picture of their subject matter, to keep the supranational element into account.

Thank you very much.

NIELS FENGER

Professor of Administrative Law at the Faculty of Law, University of Copenhagen.

Education: Diploma in European Law, European University Institute, Florence (1992); Doctor of Laws (2004).

***Employment:** Head of Section, Ministry of Justice (1992-1994); Référendaire at the Court of Justice, Danish Advocate General (1994-1995); Research Fellow at the Faculty of Law, University of Copenhagen (1995-1996); Head of Section, Ministry of Justice (1996-2000); Head of Division, Ministry of Internal Affairs (2001-2002); Director of the Legal Service, EFTA Surveillance Authority, Brussels (2002-2009) - he has in that capacity appeared in a considerable number of cases before the European courts.*

He is a qualified solicitor.

First of all we would like to thank you warmly for accepting this interview.

We have to state in the beginning that, along with Mr Professor Morten Broberg, you have authored an important book on the preliminary references to the European Court of Justice[1].

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

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[1] *Preliminary References to the European Court of Justice*, Oxford University Press, 2010. Translated into Romanian "Procedura trimiterii preliminare la Curtea Europeană de Justiție", Wolters Kluwer, 2010.

Also, is it possible to provide us with a description of your main teaching and research interests in EU law?

My background is probably somewhat different from most academics as I have spent the bulk of my professional time being a practitioner. After having become a professor, I still retain a close link to the non-academic world. For example, from time I represent the European Commission in legal proceedings before the ECJ just as I sit in governmental commissions and the like.

I believe this practical experience to be highly valuable for my teaching and research. First, it gives me a greater insight into what issues are relevant for those working in practice, something which helps me in deciding what to write about and to do so in a manner that, hopefully, increases the usefulness of my writing. Second, it provides me with an insight into the context that the law operates in and thus, all things equal, enhances my ability to predict how legislators and judges will deal with a given legal issue. Third, my practical experience helps me in giving the students examples that are relevant for the situations that they will soon find themselves in.

I graduated from the Law Faculty at Copenhagen University in 1992. Thereafter, I worked in the capacity of Head of Section in the Danish Ministry of Justice from 1992 to 1994 and from 1996 to 2000, first with EU law and thereafter with Danish constitutional and administrative law. I moreover, served as a Legal Secretary at the Court of Justice of the European Communities in the period 1994-1995. I was Head of Office in the Danish Ministry for Interior in 2001-2002. From 2002 to 2009 I worked as Director of Legal and Executive Affairs at the EFTA Surveillance Authority. Since 2009, I have held the chair as professor in Administrative Law at the Law Faculty of Copenhagen University.

My background entails that I have dealt with most parts of EU law except agriculture and external relations. My writing has primarily dealt with preliminary references, the Rules of

Procedure of the ECJ, the administrative law of the EU, and the relationship between national law and EU law. However, I have also written on State aid law and free movement.

I have taught in both EU law and Danish administrative law.

2. From the point of view of the legal order you are coming from – Denmark – are there any lessons that might useful for a comparative perspective on EU law?

Nothing springs to mind. The interaction between EU law and Danish law has been rather smooth, probably because of the considerable pragmatism that characterises Danish law.

Moreover, I don't think that one can find examples of how Danish law has influenced EU law. Perhaps an example could be the wish to have more open rules on access to documents in the administration. Denmark has consistently over the years, both in the Council and before the ECJ, argued for more transparency in EU. However, it would be presumptions to argue that Denmark has been the most influential state in securing a more open EU administration.

3. You held the position of Head of the Legal Services at EFTA Surveillance Authority. Therefore, we would like to ask you to provide a comment on the issue of convergence of EFTA and EU. Is there a future of a EFTA-model in a framework of a two-(or more-) speed EU?

I assume that you refer to an EEA-model and not an EFTA model.

I don't believe that the EEA-Agreement can usefully serve a paradigm for a two-speed EU. The EEA-agreement was designed as a medium-speed alternative to membership for seven countries on the outskirts of Western Europe that for various reasons either could not, or would not, contemplate full membership of the EC but, who after the fall of the iron curtain, mostly found themselves ready and able to enter

mainstream European politics. As those political conditions changed most EEA-EFTA state joined the EU. Today, the EEA-Agreement functions under a third set of circumstances where EEA is hardly of great importance to the EU, but paramount for the three EFTA Countries in securing access to the wider European Market.

The EEA-Agreement means that the three EEA-States, while retaining their formal sovereignty, in practice takes over EU legislation without having had any genuine influence of the content of that legislation. As I write in my book "EFTA and EEA", on page 61, already during the negotiations on the EEA-agreement "it had become clear that the acceptance of large and important parts of the *acquis communautaire* and the case law of the ECJ amounted, in practice, to taking over obligations quite similar to those of membership of the EC without having the same say in the political decision-making process."

As I understand the discussions on a two-speed EU, the intention is not that the "high-speed countries" should make rules that are intended to bind the other Member States. Hence, I don't really see a clear parallel to the EEA-Agreement.

For the same reason, it has never been on the table that States that wishes to join the EU, such a Turkey, should first join the EEA.

4. From your perspective, what would be the main challenges for the current European Court of Justice?

Obviously, one of the main issues is the workload, especially for the General Court. It is a serious problem that the time that it takes to decide a case is so considerable. Admittedly, the ECJ has managed to reduce considerably the average case handling time for preliminary references. However, much of that laudable reduction may be attributed to the two latest enlargements of the European Union and the consequent increase from 15 to 27 judges sitting in the ECJ.

Until now this expansion has not been followed by a similar increase in cases from the new Member States. There is normally a certain time-lag before the full weight of a new Member State is reflected in the number of cases brought before the General Court and the ECJ. Thus, it may be expected that within the foreseeable future there will be a substantial growth in the number of both preliminary references and direct actions relating to the new Member States.

At the same time there has been an extension of the areas of law in which it is possible to make a preliminary reference. Of particular importance is the Lisbon Treaty's expansion of the Court's jurisdiction in the area of Freedom, Security and Justice. On that basis, one might assume that not only the General Court, but also the ECJ will soon face another crisis of workload.

For the preliminary procedure a constant challenge is to achieve a balance where the Court is not asked to treat more cases than it can handle while still ensuring that EU law is being developed primarily by the Court of Justice itself. If no measures are taken it is not unlikely that both the unity and the impact of the Court's decisions will diminish as their number increases and as they deal more frequently with questions of secondary importance or of interest only in the context of the case concerned.

The difficulty in this task has not become smaller considering that presently the Member States' appetite on embarking on further Treaty change is rather limited. Moreover, the recent experience in relation to the suggestion to increase the number of judges at the General Court, indicates that changes of a more expensive nature will find little favour with the Member States in these times where the States themselves are facing tough budgetary decisions.

Another challenge is how the case law of the Court of Justice is perceived in some Member States. Not all national judges are always convinced about the reasoning of the Court

of Justice. In Denmark, there are no known examples where a referring court has not followed a preliminary ruling. However, it cannot be excluded that the incentive of some national judges to make preliminary references to the ECJ is diminished due to scepticism to the interpretative canons of EU law that differs considerably from the interpretative style that one finds in Danish law. Let me emphasise that I find this scepticism somewhat exaggerated. My point is merely that I often hear it voiced in discussions with Danish judges. It might be of interest that the same criticisms are voiced against some ruling of the Court of Human Rights.

5. Could you please comment on the goals of the competition among European Courts – the European Court of Justice and the European Court of Human Rights? What would be the usefulness of an adhesion to the European Convention on Human Rights as far as the European Union has already adopted the Charter of Fundamental Rights?

I am afraid that this is not an issue that I know enough in order to have a qualified opinion. That being said, I am not sure that the word "competition" adequately reflects how the judges of the two courts view the situation.

6. What is your opinion concerning the "construction" of the principles of the ECJ? What is the role played by the preliminary reference?

The preliminary reference procedure has clearly been the arena where the ECJ has had most occasions to develop general principles of EU law. Obvious examples are the principle of primacy, direct effect and the limits to procedural autonomy.

Any legal system needs to develop principles in order to obtain an internal consistency in the law and arrive at result that can be accepted as just. However, some might question the readiness that the ECJ sometimes shows in discovering principles that the founding fathers and EU legislator probably

never imagined having inserted into the Treaties and secondary legislation. I personally find a judgment such as Case C-555/07, *Kücükdeveci*, disconcerting.

7. On the other hand, which role does play the purposive interpretation (generally) in law and more particular at the ECJ? Are the any „malaises" concerning this interpretation in the judgments delivered by the ECJ?

At the ECJ, the purposive interpretation seems to hold a privileged place compared to other means of interpretation (systematic, literal, historical). Is this perception grounded? And also, which might be the justification that this kind of interpretation leads finally to a new law?

Let me make a couple of observations:

First, in a legal system with 23 different languages one simply cannot stick to a literal interpretation in the same way as it is possible in a legal system that only operates in a single language. For that reason alone, the Court often has no other choice than to resort other modes of interpretation.

Second, I believe that one should distinguish between the interpretative style of the ECJ in cases concerning what one could call constitutional issues and the way that the ECJ deals with technical issues such as VAT cases or the common customs tariff. In the latter type of cases, my feeling is that the ECJ to a far larger extent tries to stick to the precise wording of the relevant secondary legislation (if such a precise wording can be found when reading the 23 different language texts together). I also have the feeling that this is often overlooked in academic circles that, for understandable reasons, prefer to focus on case law on the "bigger issues" and not to the same extent study what has now become the bulk of the cases before the ECJ, namely interpretation of secondary law such as the rights of passengers in cases of denied boarding or rules on animal welfare.

Third, I believe that, especially in relation to secondary legislation, we witness a clear tendency of the ECJ to look more and more to the preparatory works thereby seeking to uncover the intentions of the EU legislator. This is not an easy task as the EP and the Council might not have had the same intentions with a particular rule, not to mention that the various Member States in the Council might not all view the matter in the same manner.

8. Which might be the objective pursued by the ECJ in a case when it answers a preliminary reference relying heavily on facts? Is the division of functions between courts (the national court and the ECJ) still possible in the (current) system of Article 267 TFEU? And also is there still a (genuine) division between law and facts?

On the other hand, are there any dangers in relying on national law in judgment of the Court (not concerning the relevant law, but in the rational building-up of a judgment)?

I agree with the premise behind your question, i.e. that the ECJ is to an increasing degree designing preliminary rulings in a manner that integrates national law and facts so that no discretion is left to the referring national court.

In my opinion, the old principle, according to which the task of the Court of Justice is only to interpret EU law in the abstract, but not to apply it in the actual case, hardly reflects how the Court today sees its own competence. Originally, preliminary rulings were formulated in abstract and general terms. What lay behind this practice was presumably a view that the distinction between abstract interpretation and its application to the facts required the Court of Justice to leave a certain scope for the national court concerning the application of the ruling. This is no longer the case. To give just a couple of recent examples,

- In Case C-429/09 *Fuß*, the ECJ concluded in the operative part of the judgment that a "worker *such as Mr Fuß in the*

main proceedings who has completed, as a fire-fighter employed in an operational service in the public sector, a period of average weekly working time exceeding that provided for in Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, may rely on European Union law to establish the liability of the authorities of the Member State concerned in order to obtain reparation for the loss or damage sustained as a result of the infringement of that provision. … European Union law precludes national legislation, such as that at issue in the main proceedings…"

- In Joined Cases C-11/06 and C-12/06 *Morgan*, the operative part of the judgment reads as follows: "Articles 17 EC and 18 EC preclude, *in circumstances such as those in the cases before the referring court*, a condition in accordance with which, in order to obtain an education or training grant for studies in a Member State other than that of which the students applying for such assistance are nationals, those studies must be a continuation of education or training pursued for at least one year in the Member State of origin of those students."

- In Case C-158/07 *Förster*, part of the operative part of the judgment holds that a "*student in the situation of the applicant in the main proceedings* cannot rely on Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State in order to obtain a maintenance grant"[2].

Personally, I don't have serious quarrels about this tendency of the ECJ. The distinction between interpretation and application is far from unambiguous. Furthermore, an abstract and general answer will often be of limited value to the referring court, just as there sometimes will be a risk that different

[2] All underlined by the author.

national courts will apply the interpreted EU provision in divergent ways, contrary to the purpose behind Article 267.

Your question, however, goes to why the Court has taken this step. There you have to ask the judges themselves. I would imagine that some of the reasons are those I just mentioned. It might also be that it is sometimes easier for the judges to agree on the result in the particular case than on the abstract interpretation of the relevant legal rules.

Another possible reason – but this really is pure speculation – could be the swift that we have seen in the typical career of the judges at the ECJ. More and more their background is from the national courts and not from academia. Judges are used to decide concrete cases and to do so after having studied the particular facts of the individual dispute in detail. Professors perhaps have a stronger inclination to approach a legal question in a more abstract manner.

9. To sum up the above questions: Would there be any risks concerning the activism of the European Court of Justice? Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

In your important book on the preliminary reference system you discard the existence of any political explanations underlying the reasoning of the European Court of Justice. But still are there any political reasons behind the reasoning of the ECJ?

I assume that your reference to activism goes specifically to the interpretation of Article 267 and the way that the ECJ approaches that provision. It is in that very context that Broberg and I have warned against theories of political scientists that view judges as strategic actors in nearly the same way as one can describe politicians. Personally, I have met no Danish judge who sees himself as being in a power struggle with the Supreme Court and who uses EU law to undermine the authority of the higher courts. That is simply not the way that they think.

That being said, law does not work in a complete legal vacuum. This is also so with regard to the preliminary ruling procedure. As Broberg and I speculate in Chapter one of our book on preliminary references:

"In the 10 years from 1960 to 1969 there were only 75 references, in other words an average of fewer than eight per year. Against this background it is hardly surprising that the Court of Justice developed a practice that was characterised by a desire not to discourage references. Among other things, the Court of Justice laid down a broad definition of what was to be considered 'a court or tribunal of a Member State', and it expressly refrained from assessing the relevance of a question referred. Likewise, it applied some rather relaxed requirements regarding the referring court's description of the facts and national law as well as regarding the precision of the preliminary question as such. It was also characteristic that the Court described the relationship between itself and the national courts as that of a non-hierarchical cooperative procedure between equal partners, where each was responsible for clearly defined tasks.

Following its somewhat hesitant beginning the preliminary reference procedure has grown rapidly and today is in danger of becoming a victim of its own success. …

Arguably, the increase in the volume of cases was a contributory factor to the Court of Justice changing its practice in the mid 1990s on a number of important points regarding preliminary references"

10. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

As already indicated, I believe that there is a risk to the unity and coherence of the ECJ's case law, simply because the number of cases brought before the ECJ is now so enormous that not even the judges themselves know all the cases in detail.

Moreover, the number of cases necessarily entails that most are dealt with by chambers. This in itself enhances the risk that divergent case law arises.

However, it is difficult to see any remedy to that situation. The Court is doing its best (and doing well) and the problems that I mention may arise before any court that is faced with the same challenges as the ECJ.

11. The ECJ Judgment in *Laval* case brought in the first line the Nordic social model. Has the ECJ eroded this model? Could you please describe in short your opinions on the current tension between market (i.e. fundamental freedoms) and social rights after *Laval* (and also *Viking* and so on).

And in a broader context, is (or would become) the EU a social market economy?

I had the pleasure of being agent for the EFTA Surveillance Authority in the *Laval* case. That, however, puts me in an awkward position, as I think one should be reticent in given academic or personal opinions on matters where one has acted as legal council. Hence, I will pass on this question.

12. Coming back to scholarly activities: Could you please provide us with a brief insight of your working methods in writing a book like that concerning the preliminary references? In other words, what means do you employ in gathering and interpreting (and also establishing the relevance of) an enormous record of judgments delivered by the European Court of Justice?

When writing about a topic which is mostly governed by ECJ case law, the search system at the Court's web site is a tremendous help. However, while one can relatively easy make a search on a given substantive article of the treaties or on secondary law, a search on Article 267 entails that all preliminary judgments pop up regardless of whether the

judgment concerned contain anything of interest to the preliminary procedure as such.

Therefore, we have been forced to identify the relevant judgments by making free-text searches on words that typically are used in relation to the legal issues that we deal with in our book such as "admissibility" and "acte clair". Moreover, we have made searches on leading judgments, as the Court often cites earlier case in later judgments. Examples would be "Cilfit" and "Cartesio". I assume that we made more than a hundred of such searches when we recently updated the book.

Having found the potentially relevant judgments, I don't think we use any particular methods of interpreting the judgments and establishing their relevance. Naturally, we read the judgments (or rather the part that is relevant for an understanding of what they say in relation to the issues that are relevant to the book). Most cases merely confirm what is established by earlier precedents. Here we often select the most recent cases in stead of the older ones. Where a case contains something new, be that a development of the case law, a nuance thereto or simply seems to be good from a pedagogical point of view, we may choose to make a short summary of the case in the book or adapt the abstract text in order to cater for the ratio of the judgment concerned.

13. And a final question: Which advice/recommendation would you give to young researchers in (EU) law?

I think it is important that one always have a clear opinion as to whom one writes to.

First, a book that should be able to be used by practitioners must obviously deal with the topics that are relevant to those very practitioners. Those topics are often very different from the issues that are the most interesting from an academic point of view. Moreover, also the style should reflect the need of the intended audience. A practitioner won't read a book from beginning to the end, but needs to be able to find the answer to the issue before him using as little time as possible.

Conversely, if you write to an academic audience, the requirements are quite different. One is well advised not to make a PhD look like a handbook.

Second, when writing about international law, on should be clear on whether one writes to a national audience or to the wider European audience. In the former situation, the value of an article of a book is far bigger if it does not only include EU legislation and cases from the Court of Justice, but integrates that national legislation and/or national case law and administrative practice.

If the intention is to discuss EU law isolated from the national context in which it operates, one should remember that the amount of scholarly material then becomes enormous. Indeed, one can probably find around 100 articles dealing with the judgments in *Laval* and *Viking*. The added value of yet another article might not be substantial unless it either examines the consequences of these judgments to a Member State (which can only be done by integrating into the research national law and practice) or it adds something new that has not already been discussed in the large amount of published articles.

In this respect, one should remember that while national judges might read a book on, say national procedural law, one cannot expect that the judges at the ECJ will read what one has to say about EU law even if one writes in English or French. Hence, it becomes even more important to have a clear mind as to who the intended reader is.

Thank you very much.

ELSPETH GUILD

Elspeth Guild holds a Ph.D. in sociology of law from Radboud University Nijmegen (1999) and is the author of numerous books and articles on the development of the EU, particularly in the area of justice and home affairs and the creation of an area of freedom, security and justice.

She is also Professor of European Migration Law (Centre for Migration Law, Radboud University Nijmegen), Solicitor Kingsley Napley London and Visiting Professor at the London School of Economics.

First of all, we would like to thank you for agreeing to have this interview.

1. At the beginning we would like to ask you to provide a short description of your formative years in law, which would be certainly very useful to "apprentices" in law.

Would you like to point out major influences during your career (concerning also methodology)?

Practice and working as a volunteer at a nongovernmental organization were the most important influences on my choice to study law. I did law at the graduate level having studied classics before. From helping lawyers advise people with real problems, I decided that this was a most interesting profession and one I wanted to join.

2. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

There are many threats almost all of them come from political actors who are dissatisfied with independent courts and judges doing the difficult job which has been assigned to them – making decisions about difficult cases. I would recommend strengthening the independence of the judiciary across Europe, ensuring that the budgets for their salaries are ring fenced; that they are protected from scurrilous attack in the media on the basis of their legal judgments; that politicians do not attack judges individually or collectively on the basis of their legal decisions or question their loyalty to any particular regime (the media coverage of the US Supreme Court's judgment on „Obamacare" is shocking in this regard – if European courts are to continue to enjoy their reputation the suggestion that individual judges should vote according to the lines dictated by political parties must be avoided at all costs).

3. From your perspective, what would be the main challenges for the current European Court of Justice?

The CJEU, like all other courts in the EU, must remember what its purpose is – to provide binding interpretation of EU law irrespective of the specific views of any one government. As long as it remembers its role it should weather the current storm over rule of law in the EU.

4. What are the main constitutional developments at the level of EU since the already famous judgment of the Court of Justice in *Kadi* case? And also, what are the most significant developments for the EU legal order during the last year in the case-law of EU courts?

The *Kadi* judgment obliged the CJEU carefully to consider the interface between the exercise of international executive power (Security Council Decisions), human rights law and EU legal principles. Over the next few years, finding the correct articulating of EU free movement rights and fundamental freedoms will continue to be a challenge.

5. Is there such a thing like activism on the part of the European Court of Justice? If so - would there be any risks concerning the activism of the Court?

One would need to find a definition of activism in order to answer that question. Where does the dividing line lie between so called judicial activism and consistent and coherence decision making which may not be to the taste of every national government but is founded on the principles of EU integration? Where some political actors may not be convinced of the need for integration in a specific area as they perceive it as unhelpful to various political interests of their own judges must not reach their decisions on the basis of these considerations but on the basis of the adopted law.

6. Are there any "grey" areas (at the national level) in the field of EU law concerning the issues of rights and remedies?

There are many grey areas regarding remedies. The EU Charter's guarantee of an effective remedy for every EU Charter right is a challenging claim. Wherever there is political contestation around rights one finds a tendency for governments to reduce, minimize or abolish legal remedies in order to ensure that executive decisions are not subjected to a critical eye of an independent judge with the procedural powers to examine the substance of the claim. In many EU countries, administrative law is founded on the principle of the privileging of the state against the individual when the two come into conflict. This extends widely to the rules on access to courts and access to effective remedies. Often where there is at least in principle access to a legal remedy, in practice this is rendered impossible through complex procedural rules (eg very short time deadlines to submit appeals against executive actions; limitations on the courts jurisdiction to receive evidence or examine facts, etc.).

7. Concerning the issue of fundamental rights in EU legal order, are there discernable any developments in the EU courts case-law since the entry into force of the Charter of Fundamental Rights?

Yes, look at the decisions on citizens of the Union – *Dereci* in particular and on refugees see *NS*. The CJEU considers seriously its role as responsible for the interpretation of the Charter.

8. And a final question concerning the research methodology in EU law: which piece of advice would you give to a researcher in EU law from the point of view of the methodology to employ?

The first piece of advice is: read carefully and in full the judgments. Just about everything you need is there.

Thank you very much.

MARC JAEGER[1]

Born 1954; law degree from the Robert Schuman University of Strasbourg; studied at the College of Europe; admitted to the Luxembourg Bar (1981); attaché de justice delegated to the office of the Public Attorney of Luxembourg (1983); Judge at the Luxembourg District Court (1984); Legal Secretary at the Court of Justice of the European Communities (1986-1996); President of the Institut Universitaire International Luxembourg (IUIL); Judge at the General Court since 11 July 1996; President of the General Court since 17 September 2007.

1. First of all, we would like to ask you a more personal question: prior to your nomination to the (former) Court of First Instance (now General Court), have you ever thought you would become a member of this Court?

No, I have never thought to become a member. However, I have always had a keen interest in European law and policy. I thus naturally turned my sight to the Court of Justice of the European Union.

2. On the other hand, from your experience (also as a national judge), what was the most peculiar/complex interpretation and application of EU law by the national courts and tribunals?

At the General Court we are not interacting directly with national courts. The Court of Justice (hereafter, "ECJ") has

[1] All views expressed are strictly personal and are solely the responsibility of the author.

exclusive competence to interpret EU law via the preliminary ruling procedure.

From my experience of a national judge, I could however observe that the interpretation and application of EU law by national judges can give rise to some difficulties. These difficulties can result from the fact that EU legislation is drafted in several languages (23 official languages) and the different language versions are equally authentic. Thus, when interpreting a provision of EU law, the national judge can be called to compare the different language versions. Moreover, it should not be forgotten that EU law has its own terminology. Thus, national courts can face difficulties when interpreting and applying legal concepts that do not necessarily have the same meaning in their national legal order.

3. We would like to ask you to describe the relationships between the General Court and the European Court of Justice concerning the possibility of lodging an appeal to the European Court of Justice against judgments of the General Court? Is there a self-restraint or deference of the General Court towards the European Court of Justice? In other words, statements like those in judgments in case T-85/09 *Kadi v European Commission*, in case T-341/07 *Sison v EU Council* etc. do prove such a trend? Are there practical consequences on the fact that the European Court of Justice has the "final word"?

It should be recalled that the creation of the Court of First Instance in 1989, now called the General Court, pursued a double objective: on the one hand, to lighten the workload of the ECJ by enabling it to concentrate its activities on its fundamental task, which is the uniform interpretation of EU law and, on the other hand, to improve the judicial protection of individuals at first instance in respect of actions requiring close examination of complex facts. In order to avoid the emergence of a discordant body of case law, which could have

resulted from potential diverging interpretation of EU law between the two courts, it appeared necessary to provide for legal remedy designed to ensure the uniform interpretation of EU law. The creating of a double degree of jurisdiction also aimed at enhancing the legitimacy of judicial decision and the quality of legal protection.

The double degree of jurisdiction does not however mean that a case will be trialled by the ECJ for a second time on all aspects. The right of appeal is limited to points of law; the ECJ's jurisdiction is confined to errors of law so as to guarantee the coherence of the European Union legal order. Accordingly, the judicial interaction between the General Court and the ECJ is limited to legal questions, the interpretation and application of a specific provision of the EU Treaties or from secondary legislation in a particular case.

I would also like to point out that the interaction between the General Court and the ECJ is not limited to those cases where there is an appeal. Of course, if a decision of the General Court is challenged before the ECJ, there will be a direct interaction between the two courts on a particular point of law. The ECJ will confirm, amend or annul the reasoning set out by the General Court on that particular point of law. In the latter case, the ECJ can either judge the case itself or refer it back to the General Court, in which case, it is the essence of the system that the General Court will follow the interpretation given by the ECJ (which was also the case in the *Kadi* judgment you are referring to). However, I would like to highlight that even if there is no appeal, the General Court will interact with the ECJ in a sense that it will follow the ECJ existing case law to resolve a legal issue brought by a new case. The respect of previous case law, the precedent oriented approach followed by our Courts, is of key importance to guarantee the value of coherence, uniformity, and legal certainty inherent to any legal system.

4. Concerning also the said relationship between those two EU Courts, we would like to ask you to point out the

specificities of the judicial work performed by the General Court compared to that of the European Court of Justice? In that connection, does the fact that the European Court of Justice is holding a continuous dialogue with the national courts (via the preliminary rulings procedure) allow the General Court to focus on the core of European Union law?

There are several differences between the task performed by the ECJ and the General Court, which result directly from the allocation of competences between the two courts.

The main task of the ECJ is to give legally binding preliminary rulings requested by national courts, to examine infringement claims raised by the European Commission against Member States for non-compliance with EU law and to rule on legal disputes between the EU institutions (notably the European Parliament, the Council and the Commission) and between them and Member States. These disputes mainly concern institutional matters, such as the demarcation of Union and national competences and the preservation of institutional equilibrium. The ECJ also acts as a Court of appeal (second degree jurisdiction) when the decisions of the General Court are challenged on points of law, in the same way as the General Court reviews the decisions of the European Union Civil Service Tribunal when they are challenged before us.

As opposed to the ECJ, the General Court deals with private party-initiated litigation and actions brought by Member States in certain matters (see Article 51 of the Statute of the Court of Justice of the European Union). The General Court is competent to hear all actions brought by individuals, companies and the Member States against decisions adopted by the institutions and bodies of the European Union. It has the essential task of ensuring compliance with the EU law by the decision-making bodies of the European Union, in particular the Commission, in a considerable number of areas. Among these areas, needless to say that competition law (in which recent actions concerning

the IT and the banking sectors, air transport and consumer goods have had a considerable impact) ranks high on the list. It can also be observed that the General Court is today a key player not only in the economic life of companies but also in sectors as diverse as security, fundamental freedoms, environment, health, trademarks, citizens' access to documents and so on.

Beyond the challenges the General Court is facing as a result of the increasing number of new areas where it has to intervene, the cases brought before it are often very complex and can have a major economic impact on different markets. By nature, they concern files that are particularly voluminous and often economically or technically complex, requiring a meticulous examination of the facts. When the ECJ intervenes in these cases on appeal, its review is limited to points of law and will not undertake a second examination of facts, which makes obviously an important difference.

5. Were the promises about preserving the unity of the EU legal order in judicial activities of the EU Courts fulfilled? What are the challenges posed to the unity of EU legal order? And also the means employed to redress any potential adverse developments?

Since it creation, the EU judicial system went through substantial modifications, passing from a single judicial body to a three tier system, without losing sight of the necessity to preserve the unity of EU legal system. The ECJ, established in 1952, was supplemented in 1988 by the Court of First Instance (now the General Court), which today has jurisdiction over all cases brought by private applicants against decisions of the EU institutions and cases brought by Member States against the decisions of the European Commission. The Treaty of Nice (2001) introduced the possibility of further extension of this institutional structure to specialised judicial panels; the first of which was established in November 2004 to deal with EU civil service litigation. The broadening of EU competences and the

enlargement of the EU from 15 to 27 Member States made these structural changes imperative in order to find the right balance between the need to preserve consistency of legal interpretation and coherence of the EU judicial system, on the one hand, and the urge to respond to the risk of an increasing backlog that could impair efficiency of the Courts and quality of their rulings, on the other hand.

The appropriate mechanisms have been put in place to ensure that the 'decentralisation' of our justice does not entail fragmentation in the case law which could have constituted a threat to the unity of our legal order. The three courts successfully work together to ensure a uniform application of EU law to preserve the unity of the EU legal order. As I mentioned previously, the Civil Service Tribunal's decisions may be appealed before the General Court and, as need be, we try to restore legal consistency. The same happens between the General Court and the ECJ. When we are faced with a new legal issue, and since we are at the first instance level, there can be a period of uncertainty as to the appeal-proof nature of our decision. However, in these situations, the ECJ quickly gives orientation. It should also be noted that, for civil service disputes and potentially for any disputes transferred to a specialised court, the ECJ keeps the possibility to review judgements handed down by the General Court on appeal, in case of serious risk of an adverse effect on the unity or coherence of EU law.

The enlargement of the Union has put even greater challenges with the growing diversity of languages used. The challenges brought by the recent enlargements have been successfully addressed though. It is now possible to bring proceedings before the Court in the 23 official languages of the Union. All judgments and opinions of Advocates General of the Courts and the most important judgments of the General Court are translated into all the 23 official languages, which is of key importance to ensure common understanding of EU law in all the Member States.

The challenge posed nowadays to the unity of the EU legal order has not substantially changed compared to the one of yesterday. We still have to strike the right balance between, on one hand, the safeguard of EU law homogeneity and, on the other hand, the guarantee of a prompt and efficient justice, sweeping away harmful backlog. In that regard, to curb the escalating judicial backlog, both the ECJ and the General Court adopted several measures to increase efficacy of the internal working methods. While these measures were successful and fruitful, they appeared not to be entirely sufficient. Discussions are thus on-going about whether structural reforms might be needed.

6. What role does play the purposive interpretation in the judicial activities of the EU Courts, and more specific in the activities of the General Court? Is it accurate to state that the latter is more restrained in relying on that kind of interpretation compared to the European Court of Justice?

Both the ECJ and the General Court use several methods of interpretation, such as grammatical, literal, historical and teleological interpretation. Amongst these different methods, it can be said that the teleological interpretation has indeed played an important role in the development of the EU case law. Some of the most important legal concepts have been developed via this method of interpretation, such as the primacy of EU law (Case 6/64, *Costa v ENEL*), the direct effect of EU law (Case 26/62, *Van Gend and Loos*). It should be however noted that the ECJ as well as the General Court does not rely on the teleological interpretation as the sole method of interpretation but combine it with other legal reasoning based on the wording of the disposition, its legislative history and context. For instance, in its the famous case, *Van Gend and Loos*, the ECJ referred to "the spirit, the general scheme and the wording of the EEC Treaty" to affirm the direct effect of a specific EU primary law provision. In a similar manner, the

recent General Court's order adopted in Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*,[2] could provide for a good example in this respect. In this case, the General Court was called to interpret for the first time the meaning of "regulatory act" provided by the fourth paragraph of Article 263 TFEU to determine the locus standi of private applicants. As the meaning of 'regulatory act' was not (clearly) defined by the Treaty on the Functioning of the European Union (TFUE), the General Court carried out a literal, historical and teleological interpretation.

The reasons underlying the importance of the teleological method of interpretation in the case law can be found in the particular nature of the EU legal order. First, the EU legal order is a pluralistic legal order with plurality of languages and different legal traditions. It is thus not unusual that the same rule can be subject to different interpretations depending on the linguistic version we are looking at, while all the different linguistic versions have the same value. Therefore, when literal interpretations give rise to dispute, the teleological interpretation can be the most appropriate to guarantee the uniform application of EU law. Second, the recourse to the teleological interpretation can also be explained by the fact that the EU Treaties often refer to broad principles and objectives which are open to development. Also, some legal texts are often ambigious as they are the result of difficult political consensus. To give a legal solution in this respect, the teleological interpretation can often prove to be the most appropriate. Third, the teleological interpretation plays an important role in the preliminary ruling procedure as it allows the ECJ to provide guidelines to national courts, which are at first place in charge of the application and interpretation of the EC law. Given that

[2] The case has been appealed before the ECJ, see C-583/11 P, pending. The interpretation given by the General Court of the "regulatory act" notion under the fourth paragraph of Article 263 TFEU will have to be confirmed or adjusted by the ECJ.

the preliminary ruling procedure constitutes the core "task" of the ECJ, it could be one of the reasons why the teleological method of interpretation is more apparent in the case law of the ECJ compared to the one of the General Court.

7. Which are, from your point of view, the most significant changes brought by the Treaty of Lisbon, both predictable and "hidden"?

The Lisbon Treaty brought about many improvements for the functioning of the EU, and definitely enhanced its legitimacy and efficiency. In this respect, I would like to refer to the greater implication of the European Parliament (a true co-legislator) in the symbolically now called Ordinary Legislative Procedure (justice and home affairs, common commercial policy, agriculture), the more extensive use of the qualified majority instead of unanimity as well as the better involvement of national parliaments in the control over the respect of the subsidiarity principle.

As far as the judiciary is concerned, important developments have been also brought by the Lisbon Treaty. I will limit myself to the three most important changes from our perspective.

First, the conditions of admissibility for private applicants have been eased, allowing more private applicants to bring actions before us. Since the entry into force of the Lisbon Treaty on 1 December 2009, applicants do not have to demonstrate that they are individually affected by regulatory acts that are of direct concern to them and do not entail implementing measures. This new provision has been already interpreted and applied in several cases by the General Court (for instance, in the *Inuit Tapiriit Kanatami and Others v Parliament and Council* case[3], the *Microban International and Microban*

[3] Order of the General Court (Seventh Chamber, extended composition) of 6 September 2011, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, T-18/10, not yet published.

(Europe) v Commission case[4], or the *Iberdrola v Commission* case[5]; note that some of these decisions have been challenged before the ECJ).

Second, I would like to refer to the obligation for the EU to accede to the European Convention on Human Rights (ECHR) and to the now legally binding status of the Charter of Fundamental Rights, which has been given the same legal value as the Treaties. The General Court and the ECJ have always paid respect to fundamental rights, through the notion of general principle of EC law and have frequently made reference to the ECHR. Therefore, although fundamental rights are not something new in our legal environment, the fact that the Charter has been granted Treaty value and that the Lisbon Treaty gives a legal basis for the accession to the ECHR are definitely the sign of a political/sociological trend. For the judge, it is also an invitation to revisit old concepts and, if needed, to consider a potential evolution of the case law. Again, on the one hand, fundamental rights are the basis for more judicial protection and, on the other hand, they also require that this protection be effective, namely for the reasonable delay point of view. We can already observe that lawyers rely on the Charter in order to reinforce their pleas and to explore the way it may justify changes in the case law.

Third, the Lisbon Treaty introduced an advisory panel to give an opinion on the suitability of candidates to perform the function of judge (Article 255 TFUE), the so-called "255 Committee". This Committee is definitively a step forward, since it contributes to giving guarantees as to the ability of the

[4] Judgment of the General Court (Fourth Chamber, extended composition) of 25 October 2011, *Microban International Ltd and Microban (Europe) Ltd v Commission*, T-262/10, not yet published.

[5] Judgment of the General Court (Eighth Chamber, extended composition) of 8 March 2012, *Iberdrola, SA v European Commission*, T-221/10, not yet published.

candidates to the nomination as a judge at the General Court, the ECJ and the Civil Service Tribunal.

8. How would you assess the new Treaty on stability, coordination and governance in the Economic and Monetary Union from the point of view of powers of the EU Courts?

The Treaty on stability, coordination and governance (TSCG), has the objective to address the current financial crisis and the consequences on the Euro zone. The ECJ has been conferred an important role and responsibility as it would control the right application of the provisions of this Treaty on the 25 contracting Member States. The TSCG confers a double competence to the ECJ: it will be competent, first, to rule on the correctness of the transposition by the contracting parties of the balanced budget rule into their national legal systems and, second, to impose a lump sum or a penalty payment on non-compliant Member States. These competences transferred to the ECJ will certainly reinforce its role in the field of the Economic and Monetary Union.

9. Would you like to briefly assess the criticism concerning the excessive length of proceedings of the EU Courts (and more specific of the General Court)?

The length of procedure is a major element to assess the quality of justice in general. Ensuring that individuals get their judicial actions treated within a reasonable time is of central importance for the EU Courts.

The average duration of proceedings before the General Court is on average 26.7 months in 2011. This is perfectly acceptable. But the General Court is confronted to an ever-increasing judicial backlog, which are due to several factors (such as a gradual extension of its competences, the steady block of trademark cases and, more generally, the enlargement of the Union and the increased legislative activity

of the Union). All these factors led to an unprecedented figure of new cases brought before the General Court in 2011 (722 new cases), which has inevitable repercussions on the length of proceedings.

Since I have the honour to be President of the General Court, many measures have been taken to improve the efficiency of our Court with the aim of reducing the duration of procedure while maintaining the quality of our rulings. These reforms included, inter alia, the establishment of three additional chambers, the optimisation of the scheduling of hearings, the simplification of the procedure in Community trademark cases, the modification of drafting methods to shorten our judgments, and the upgrading of statistical and IT tools to better control our internal deadlines. These measures were very fruitful: if we are looking at the statistics for the period of 2007-2011, they show a significant increase of completed cases (passing from 397 to 714) and also a slight reduction in the average duration of the procedure (passing from 27.7 to 26.7 months).

However, despite these results, the number of pending cases continues to increase. As the possibilities for internal reforms have been fully exploited, efforts are now directed towards modernisation of the General Court's Rules of Procedure with a view to ensuring still greater efficiency and improved flexibility in the procedural treatment of the various types of cases before us, whilst observing parties' procedural rights. Above all, however, the statistics tell us that the General Court cannot reasonably contemplate the future without structural change and the addition of new resources.

Thank you very much!

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Law Degree University of Leyden (Meester in den rechten) in 1961. Awarded the title of Doctor Honoris Causa, New Bulgarian University (November 2002). Presented 13 October 2004 Liber Amicorum Alfred E. Kellermann: "The European Union – An Ongoing Process of Integration"[1].

Awarded in 2004 the Royal Knighthood of Orange ("Ridder van Oranje Nassau").

Former Member of the Advisory Board of European Business Organization Law Review, The Hague. Member of the Scientific Board of Revista românã de drept european (R.R.D.E.), Bucharest, since 2004.

Since 2011 Member of the Section European Affairs of the Dutch Liberal Party (VVD).

Visiting Fellow European University Institute Florence. As from 2013 Member of the Editorial Council of the e-journal "Russian Law in Internet".

Team Leader and Project Director for various EU Enlargement projects.

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[1] Jaap W. de Zwaan, Frans A. Nelissen, Jan H. Jans, Steven Blockmans (Eds.), T.M.C. Asser Press, 2004. Translated into Romanian: „*Uniunea Europeană, un proces de integrare continuă*", CA Publishing, Cluj-Napoca, 2010.

1. Acknowledging the fact that you have an impressive (academic and administrative alike) career and taking also into account that your name is closely linked to the T.M.C. Asser Instituut, we would like to ask you to point out what would be the elements needed for a research institution to be successful.

The most important element is the availability of excellent researchers staff combined with some practitioners. Researchers should be involved in implementation of EU policies in practice.

2. For 38 years you have been a researcher at the Interuniversity Asser Instituut for European Law and Governance and then you have spent another 24 years as Head of EU Law Section at T.M.C. Asser Instituut. For a young researcher of today, such references look impossible: does the current mobility of researchers involve giving up long term researches? And also, which would be the impact of the free movement for the researchers coming from the Eastern Europe?

Although I was 38 years employed at Asser Institute, I did not do 38 years of research. I was also involved as Secretary General in the management and development of the Institute and in the interuniversity cooperation of research between the participating Law Faculties. I believe that the free movement of researchers can contribute very much to a better result in research activities. That is already the practice nowadays in Asser.

3. Moreover, you have extensive expertise concerning the preparations undertaken by (former and current) candidates countries to the European Union. We would like to ask you to comment on the issues of domestic "homework" needed in the pre-accession stage. Which are the main yardsticks employed in establishing whether the legal order of a country is prepared for full membership of

the European Union? On the other hand, is there any disparity between theory (i.e. pre-accession preparations) and practice (i.e. the membership) concerning the ability of a country to deal with the "business as usual" in EU affairs?

Training and briefing in Theory and Practice of EU Law, Politics, Economics and History will equally be important!

The following article I wrote on request of the "Business Journal of Albania and Kosovo" some weeks ago. It was published also electronically[2].

Why Albania Is Not Yet an EU Candidate Member State?

In order to give an answer to the question why the EU has refused several times to give Albania the candidate status, I analyzed the main Agreements and recent documents regarding Albania's application for EU Membership[3].

I based my recommendations moreover on my experiences, during the years 2006-2008 when I was EU Team Leader of an EU project to Strengthen the capacity of the Albanian Ministry of European Integration[4].

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[2] *The Business Journal of Albania and Kosovo*, www.thbjournal.com.

[3] The Stabilisation and Association Agreement between the EU and Albania signed in June 2006 and entered into force in April 2009; the presentation by Albania of its application for Membership of the EU on 28 April 2009; the Commission Opinion on Albania's application for Membership to the EU of 9 November 2010; Commission Staff Working Document - Albania 2012 Progress Report of 10 October 2012; Council Conclusions on Enlargement and the Stabilisation and Association Process adopted on 11 December 2012.

[4] Please refer to my publications during my activities as Team Leader in Tirana of an EU Project on the Strengthening of the Ministry of European Integration of Albania during 2006-2008:

1. Impact of EU Accession on the legal order of Albania, *Revista E drejta parlamentare dhe politikat ligjore*, 1/2007, pp 4-35 (published in Albanian language);

2. European experiences of good governance, *E drejta parlamentare dhe politikat ligjore*, 3/2007, (published in Albanian language);

Introduction to the New Accession Approach of EU and its Member States

Enlargement remains a key policy of the European Union. However after the last accessions in 2007 the EU has strengthened its criteria for accession. This is the so-called *new approach* for accession which is now applicable to Albania. At a time when the European Union faces major challenges, the enlargement process continues to reinforce peace, democracy and stability in Europe and allows the EU to be better positioned to address global challenges and pursue its strategic interests. The prospect of accession stimulates Albania to develop political and economic reforms, transforming societies, consolidating the rule of law and creating new opportunities for citizens and business. These reforms are necessary in order to receive the candidate status.

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3. Report on guidelines for an effective approximation of Albanian legislation with the acquis communautaire, *Revista E drejta parlamentare dhe politikat ligjore*, 4/ 2007;

4. *European* Nrs 12, 13 and 14 (Periodical of the Albanian Ministry of European Integration produced by GTZ). Including three articles on the impact of EU accession on the Albanian legal order (2) and the Reform Treaty signed at Lisbon (1);

5. Guidelines on the Quality of EU Legislation and its Impact on Albania, in *European Journal of Law Reform,* (Basel, London, Indianapolis), Volume 10 (2008), pp 183- 218;

6. The Rights of Non-Member State nationals under the EU Association Agreements, *European Journal of Law Reform*, (Basel, London, Indianapolis), Volume 10 (2008), no 3 , pp 339-382.

7. 'Legal effects of EU Association Agreements for non EU Member State nationals', *Revista E Drejta parlamentare dhe politikat ligjore, Tirana* (in Albanian language), Nr 41 1/2008, p 4-63;

8. 'Procedures for the approximation of Albanian Legislation with the Acquis Communautaire', Chapter 15 of book edited by University of London and published in Memory of *Sir William Dale, 'Drafting Legislation: A Modern Approach'* (Ashgate Publishing) pp 213-231;

9. Accession Negotiation Techniques for Albania, *Revista E Drejta parlamentaredhe politikat ligjore, Tirana* (in Albanian language), Tirana Nr pp 1-21., 2008.

1. Strengthening the rule of law and democratic governance remains crucial for Albania to come closer to the EU and later to fully assume the obligations of EU membership. The *new approach* to negotiations on judiciary and fundamental rights and on justice, freedom and security, resulting from the experience of previous accession negotiations, has put rule of law issues, including the fight against organised crime and corruption, at the centre of the EU's enlargement policy. The *new approach* provides for the above-mentioned issues to be tackled early in the enlargement process, and reaffirms the need for solid track records of reform implementation to be developed throughout the negotiation process, with the aim of ensuring sustainable and lasting reforms. The *new approach* envisages incentives and support to the candidate countries, as well as corrective measures, as appropriate. In the *new Union's approach* for accession the rule of law is now firmly anchored at the heart of the accession process. The Council also welcomes the cooperation with Europol in this area, as well as the closer interaction with Member States, and the Commission's intention to reinforce its assessments and reporting to the Council on organised crime for each Western Balkans country, on the basis of specific contributions prepared by Europol.

2. The importance of protecting and ensuring the enjoyment of the full range of human rights is now underlined, including the rights of persons in Albania belonging to minorities, and without distinction as to the sexual orientation or gender identity of persons, including the right to freedom of assembly, expression and association, and the importance of promoting a culture of tolerance. Furthermore, the work on improving social and economic inclusion of vulnerable groups, including the Roma, should continue, in particular through the EU Framework for National Roma Integration Strategies.

3. The Council on 11 December 2012 welcomes the progress made by Albania to meet the 12 key priorities laid out in the Commission's 2010 Opinion. The 12 key priorities concern the following areas:

- the proper functioning of Parliament;
- adopting reinforced majority laws;
- appointment procedures and appointments for key institutions;
- electoral reform;
- the conduct of elections;
- public administration reform;
- rule of law and judicial reform;
- fighting corruption;
- fighting organised crime;
- addressing property issues;
- reinforcing human rights and implementing anti-discrimination policies;
- improving the treatment of detainees and applying recommendations of the Ombudsman.

The improved dialogue between the government and the opposition, after the November 2011 agreement, has allowed Albania to make good progress towards fulfilling the political criteria for membership of the EU. Albania has delivered on a set of reforms against the twelve key priorities, particularly addressing the proper functioning of the Parliament, electoral reform and appointments of key officials. The European Commission assessed that Albania has met four of the key priorities and is well on its way towards meeting two others. Albania's continued constructive role in the region is welcomed.

However good progress is not enough! The Council underlines the need to further intensify efforts, particularly in the area of the reform of the judiciary in order to strengthen its independence, efficiency and accountability, fight against corruption and organised crime, protection of all minorities, as well as the implementation of reforms. The successful conduct of Parliamentary elections in 2013 will be a crucial test for the smooth functioning of the country's democratic institutions. Sustainable political dialogue and continued efforts in all the areas covered by the key priorities will remain essential to implement reforms necessary for Albania's EU future.

4. *The opening of accession negotiations* will be considered by the European Council, in line with established practice, once the Commission has assessed that Albania has achieved the necessary degree of compliance with the membership criteria and has met in particular the 12 key priorities set out in the 2010 Commission's Opinion. Sustained implementation of reforms and fulfilment of all the key priorities will be required for Albania to open accession negotiations with the EU and to receive the candidate status. The necessary degree of compliance with accession criteria includes according to the Council inter alia: conducting elections in line with European and international standards; strengthening the independence, efficiency and accountability of judicial institutions; determined efforts in the fight against corruption and organised crime; effective measures to reinforce the protection of human rights and anti-discrimination policies, including in the area of minorities, and their equal treatment; and implementation of property rights.

5. *What is the necessary degree of compliance with the accession criteria?*

From the analysis of the Commission Progress Report 2012, we conclude that Albania has not met all key 12 priorities. According to the *new approach* the EU Council is not yet satisfied with good progress and partial implementation of accession criteria. Taking into account the disappointing experiences with the accession of Bulgaria and Romania, the degree of compliance with the accession criteria has increased after 2007. In the new approach and vision of the EU Council and its Member States all the requirements to become a candidate EU Country must be fully met. That is in my opinion the reason why Albania has not received the EU candidate status.

Not receiving the candidate status is just a formality but not a tragedy. Switzerland and Norway are not an EU Member State, however the country is happy with its position. More

important is the full implementation of the accession requirements by Albania which result in the political and economic reforms, transformation of the society, consolidation of the rule of law and the creation of new opportunities for Albanian citizens and business.

4. Taking into account your lifelong experiences with the EU law, please describe which are, from your point of view, the main challenges facing the current European Union (and especially its legal order), two years after the Lisbon Treaty has entered into force. In other words, which are the most important developments brought by the said Treaty?

The most important developments of Lisbon Treaty are included in the following remarks. In these preliminary concluding remarks we will deliver comments on the Lisbon rules for the following selected topics:

The division of powers and categories of competences (Articles 4-5 TEU and 2-6 TFEU), the new roles of the Parliament, European Council, Council, European Commission and National Parliaments (Articles 12-18 TEU) and finally the new legislative procedures including ”comitology” (Articles 289-294 TFEU).

Firstly we start to discuss the Articles 4(1) and 5 TEU, that explains the system of the fundamental principles relating to competences. In principle the attribution of powers is reaffirmed. In addition it is stated twice that competences not given to the EU remain with the Member States. The TFEU contains a special title on “Categories and areas of Union Competence” (Articles 2-6).

The general approach is to delineate different categories of competence for different subject matter areas and to specify the legal consequences for the EU and Member States of this categorization. The types of competences (Article 2 TFEU) are identified as follows

- exclusive competence, Article 2(1) TFEU;
- competence shared with the Member States, Article 2(2) and Article 4 TFEU;
- competence to carry out actions to support, coordinate and supplement the actions of the Member States, Article 2(5) and Article 6 TFEU.

The list of most relevant areas of competences is mentioned in respectively in Article 3 TFEU, that contains an exhaustive list of exclusive competences.

In Article 4 TFEU, which states that *shared competences* relate to areas that are not referred to in Articles 3 and 6 TFEU and in Article 6 TFEU that contains an exhaustive list of *competences to carry out actions to support, coordinate and supplement* the actions of Member States.

The Lisbon Treaty distinguishes between the existence of competences and the use of such competences, which is determined by *subsidiarity* and *proportionality*. The exercise of Union competences is limited by the principle of *proportionality* (Article 5(4) TEU) and in the case of non-exclusive competences by the principle of *subsidiarity*. (Article 5(3) TEU).

The question now arises if the provisions on competences in the Lisbon Treaty are reflecting the aims of the Laeken Declaration (for example improving democracy, delimitation of competences and simplification) that those provisions were designed to serve. Will the greater clarity in theory as to the division of competences in all three categories after Lisbon also been realized in practice?

The complexity of the provisions and the demarcation of the boundaries in practice with the areas of competence will in practice be identified by the interpretation by the actors in the legislative process within any such area.

The devil is always in the detail. In case of differences of opinions, the European Court of Justice will need to assist with the interpretation of these provisions.

Secondly we will discuss the provisions on the institutions (Articles 13-19 TEU and 223-250 TFEU).

There is no doubt that the Lisbon Treaty has improved democratic input by making the system more "parliamentarian" than before. The *European Parliament* (Article 14 TEU) has been empowered through the extension of the ordinary legislate procedure to new areas, and has greater control over the appointment of the Commission President. Also in the Article 290 (TFEU) on delegated acts the powers of the Parliament have increased since they have now a veto.

The *European Council* as a newcomer in the list of formal institutions, shall not exercise legislative functions. However it may adopt according Article 48(7) TEU a decision allowing for the adoption of acts authorizing the Council of Ministers to act by QMV in stead of unanimity.

The Council of Misters shall jointly with the European Parliament exercise legislative and budgetary functions (Article 16(1) TEU). The Lisbon Treaty increased the areas to which *qualified majority voting* applies, although unanimity is still the rule in over 70 areas. The provisions of Lisbon Treaty on the definition of a qualified majority are complex as they are different according to the time, and requests of the Council Members and therefore confusing. Sometimes from 1 November 2014 the voting system of Nice will be preferred, and sometimes the Lisbon rules.

Article 16(4) TEU: defined as 55% of Member States, comprising at least fifteen of them, and representing 65% of the population: a blocking minority must include four Member States. This new QMV will not become effective before 2014, and Member States may continue to have recourse to the Nice voting rules until 2017 (Article 16 TEU and Articles 3 and 4 of Protocol No. 36 on transitional provisions[5]). For some areas there are exceptions. It has been estimated that the voting rules

[5] OJ 2007 C306/159.

in the Lisbon Treaty will increase the probability of securing the passage of legislation through the Council as compared with those of Nice Treaty. However academic study has shown that voting in the Council has been relatively rare, even in areas where qualified majority voting operates, and that decision making by consensus has been the norm. Since the voting requirements are sometimes rather arbitrary and complicated consensus might be preferred.

However since the "*Ioannina compromise*" applies (Declaration No 7, on Article 16(4) TEU and Article 238(2) TFEU) "wider basis of agreements" are made available.

Legislative proposals subject to the ordinary legislative procedure can be submitted not only from the Commission (Article 17 TEU) in line with its 'right of initiative', but in specific cases laid down in the Treaty also on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice. In these cases certain provisions concerning the role and prerogatives of the Commission do not apply (see Article 289(4) and 294(15) TFEU).

However the Parliament and the Council under Article 225 and Article 241 TFEU may also request the Commission to submit appropriate proposals in order to attain the objectives of the Treaty.

Under the ordinary legislative procedure (see below), the negative opinion from the Commission also forces the Council to vote by unanimity rather than majority. There are also limited instances where the Commission can adopt legislation on its own initiative. In general de role of the Commission has also been strengthened by Article 294(11) TFEU which holds that the Commission shall take all necessary initiatives with a view to reconcile the positions of the European Parliament and Council.

Thirdly we mention that the role of the National Parliaments (Article 12 TEU) has been strengthened. One of the means to

increase democracy in the EU was according to the Laeken Declaration the possible involvement of the National Parliaments in the decision-making process. The main changes provided for in Article 12 TEU of the Lisbon Treaty are the following:

Commission consultation documents shall be forwarded directly to the National Parliaments; The right of the National Parliaments to object against a draft legislative proposal on the ground of a breach of subsidiarity (Article 12(b) TEU). If the objection is supported by at least one third of the National Parliaments, the proposal should be reconsidered ("*yellow card procedure*"). In the area of Freedom, Security and Justice (Article 7 Protocol No. 2 and Article 76 TFEU): threshold will be a quarter; if the Commission wishes to maintain its proposal it must give reasons for the decision.

If the objection was supported by at least a simple majority of the national Parliaments, the Commission must justify its refusal to withdraw the proposal in a reasoned opinion, which will be forwarded to the Council and the European Parliament ("*orange card procedure").*

National Parliaments are further involved in Judicial cooperation in civil matters.

Article 81(3) TFEU: The proposal referred to in the second subparagraph shall be notified to the National Parliaments. If a National Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. National Parliaments are further involved in the scrutiny of Europol's activities (Article 88(2) TFEU and the evaluation of Eurojust's activities (Article 85(1) TFEU).

Does in practice the greater involvement of National Parliaments in reviewing the EU legislative procedures improve democracy and strengthen the role of National Parliaments? This greater involvement depends in practice not only on the new rules but also on the knowledge of European law and the political will of the respective Members of National

Parliaments. Since often national interests have priority in National Parliaments, the strengthened role of National Parliaments according the Lisbon Treaty have to be awaited. *However it is remarkable that the powers of decision-making of National Parliaments has been increased. In some cases they can veto a decision of the European Council or Council of Ministers.* See respectively Article 48(7) TEU on simplified revision procedures, Article 81(3) TFEU judicial cooperation in civil matters.

Fourthly –we discuss the rules of the ordinary legislation procedures (Articles 288-299 TFEU)

The ordinary legislative procedure is based on the principle of parity between the directly-elected European Parliament, representing the people of the Union, and the Council, representing the governments of Member States. The two co-legislators adopt legislation jointly, having equal rights and obligations - neither of them can adopt legislation without the agreement of the other.

With the Treaty of Lisbon the scope of codecision almost doubles to reach 85 activity areas ('legal bases') from previously 44 areas under the Treaty of Nice. The areas that will most benefit are agriculture and fisheries, freedom, security and justice and the common commercial policy.

The institutional position of the European Parliament is strengthened further by making it clear that – like the Council - the Parliament is adopting in first and second reading a 'position' and not just an 'opinion' any more. Further because the European Parliament, like the Council, involved in the three readings and the conciliation committee.

In the fifth place we discussed the renovations in the "Comitology" system.

With the entry into force of Articles 290 (Delegated acts) and 291 TFEU (Implementing Acts), we have two new legal bases in the treaties, which now regulate what was known as "comitology". The division of legal acts in these new articles

is problematic, particularly that between delegated and implementing acts. What is the normative justification for the differential controls prescribed for these kinds of acts?

As Article 290 TFEU is excluding the Comitology committee in relation to delegated acts, this would be the most important impact on the division of powers in the EU. It will increase the regulatory autonomy of the Commission, and will decrease control by the Council and European Parliament. Although these institutions have the veto power, they miss the informational assistance by the Comitology committees to exercise a meaningful review of legislative acts.

The question is which of the Articles 290 and 291 TFEU will be applied in a concrete case.

That might be depending for Article 290 TFEU on the interpretation of the terms "amend" and "supplement", which terms are central for the division between delegated and implementing acts. A final answer will be sought to the European Court of Justice.

On the other hand for Article 291 TFEU the question arises on the interpretation of uniform conditions that are needed for the implementation of European law.

In Article 291 TFEU we find the 'traditional' comitology system and procedures that were in operation before Lisbon, although now with some changes. Here the Commission is granted the power to implement the legislative act. We discussed Regulation (EU) No 182/2011, that implemented Article 291(3) TFEU and entered into force on 1 March 2011. This new regulation establishes two procedures for controlling the Commission's exercise of implementing powers: *an advisory and an examination procedure*. Both procedures involve committees composed of member state representatives and chaired by the Commission. The Commission must ensure the widest possible support within these committees. Since Lisbon working with comitology now means working with two separate regimes: Delegated and Implementing Acts. For both of these

categories the procedures are simplified and information will be more accessible – making working with both regimes less difficult than before. However the choice of the applicable procedure might sometimes be problematic.

The word 'comitology' has become part and parcel of Community terminology in the last couple of years. The word 'comitology' is well known and is roughly equated with the idea of being a higher, mysterious and nontransparent power.

But there is a gap between the intellectual understanding of what comitology is and the way in which it is put into practice on a daily basis. You need to work with comitology every day to get a grip of what it is all about. This lack of expertise applies to the Members and Staff of the European Parliament, Council and Commission. They all need to understand comitology? The same can be said for the national administrations and permanent representations of the Member States in Brussels.

5. You have authored some years ago a very thoughtful paper concerning the constitutional issues connected to the Irish referenda[6], contribution which is still topical. You focused on the potential recourse to the duties of loyalty and solidarity imposed on the Irish State in order to attain an EU goal (i.e. a successful referendum concerning the Lisbon Treaty). Then, the question is: are those duties enforceable against certain "people" as (primary) holder of sovereignty? In other words, is the European Union order still "under-constitutionalised"?

Duties of loyalty and solidarity are not enforceable.

6. In connection to the above question, we would also like you to briefly comment on potential difficulties brought by the current economic and financial crisis to the same

[6] *The Irish Referendum on the Lisbon Treaty*, Amicus Curiae, Issue 75, 2008, 33-36.

legal order (of the European Union)? Is the idea of a "two-speed Europe" feasible? But still, would not be required a unanimous vote on the part of Member States to allow such a "two-speed" construction?

A two-speed construction would be feasible as the criteria and development for social and economic policies, and budget management as well as respect for the rule of law are different in some countries.

7. In the end of our interview, we would like to ask you to provide certain ideas for a methodology of research in EU law: which piece of advice would you provide to a researcher in that field? Are there any specific requirements to dig deeper into the EU law?

As a methodology for research in EU law I would suggest to focus on practical issues and cases. Research investigation on the impact of EU, international and national law in practice and a comparative analysis on the actual European Court of Justice cases.

Thank you very much.

PHILIPP KIIVER

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Law degree (2003) and PhD (2005) from Maastricht University; Associate Dean of the Maastricht Law Faculty (2008-2010). In 2008 he became a Veni grant laureate with the Netherlands Organisation for Scientific Research (NWO). Fellow at the Montesquieu Institute Maastricht and a member of the editorial committee of the Maastricht Journal of European and Comparative Law. Author of "The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality", London: Routledge 2012; co-author of an introduction to comparative constitutional law ("Constitutions Compared", Intersentia, 2nd edition 2009).

First of all, we would like to thank you for accepting this interview.

You have invested a great interest in studying comparative constitutional law and issues connected to the principle of subsidiarity within the EU legal order. In fact, (without meaning to flatter you) you are a main reference in questions concerning subsidiarity.

Therefore, the following questions will concern the above fields.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law. What were (are) your models (in law)?

After finishing high school and national service in Germany I went to study law at Maastricht University in the Netherlands. More specifically, I followed the Maastricht Law Faculty's European Law School programme, which combines studies of national law with extensive European and comparative law studies in English. Looking back at my studies and my subsequent career steps, I can only advise young lawyers to also seize opportunities to gain insight into EU and comparative law, perhaps by following a dedicated master. Not just for reasons of idealism or intellectual curiosity, but also for very practical reasons. Even the most mundane legal transactions nowadays contain cross-border elements, such as when a Romanian buys a CD player from a store in Hungary through an Austrian website. Not to mention cross-border marriage and divorce cases, international crime cases involving more than one prosecution service, or transnational corporate architecture. And even in purely domestic cases, pieces of national legislation actually may be the result of a transposition of EU law into national law, and this transposition may not always be entirely correct. I believe that 21st century lawyers can hardly afford to be trained only in the law of their own country, or to have studied EU law as if it were just a chapter of ordinary international law.

2. From your point of view, which role does comparative law play in law (generally)? And more specific in constitutional law, but also in EU law?

Comparative legal studies are in my view among the most valuable contributions that legal academia can make to society. Without necessarily prescribing any ideal solutions, findings from comparative legal analyses can provide a range of *possible* solutions to a problem, from different legal systems or from different periods within the same legal system, to the extent that the problem in question can be addressed through law. Constitutional law is not much different from other areas of

law in that respect. The main difference is that while state organs can enforce private and criminal law as against individuals, constitutional law is meant to be binding on those state organs themselves. This means that the cultural embedding of constitutional rules, and their acceptance as an authoritative source of law, is especially important in that context. As regards EU law, comparative law is highly relevant for an additional set of reasons. Comparative legal expertise should help EU lawmakers take stock of pre-existing national legal regimes in order to assess the degree of divergence across the member states – or convergence, if legal solutions differ doctrinally but in effect boil down to the same thing. And for the Court of Justice of the EU, comparative law has of course for decades been a source of inspiration for the formulation of general principles of law, including fundamental rights.

3. What are the most significant changes brought by the Treaty of Lisbon, more than two years after its coming into force? Or, if you like, what are the most important recent developments concerning the EU legal order?

There certainly were a few important institutional innovations in the Lisbon Treaty, such as the extension of the ordinary legislative procedure to the justice area, the distinction between implementing and delegated lawmaking, the binding effect for the Fundamental Rights Charter and the legal basis for the Union's accession to the ECHR, or the permanent European Council chairmanship. But all these innovations can now seem almost trivial compared with the events of the European debt crisis, the policy measures and proposals for policy measures that they trigger, and their constitutional implications. For scholars of constitutional law this is a new phenomenon, at least on this scale. In the past, when we talked about, say, the democratic legitimacy of EU policy formulation, it was often about policies whose financial impact was hard to quantify and whose redistributive aspects were limited. Think

of things like the extent of consumer health or data protection or the rights of the suspect in criminal proceedings. These policies continue to be made, of course. In the context of financial and fiscal oversight, however, the currency of EU bargaining is actual currency, actual money, and the subject of discussion on competence transfers concerns the mutual agreement, and policing, of restraints on public spending in the national budgets. It has little to do with the Lisbon Treaty, but it all feels immediate and real, sometimes eerily immediate and real, and certainly much more so than the mentioned Lisbon reforms.

4. What is the constitutional stage of the EU legal order? And in connection to that, from an EU constitutional point of view, are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

The very fact that the question about the European Union's constitutional stage is asked in the first place illustrates that we are dealing with an extraordinary polity. One would not ask about the constitutional stage of EFTA or NATO. That also means, however, that integration at some point can reach depths that not all member states are willing to accept. Unity and cohesion of the EU legal order can in principle be reduced by two processes: by multispeed integration, of course, whereby chunks of EU law apply to some member states but not to others, but also by plain non-compliance by member states with EU law that actually does apply to them. Whether all member states should be moving at the same speed in signing new treaties or compacts is essentially a political question, and if they do not, then specialist lawyers are perfectly able to handle the reduced uniformity of law in cross-border cases. We should be very alert, though, when discontent with too much integration, or an erosion of the authority of EU law due to political disunity, manifests itself in reduced respect for EU norms already in

force. From the point of view of the rule of law and legal certainty, one should prefer full compliance with agreed laws over partial and unpredictable compliance with over-ambitious laws.

5. What is the true meaning of subsidiarity? In fact, after more than two years since the Lisbon Treaty came into force, a persistent lack of legal (and judicial (?) alike) relevance of that principle is seems to be obvious, in spite of abundant political references made to it. Would you please describe briefly your perspective on that? What should be done to enforce the legal and judicial relevance of subsidiarity? Or is subsidiarity (in the context of EU) "doomed" to remain a mainly political principle? What would be the means to employ in order to strengthen that principle?

And also, concerning the European Court of Justice: is the recent case-law of the ECJ a "clue" in the direction of consolidating the judicial review concerning subsidiarity?

Subsidiarity is of course neatly defined in Article 5 TEU, with its cumulative negative and positive conditions. But that is of not much help if one actually has to determine in a concrete case whether the principle is respected or breached. In fact, it is fiendishly difficult to think of a measure that would *not* respect subsidiarity. One of the reasons is that compliance with subsidiarity is established with respect to the aims of a proposed EU measure – and whether Member States can achieve that aim on their own – and often it is readily apparent that only an EU measure can achieve the aims of an EU measure.

When we look at the way in which national parliaments have been using subsidiarity in the formulation of their reasoned opinions, i.e. the complaints they are invited to send if they detect subsidiarity breaches in draft EU legislation, we see that the most controversial proposals – those that attract the greatest number of opinions – tend to lie in areas where the Union enjoys

limited competence to begin with, and where EU action comes dangerously close to encroaching upon national prerogatives. These areas include family and inheritance law, substantive criminal law, tax law, health care and labour relations. In my recent book on the subsidiarity check[1] I argue that we should acknowledge which issues are most sensitive to national parliaments, and that the subsidiarity check can be validly used to accommodate these competence-related priorities, too. After all, without competence the Union cannot possibly achieve the aims that a measure proposes, and in such case a subsidiarity test cannot possibly be positive.

As regards the Court of Justice, I would find it positive if it considered national parliaments' reasoned opinions, if there are any, as part of its review of already adopted secondary EU law. For both the parties and the Court, including the Advocate-General, reasoned opinions could serve as freely and openly available pieces of evidence to support claims that, for example, a contested directive had already been contested at the proposal stage. Whether review on subsidiarity grounds as such should be stricter than it currently is, is a different question. There are reasons why the Court is not too activist on that count. But then again, we should not make the mistake of implying that subsidiarity enforcement works best if as may directives as possible get annulled or invalidated on subsidiarity grounds; similarly, the success of the ex ante subsidiarity check by national parliaments should not be measured by the number of proposals that got blocked either. What I find more important is that the initiator of EU legislation makes a solid effort to *justify* the need for new EU legislation under the heading of subsidiarity. The fulfilment of the duty to state reasons after all provides an opportunity to persuade others of a measure that is justified, but also to reconsider a measure if it turns out to be actually hard to justify.

[1] *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, London: Routledge 2012 (ed.).

6. In a similar vein, from the level of national parliaments in EU, could you please comment on possible means to employ in order to consolidate the role of those parliaments in EU affairs? Is there an inherent constraint concerning the potential effectiveness of national parliaments in influencing the EU politics in the fact that frequently those parliaments pursue different goals and priorities? How to "Europeanise" the role played by those?

Or, to put in other words, are COSAC (or other forms of parliamentary cooperation in UE) and an increased exchange of information solid means to strengthen the role (and the power) of national parliaments?

When we speak about national parliaments, we usually mean unicameral parliaments or lower chambers whose majority typically coincides with the composition of the cabinet. Most of the critical mass for sharp scrutiny would therefore lie where assertive government MPs, members of opposition parties and – in bicameral systems – members of the upper chamber hold the government to account by asking intelligent questions and by demanding adequate answers. The fact that some matters are more interesting to parliamentarians, and to their voters, than others, is often very understandable, though.

COSAC, the half-yearly conference of the European Parliament and the European affairs committees of the national parliaments, is a famous forum for the exchange of opinions and practices. However it is too unwieldy for ongoing inter-parliamentary coordination. What seem much more promising are the weekly meetings of the permanent representatives of national parliaments in Brussels. These are civil servants who have their offices on the same floor and who can swiftly alert each other about initiatives pending in their home parliaments.

7. The Lisbon decision delivered in June 2009 by the *Bundesverfassungsgericht* is already a "classic" case in the

field of EU (and national alike) constitutional law. Is it the "ultimate" piece of EU constitutional law from a national perspective? Yet, is there a "hidden" meaning in that decision? Is the national parliament scrutiny (over the national government) the key to solve the problems?

The *Lisbon* ruling has what we might call a doctrinal and an operative part. Most academic commentaries have focused on the former: the Court's lengthy lecture on what the nature of the European Union is, how it relates to democracy and statehood, and where the limits to integration are. But we should also pay attention to the operative, perhaps a bit more technical part, which deals with the question when and under which circumstances – at least in Germany – prior national legislative consent is needed for the adoption of EU decisions. This fits into a larger line of case-law, whereby the Constitutional Court does not immediately prevent steps towards greater European integration, but instead demands that, if such steps are taken, the national parliament (or at some stage the population itself) must be closely involved. A similar approach can be seen in the rulings regarding the parliament's participation in the setting up and operation of the European financial stability mechanisms. Whether this does alleviate democracy-related concerns in Germany is hard to assess, let alone quantify. But it certainly somewhat helps reduce the pressure on the Court to keep defining the speed and limits of integration.

8. What is the role of expertise in the law-making (more generally) and Parliamentary scrutiny concerned matters connected to EU law (more particularly)? What lessons should be drawn from the others experiences in a comparative perspective (to other Member States of the EU)?

Usually I would say that parliamentarians do not have to be specialists in everything. After all, not all of them are experts

in public health or defence either, instead the political parties' spokespersons and expert committee members take the lead. Yet there is a major difference between these areas, on the one hand, and EU law on the other, and that is that EU law is not a policy area as such, but rather a horizontal dimension to other policy areas. Thus, I would find it important that a member of a parliament's environment committee is familiar with regulatory developments in EU environmental policy as part of his or her overall expertise. What happens otherwise is that EU expertise is concentrated, or one could say abandoned, to the European affairs committee. And that would be a shame, because European affairs committee members are typically generalists, and they should by all means profit from expert input in order to improve the depth of the questions which they put to the government. So it appears that the key to parliamentary expertise lies not only in qualified European affairs committee members and parliamentary support staff, but in the mainstreaming of EU knowledge among sectoral committees, and in a fruitful cooperation between sectoral committees and the European affairs committee. The Finnish model enjoys a good reputation in that respect: the high-profile European affairs committee receives EU dossiers, gathers opinions from sectoral committees, and on that basis goes on to engage in a dialogue with the government. This means the specialist work is decentralized but deliberations are centralized.

9. Would you like you to point out your major influences concerning methodology during your career? What advice/ recommendation would you give to young researchers?

I have greatly profited from incorporating the findings of political scientists in my own work on constitutional law. This does not mean that we should start replicating the methods of a discipline in which we are not trained; but lawyers can very well take note of at least the *results* of the research of other

disciplines. For example, lawyers are often tempted to claim that a certain legal arrangement *causes* certain societal effects; a somewhat greater awareness of how political scientists but also economists conduct actual empirical research to see whether this is true, and how they seek to distinguish causation from mere correlation, would often be a good thing.

Thank you very much.

JULIANE KOKOTT

Born 1957; law studies (Universities of Bonn and Geneva); LL.M. (American University/Washington DC); Doctor of Laws (Heidelberg University, 1985; Harvard University, 1990); Visiting Professor at the University of California, Berkeley (1991); Professor of German and Foreign Public Law, International Law and European Law at the Universities of Augsburg (1992), Heidelberg (1993) and Düsseldorf (1994); Deputy Judge for the Federal Government at the Court of Conciliation and Arbitration of the Organisation for Security and Cooperation in Europe (OSCE); Deputy Chairperson of the Federal Government's Advisory Council on Global Change (WBGU, 1996); Professor of International Law, International Business Law and European Law at the University of St Gallen (1999); Director of the Institute for European and International Business Law at the University of St Gallen (2000); Deputy Director of the Master of Business Law programme at the University of St Gallen (2001); Advocate General at the Court of Justice since 7 October 2003.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

I studied law at the universities of Bonn/Germany and Geneva/Switzerland and also in the United States: at American University/Washington D.C. and at Harvard Law School. Evidently, it was helpful for my later professional life to study in French (at Geneva) and in English (U.S.). From the

beginning, my focus was on international and European law, as I always had an interest in learning about other cultures.

2. We would like to ask you how have you started to study EU law? What would you recommend to those academics in Romania that have started their professional career in other fields of law and then, after the EU law has "come" to Romania, took the EU law as a main academic interest?

As a postdoc and research fellow at the Max Planck Institute, I focused on EU law. Academics who have started their career in other fields of law should not worry though: EU law now permeates all fields of law. So, those academics may remain specialists in their particular fields, but integrate all the changes and new aspects caused by EU law. In addition, there are many opportunities to meet colleagues from other Member States for scientific exchange; a good opportunity to keep up-to-date with the development and new tendencies of Union law and to get together with EU practitioners, decision makers and academics is to help to prepare or to participate in the bi-annual FIDE conventions (Fédération Internationale de Droit Européen).

3. Would you like to point out your major influences concerning methodology during your career? Which advice/ recommendation would you give to young researchers?

Intensive study of my own (German) legal system has been an excellent basis to study the law of the European Union and international law. Good knowledge of one or more national legal orders is a prerequisite for understanding the general principles of law and helps to deal with new legal problems.

4. Returning to the ECJ, we would like to ask you about your professional experiences at the Court. What are your models among the (former and current alike) Judges and AGs at the ECJ?

It is difficult to single out particular judges and AGs. Working at the Court is fascinating because of all the intensive discussions and jurisprudential exchanges integrating the perspectives of the various legal cultures of the Member States as well as the different backgrounds of the Court's members who come from different legal professions: judges, law professors and others. There is much more reflection and research going on behind the scene than is expressed explicitly in the judgments.

5. In connection to the previous question, which was your most important experience acting as an AG? Could you please describe one or more cases that raised the most significant challenges?

For me, the most important experience is a permanent one: the chance to deal with law as a structural principle of European society. This includes all areas of law, but from an overall perspective. Also, legal technique must be used with much responsibility. We must be aware of and take into account the consequences of our jurisprudence in all Member States.

One of the cases which raised significant challenges was the so called *Test-Achat* Case (C-236/09), that was decided in 2011. I concluded that taking the gender of the insured individual into account as a risk factor in insurance contracts constitutes discrimination; the Court followed. One of the challenges posed by this case was that all intervening Member States as well as the Commission pleaded that the discrimination was acceptable.

6. What is the view of an AG in case a judgment delivered by the ECJ does ignore his previous opinion? On the contrary, what is the secret "recipe" for an influential opinion? On the other hand, sometimes, an opinion is broader than the judgment in that case. Could you please explain the main reasons for that (i.e. "for the sake of completeness")?

a) The Court might adopt a judgment not following its AG by different reasons. For example, the Court did not follow me in the *Berlusconi* case (Joined Cases C-387/02, C-391/02 and C-403/02). I had pleaded against the retroactive application of more lenient ex post facto national criminal law provisions which violated Community law. Even though the Court did not follow me, I am still convinced of my approach. Usually the AG's opinion gets more attention in cases where the Court does not follow. Sometimes, different solutions are possible. Opinions of AGs are to a certain extent also functional equivalents of dissenting opinions.

b) The "recipe" for an influential opinion is: it must be well reasoned and clear, not too long and come out as fast as possible (taking into account translation time) after the hearing.

c) The AG's opinions are sometimes "broader" because the AG can never be sure that the Court follows her approach. Therefore, it sometimes makes sense to formulate alternative pleadings for different legal solutions, the one preferred by the AG and the other one which is also arguable and could be adopted by the Court.

7. From your point of view, what are the most important recent developments concerning the EU legal order? Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

Until recently, European integration has been a success story. Now, we are faced with the financial crisis. One of the problems is that people take the advantages of the Union - e.g. peace and freedom - for granted while focusing on current problems. This way, the value of Europe falls into oblivion. What we need is constructive thinking.

Also, many new Member States joined the European Union within a relatively short time period. The growing number and diversity of Member States, while offering exciting new

opportunities, also renders integration more of a challenge.

A constant challenge remains the further development of democratic governance on the supranational level, with due respect for the principle of subsidiarity.

8. From your perspective, what would be the main challenges for the current European Court of Justice?

A potential challenge is how to deal with Member States where the rule of law is less firmly established than usual in the framework of European integration. This touches the foundations of the European Union which is based upon integration through law.

Another challenge is to keep up the high standards of judicial reasoning while the number of cases is increasing and cases are getting more and more urgent. For example, within the so called "urgent preliminary procedure" we decide under high time pressure in new fields of the law on the basis of written submissions only from the Member State concerned and the Commission. Other Member States may only plead orally in these proceedings.

9. A final question: what would be the limits – if any – concerning the academic opinions expressed by members of the EU Courts (Judges and AGs)?

They must keep the secrecy of judicial deliberations and they must not express opinions on pending or potential cases in order not to prejudice themselves.

Thank you very much.

VALENTINE KORAH

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She has taught at many universities: full courses at the College of Europe for nearly 20 years and Fordham Law School for 14 consecutive Spring semesters, shorter but repeated visits to the Universities Lund, Carlos Tercera, Monash, Melbourne and the Victoria University of Wellington. She frequently lectures outside the UK.

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Publications (selections):

- Introductory Guide to EC Competition Law and Practice, 9th ed. (2007), Hart Publishing;

- The Lisbon chapter, "Competition Law and Economics", eds Mateus and Moreira (2007), 301-324;

- Judgment of the court of first instance in GlaxoSmithKline, (2007) 6 Competition Law Journal;

- Cases and Materials on EC Competition Law, 3rd ed September (2006), Hart Publishing;

- Intellectual Property Rights and the EEC Competition Rules (2006), Hart Publishing (replacing 4 earlier monographs);

- Intellectual Property rights and the EC Competition Rules (2006), Hart Publishing;

- 'Advocate General Jacobs' Contribution to Competition Law,' (2006) 29 Fordham ILJ 716;

- 'Wanadoo', (2005) 4 Competition Law Journal, 250;

- 'Intellectual Property Rights and the EC Competition Rules,' chapter 9 in Competition Law of the European Community, Lexis Nexis, General Ed Valentine Korah, release 15, (2005);

- EC Competition Law and Practice , 8th. ed., Hart Publishing, Oxford, September (2004); The 9 th ed. Sept. 2007;

- Distribution Agreements under the EC Competition Rules, with Denis O'Sullivan, (2002), Hart Publishing, (replacing 3 earlier monographs);

- Competition Law of Britain and the Common Market (1982) 3rd ed. Elek for 2 editions, then Nijhoff;

- Penguin Education, Foundations of Law, (1967).

Many other books, articles, chapters etc.

In the beginning, we would like to thank you for agreeing to answer the following questions.

1. You are one of the most important voices in competition law. Therefore, we would like to ask you to comment on the most significant stages in the evolution of EU competition law. What are the roots of competition law? On the other hand, what are – from your point of view – the deficiencies of the EU competition law system?

Thank you, but I am past my sale by date. There were competition provision in ECSC Treaty, but they more or less organised a cartel, because you could not change your prices once announced. Part of the motivation clearly was that it would be useless to ban customs barriers if firms could reintroduce them by contract. The search for efficiency was another motive. See some of the writings by von der Groeben in the 1950s and 60s.

2. How would you assess the Lisbon Treaty more than two years after its coming into force? Both on an overall level and more specific in the field of competition and state aid law.

It did little for competition other than changing the numbering of the articles. I am not a generalist. Much was written about excluding Article 3(1)(a), but a protocol has the same legal effect.

3. From your point of view, what are the most notable recent developments in EU competition law?

The Regulation of 2003 ended individual exemptions, and substituted exceptions. All enforcers of competition, Commission, national courts and authorities apply identical tests and exceptions require no exercise of discretion. Much expensive time was saved by Commission and businessmen.

The modernisation was very important. There was much negotiation, mainly behind closed doors throughout the 1990s. Commission officials often allege that it is interested in the effects of practices, not their form, but the prioritisation document was clearly written by more than one person with different views.

4. Could you please assess the future accession of the European Union to the European Convention on Human Rights from the point of view of EU competition law? What would be the main challenges brought by that accession in the field of EU competition law?

This is not my field of expertise. For many years now the General Court has taken steps to avoid conflicting with the Strasbourg Court. I hope we now look to fundamental rights, which affect companies and not only human beings.

5. How would you describe the developments in the field of state aid under the current economic and financial crisis? Which are the main challenges to that field.

I know nothing of state aid. It is now more than important than ever with the bail outs.

6. We would like to ask you to comment on the meaning of the "more economic approach" currently en vogue in certain circles? And also, what role does economics play for a lawyer's understanding of EU competition law?

Economists are interested in effects and not form. When Ehlermann was in charge of DG Competition, he used it as a snappy way of not having to use his scarce manpower to grant exemptions

He praised the more economic approach because he wanted to avoid having to grant exemptions for harmless agreements. He achieved that aim with Regulation 3/2003. He lacked sufficient staff.

7. A final question to you: what research methodology would you recommend to young researchers in EU competition law?

I don't know what you mean. It depends on what you are researching. Most economists stress the importance of empirical research.

Thank you very much once again.

ALEXANDER KORNEZOV

Référendaire at the Court of Justice of the European Union since January 2007. Master of Laws from the Sofia University, LLM in European Legal studies from the College of Europe, Bruges, Belgium, Ph.D. in EU law from the Bulgarian Academy of Sciences. Former member of the Brussels Bar Association and lawyer at Van Bael & Bellis, Brussels, where he specialized in EU trade law, WTO law and competition law. Founding member and member of the board of directors of the Bulgarian Association for European Law. Author of three books on EU law and of numerous articles.

Lecturer of EU procedural law at the Sofia University and the University of National and

World Economy, Sofia, guest lecturer at the British Law Centres. He is fluent in English, French, Spanish, Portuguese, possesses working knowledge of Russian, as well as basic understanding of German and Arabic.

In the beginning, we would like to thank you for agreeing to answer the following questions.[67]

1. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

There is a tendency in recent years to look for solutions to some of the most pressing European issues outside of the legal

[1] The views expressed are strictly personal.

framework of the European Union. Examples include the European Fiscal Compact[2], the European Stability Mechanism, as well as the (failed) attempt to solve by intergovernmental means the European patent saga. There are at least two reasons for this. The first one is the omnipresent fear of having to amend the Treaties which is perceived at present as practically impossible. The other reason is that intergovernmental cooperation is considered by some as more efficient and, in any event, likely to yield results in the short run where urgent solutions are needed.

Another challenge for the unity and coherence of the EU legal order is the forthcoming EU accession to the ECHR where a number of problems are still pending.

The means to overcome these challenges depend on the nature of each challenge. In general, it is of utmost importance to preserve the autonomous character of the EU legal order. In that regard, the multiplication of different levels of intergovernmental cooperation between EU Member States, alongside with EU-proper action, as well as enhanced cooperation measures, risk to undermine the coherence of the EU legal order. The ultimate goal should therefore be to bring at least some of these instruments, at some point in the future, within the framework of the EU legal system. It is noteworthy that some of them, for example, the European Fiscal Compact, provide precisely for such eventual re-integration within the proper body of EU law.

2. From your perspective, what would be the main challenges in the foreseeable future for the European Court of Justice?

The main challenges, as the Court stands today, are at least three. First is the challenge of coping with an ever increasing

[2] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

workload, while still managing to deliver well reasoned and authoritative judgments within a reasonable period of time. The increase in the workload of the Court can be explained, on the one hand, with the fact that the Treaty of Lisbon widened the competence of the Court to a number of areas where the Court's jurisdiction was limited before. On the other hand, the courts of the so-called new Member States more and more often make use of the preliminary references mechanism, a trend which only seems to increase with time. Second, the duration of the proceedings before the General Court of the EU continues to be a problem which has to be resolved without delay. Last but not least, the forthcoming EU accession to the ECHR may add further strains on the judicial activities of the Court, in particular if the prior involvement of the Court is envisaged.

3. Also, in connection with the above question, could you please comment on recent developments in the judicial politics of the European Court of Justice?

First, the Court has taken the initiative to propose new Procedural Rules, which have now entered into force. They aim to clarify and simplify certain rules and thus accelerate the procedure. This is an important step which should contribute to the ongoing effort to enhance the efficiency of the Court. Second, the Court has proposed that the number of judges at the General Court be increased in order to address the problem mentioned above. Unfortunately, there has been no decision on this point yet.

4. On the other hand, what research tools would be useful for discerning and explaining the political weight employed by the European Court in its rulings?

Purely political considerations are, by definition, inadmissible in judicial proceedings before the Court, which is guided solely by the rule of law. This being said, the Court does take account of the general context in which the question

of law has arisen. Indeed, a legal issue cannot be artificially disconnected from the factors which lead to it. There is no preset list of tools which can be referred to in order to discern whether or not the Court took account of the general context in which the question referred to it had arisen. Still, a number of general principles of law, recognized under EU law, such as the principles of legal certainty and legitimate expectations, can be relied upon in order to taken account of the general context of the case. In addition, the possibility for the Court to limit *ratione temporis* the effects of its judgments is also an important tool to that end.

5. Are there any genuine principles common to the Member States or that statement is just a legal fiction employed for a *reductio ad absurdum* of different legal traditions?

There certainly are. It suffices to refer to the principles of mutual recognition and mutual trust which underpin the EU area of freedom, security and justice. If the legal values and traditions – albeit different – of the Member States were not based on common principles, it would at the very least be impossible to ensure free movement of judgements within the EU.

6. What is EU law compared to comparative law? Do you think that one can speak of European comparative law (meant to bring elements designed to build EU law)?

While EU law certainly relies on principles, ideas and solutions applied and tested in national law, some of its elements are *sui generis* and therefore unique. European comparative law in the sense that you mention seems therefore a reasonable concoction as long as it bears in mind the unique character of EU law.

7. Could you please comment on the goals of the competition among European Courts – the European Court

of Justice and the European *Court of Human Rights*? What would be the usefulness of an adhesion to the European Convention on Human Rights as far as the European Union has already adopted the Charter of Fundamental Rights?

This is a very complex question which cannot be answered in a few lines. In short, in my personal opinion, I don't expect that EU accession to the ECHR will result in a substantive change in the standards of protection of fundamental rights in the EU. Nonetheless, one of the obvious consequences of accession would be that the actions of EU institutions will be subjected to the scrutiny of the ECtHR, which could be seen as a positive development in itself. However, if a complaint is filed at the ECtHR after the domestic remedies in a given EU Member State had been exhausted without a preliminary reference having been made to the ECJ, there might be a risk of EU law being declared incompatible with Convention rights without the ECJ having had the opportunity to rule on the question. This is in itself problematic in the light of one of the main procedural principles of the Convention, i.e. the principle of subsidiarity.

Apart from that, it should be borne in mind that the multiplication – or rather the interposition – of various legal systems for the protection of fundamental rights in the EU may not necessarily be beneficial to individuals, in particular where there is a risk of creating an overly complex system of remedies which would be unable to deliver a final solution to a dispute within a reasonable period of time. This is why it is, in any event, of utmost importance that efficient solutions be rapidly found to sort out the ECtHR's very worrying backlog.

8. In that connection, what would the essence of the reflection document[3] of 2010 concerning the accession of the European Union to the ECHR be?

[3] http://curia.europa.eu/jcms/jcms/P_64268/

In that document the ECJ pointed out that, in order to observe the principle of subsidiarity which is inherent to the Convention and at the same time to ensure the proper functioning of the judicial system of the Union, a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the ECJ before the ECtHR rules on the compatibility of that act with the Convention. The ECJ has thus identified one of the issues which should be addressed in the light of the forthcoming EU accession to the ECHR. The purpose of this document is to contribute to the process of finding effective solutions to the problems which arise with regard to the aforementioned accession.

9. Could you please describe the impact the judgments delivered by the General Court has over the courts or tribunals of the Member States (compared to the judicial dialogue entailed by the preliminary rulings procedure)?

And also, is there a deference/difference? in the reasoning of the General Court compared to the reasoning of the Court of Justice?

This is an interesting question which needs yet to be explored. It is difficult to assess whether and how, in practical terms, the impact of the General Court's judgments is different from that of the ECJ's, since, legally speaking, both provide authoritative interpretation of EU law. Nonetheless, as a result of the judicial cooperation established by the preliminary reference mechanism, national courts look up to the ECJ – mostly or even exclusively and only very rarely to the General Court – in order to obtain authoritative interpretation of EU law. Apart from this natural habit, it should also be borne in mind that the material scope of the General Court's jurisdiction is limited. Therefore, the comparison should be carried out only in relation to the areas of law where the General Court is competent, such as EU competition law.

There are indeed differences in the reasoning of the judgments of the General Court and the ECJ. These can be explained by the different nature of the proceedings before the two courts. First, whereas the General Court does a considerable amount of fact finding its judgments, the ECJ – with the possible exception of infringement actions – does not. Second, the General Court normally seeks to address each and every issue which is put by the parties before it in order to minimise the risk of its judgement being quashed on appeal. By contrast, the ECJ may choose to focus on the issues which resolve the dispute without necessarily addressing every argument raised before it, in particular in preliminary ruling proceedings. Las but not least, the material scope of the cases subject to the General Court's jurisdiction, presupposes a more fact-entrenched economic-based analysis, while the ECJ, due to its virtually unlimited material competence, normally adopts a more horizontal, across-the-board approach.

10. To sum up the above questions: Would there be any risks concerning the activism of the European Court of Justice? Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

I don't think that the ECJ could be accused of activism. From the ECJ's perspective, the preliminary reference procedure is a strictly legal mechanism. While it is probably true that certain preliminary references may have been influenced, in the background, by political or economic considerations, these should in any event be assessed by national courts which have decided to refer the question to the ECJ. Once the reference has arrived in Luxembourg, the possible political or economic implications should normally cease to be relevant as such.

11. You are familiar with the Bulgarian legal order, as well. Therefore, we would like to ask you to comment on noticeable aspects (in the legal world) which have taken place in Bulgaria (after it became a Member State of the European Union) besides the legislative approximation work.

The most noticeable aspect, from an EU perspective, is definitely the ever increasing number of preliminary references made by Bulgarian courts, which is one of the highest in comparison with the other new Member States. Moreover, most of these references demonstrate good knowledge of the preliminary reference mechanism. Indeed, very few have been struck down as inadmissible or for lack of competence. In addition, some of these references have contributed to the development of the ECJ's case-law in a number of areas of EU law.

It is noteworthy that the majority of these references come not from supreme courts, but from lower courts. In addition – and this seems to me as an outstanding feature of Bulgarian references – lower courts have on several occasions used the preliminary reference mechanism as a tool to call into question the constant case-law of the supreme courts which was deemed to be incompatible with EU law. These are, in my view, the signs of a quiet revolt led by lower courts against certain doctrinal positions defended by supreme courts.

12. What about the Bulgarian judiciary? Is it ready to work with EU law? The last question is also of great interest for a new Member State like Romania. In connection to the above question, Bulgarian courts and tribunals seem to become (more and more) familiar with EU law. Those courts and tribunals are quite active in addressing preliminary references to the ECJ, and some of them are noteworthy. Therefore, could you please comment on those developments? Which one of the preliminary references (originating from Bulgaria) would be the most significant?

Indeed, a number of judgments handed down on Bulgarian preliminary references have been noted for their importance for the EU legal order as a whole. Mention should be made, in particular, of the judgments given in *Kadzoev* (Grand chamber)[4], *Elchinov* (Grand chamber)[5], *Gaydarov*[6], *Aladzhov*[7], *Byankov*[8], etc. There are also a number of pending cases which are worth mentioning, such as, in particular, *Belov*[9] and *Agrokonsulting*[10].

It should however be noted that the successful use of the preliminary reference mechanism in Bulgaria should so far be attributed to a limited number of courts and judges. Indeed, the big majority of the preliminary references originate from one and the same courts and even from the same national judges. This shows that adequate application of the preliminary reference mechanism throughout the country and throughout the various judicial degrees is yet to be achieved.

13. On the other hand, another important issue concerning the newer Member States is related to the quality of translation work of the *acquis* in the languages of those States. Therefore, is the quality of legal translations proper? Are there any shortcomings?

When such an enormous amount of legal texts has to be translated into a new language, it is inevitable that certain errors occur. I have myself had to deal, in my personal experience, with misleading translations of EU primary or secondary law, or even of the case-law of the Court on a number of occasions.

[4] Judgment of 30 November 2009, *Kadzoev*, C-357/09 PPU, Rec. p. I-11189.

[5] Judgment of 5 October 2010, *Elchinov*, C-173/09, Rec. p. I-8889.

[6] Judgment of 17 November 2011, *Gaydarov*, C-430/10.

[7] Judgment of 17 November 2011, *Aladzhov*, C-434/10.

[8] Judgment of 4 October 2012, *Byankov*, C-249/11.

[9] Case C-394/11.

[10] Case C-93/12.

This is why I always advise all practising lawyers to compare, whenever possible, several linguistic versions of the legal text at issue.

Thank you very much.

MARCO LOOS

Marco Loos is professor of private law, in particular European consumer law. He conducts research and teaches in the areas of Dutch and European contract and consumer law.

Marco studied law at the University of Amsterdam. In 1993, he started working as a junior researcher at the Molengraaff Institute for Private law at Utrecht University. He wrote his Ph.D.-thesis on the contract to supply energy to consumers under the responsibility of professor Ewoud Hondius and successfully defended his thesis in 1998.

From 1997 to 2001 he worked as a researcher and lecturer of law at Tilburg University. From 2002 to 2004, he worked as a senior researcher and senior lecturer at the University of Amsterdam.

As of 2005 he is a professor at University of Amsterdam. In 2005 and 2006 he was Director of the Amsterdam Institute for Private law (AIP, currently the Centre for the Study of European Contract Law). From 2007-2009 he was chairman of the Department on Private Law. He regularly publishes in the fields of contract law, consumer law and European private law. He published in Dutch a book on standard contract terms in 2001, one on consumer sales law in 2004, his inaugural address on spontaneous harmonisation in contract law and consumer law in 2006, and a book on the sales regulation in the proposal for a consumer rights Directive in 2009.

In English, he published a book on the Review of the European Consumer acquis in 2008. He co-wrote the Principles of European Law on Service Contracts, published by Sellier in

2006. The Principles of European Law on Mandate Contracts (together with O. Bueno Díaz) was published in December 2012.

He co-edited a book on collective redress in consumer law in 2007 (in English, with Willem van Boom, Rotterdam), a book on the proposal for a consumer rights Directive (in Dutch, with Martijn Hesselink, Amsterdam), another on the upcoming Optional instrument (in Dutch, with Martijn Hesselink, Aukje van Hoek and Arthur Salomons). Finally, he published a 'preadvies' to the Dutch Lawyer's Association Vereniging voor Burgerlijk Recht on the enforcement of consumer law (with Willem van Boom).

Marco Loos has been a member of the Study Group on a European Civil Code; he has been the manager of the Study Group's Working Team on Services charged with developing common European Principles for Service Contracts, and the team leader of the Study Group's Working Team on Mandate Contracts (still to be published). He has also been an Advisor to the Working Team on Donation.

He is a member of the editorial board of the Dutch consumer law review 'Tijdschrift voor Consumentenrecht en handelspraktijken' (since 2009 as editor-in-chief) and a part-time judge to the District Court of 's-Hertogenbosch.

In 2010 and 2011, Marco headed a study on Digital Content Services for Consumers, commissioned by the European Commission.

First of all, we would like to thank you warmly for accepting this interview.

1. What about the public/private law divide in the current (global) landscape? Is it still relevant? And what are its limits?

Since private law is more and more influenced by European (Union) law (and to a lesser extent also by the case law of the

European Court of Human Rights), and European law is not centred around dogmatic divisions between public and private law, the distinction becomes less relevant over the years. Nevertheless, the distinction remains relevant, if only because the applicable jurisdiction (the relevant court) may depend on it.

2. In connection to the previous question, we would like to ask you to describe the role played by the EU legislator and the Court of Justice of the European Union in shaping the EU private law. In other words, what role has to play the EU legislator and what role is assigned to the EU courts?

As European Union law is driven by the promotion of the internal market, legislation tends to focus on that. In this respect, it is irrelevant to the European legislator whether a particular matter belongs to private or public law at the national level. The ECJ is required to interpret European private law, and does so again without being much bothered by the outcome of its rulings on the coherence of national private law. National courts – also acting in their capacity as European courts – traditionally have had more eye for the impact of their rulings in their domestic private laws. As a result, they may have come to apply European law also outside their scope of application (this may be called the spill-over effect of European private law or spontaneous harmonisation, depending on whether you look it at from the European or national perspective).

3. Which is the role played by the consumer protection in establishing a European Civil Code? Has the consumer protection been used as a curtain for the judicial building of a private law?

Consumer protection law has certainly had an important influence on the building of European private law – whether or not this will ultimately lead to a European Civil Code is to me less relevant. However, I do think that consumer protection

nowadays is being made too much subordinate to, or a derivative from, the internal market policy of the European Commission. This is undoubtedly the consequence of the limited competence of the European Union in the area of private law.

4. From your point of view, how important is the concept of public policy (*ordre public*) in shaping of a European private law? Does the European private law maintain the traditional features as private law?

Even though there is traditionally a lot of attention for the subject, for legal practice the notion of 'public order' is only to a very limited extent relevant. Far more relevant are notions such as 'good morals' and 'legal capacity'. These matters do not attract sufficient attention at the European level (see for instance the legal of legal provisions in the Draft Common Frame of Reference (DCFR) and the proposal for a Common European Sales Law (CESL) on these matters).

5. What role does the rules of international trade law (UNIDROIT, UNCITRAL) play in the process of shaping of a European private law? Could you please provide a short outline of the significant moments that have taken place at the Court of Justice of the European Union in that regard?

Rules of international trade law, in particular of the CISG, have played an important rule in shaping, in particular, legal provisions – be it the Consumer Sales Directive, the DCFR or the CESL. I do not see much influence of these international instruments in the decisions of the ECJ.

6. What is the role the comparative law has to play in shaping the European private law?

In particular where soft law, such as the DCFR, is created, comparative law plays an important role. The same is true in the preparation of legislative proposals, although the results

thereof – even if the comparative research is published – is much more difficult to ascertain in the proposals themselves. In the case-law of the ECJ comparative law appears to play a marginal role at best.

7. Are there any genuine principles common to the Member States or that statement is just a legal fiction employed for a *reductio ad absurdum* of different legal traditions?

I would not argue that the use of the notion of 'principles common to the Member States' is *reductio ad absurdum*, even if it may be difficult to ascertain the concrete borderlines in the different legal traditions. However, general notions such as the idea that one should not be able to benefit from one's own deliberate non-performance to the detriment of the creditor are certainly common to most, if not all Member States. Such arguments – which indeed have an important 'but of course'-character – obviously may play a rhetorical role in the argumentation of the ECJ. But I ask you: what would be wrong with that?

8. A final question to you: what research methodology would you recommend to young researchers in EU (private) law?

Comparative law is indispensable, but it would be good to study European law also from the angle of internal coherence. Finally, the link to one's own national currently remains important. Therefore, one should not study just one methodology, but rather a multitude of methodologies.

Thank you very much.

THOMAS LUNDMARK

A native San Diegan, Thomas Lundmark studied in San Diego (AB), Uppsala, Berkeley (JD), Freiburg, and Bonn (Dr jur). After serving three years as a senior Fulbright professor at the Universities of Bonn, Rostock, and Greifswald, and for one semester as a visiting professor at the University of Jena, he was appointed Professor of Common Law and Comparative Jurisprudence at the University of Münster. Upon his appointment in 1997, Lundmark became the first American appointed to a professorship in law at a German university. Professor Lundmark is a member of numerous philosophical and comparative law societies, and has held seminars at dozens of universities around the world. His over 100 publications include more than 10 books. His latest book is Charting the Divide between Common and Civil Law (2012).

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law. What were (are) your models (in law)?

I studied law at UC Berkeley, Freiburg, and Bonn. Today, I would say that it was the teachers at UC Berkeley who had the greatest influence on me. There were number of German expatriates there. Kelsen had already died, and Ehrenzweig died while I was there. Kessler and Riesenfeld were teachers

of mine. Although I didn't realize it at the time, Kessler could be said to have been a member of the *Freirechtsschule*. That might be going too far, but I can say that his view of the law was decidedly not positivistic. In other words, he did not consider the law to be autonomous. I knew Riesenfeld much better. In my conversations with him, he stressed the commonalities between German and American law. "The older I get," he told me, "the more it all seems alike." There were of course others who influenced, and still influence me, like Buxbaum and Hetland.

2. You have an absolutely remarkable record of professional mobility. Could you please provide young researchers with certain lessons drawn for your personal experiences? What would by the gains and (potential) shortcomings of (young) legal students and professionals mobility in EU?

This question cannot really be answered, because the answers depend upon so many factors, particularly on how similar the jurisdictions are, how open they are, and what role one is playing. The answer is also tied up with the personal and professional interests and goals of the academic.

3. On a more personal note, we would like to ask you to assess the value of a German and US (or Anglo-Saxon, if you like) professional background as it is your case: you are familiar with both legal environments. In brief, what might be the gains from each system?

This question is also far too broad for me to answer in a few words, but I'll recite a few of my opinions. First, it is better for society to have young people begin their studies of law directly, rather than (as is the case in the US, is often the case in Canada, and is sometimes the case in Australia) making them study some other (albeit sometimes related) subject before they can do a degree in law. However, the legal education in

Germany suffers because law is taught as if it were autonomous from politics, economics, religion, morality, etc. In this regard, the English tradition is far better. Germany requires lawyers who want to practice before courts (but not all lawyers) to complete a two-year apprenticeship (Referendariat), which I think is preferable to the English requirements for admission to practise (either the Bar Professional Training Course or the Legal Practice Course) and the American system, which only requires passage of a written examination.

4. Is the division between continental legal system and common law fading nowadays under the pressure of globalisation? Is this statement correct?

Yes. But, in most cases, the "convergence" that people "discover" was there already. Riesenfeld was right: There are far more similarities than there are differences. See my book *Charting the Divide between Common and Civil Law*.

5. On the other hand, is (are) the human rights doctrine(s) currently leading to a convergence in those different legal worlds (continental, common law)?

Yes. They are also helping to erode the autonomous thinking about law, something that is (still) much more prevalent on the European Continent than in the common law world.

6. From your point of view, which role does comparative law play in the EU law?

And also, what lessons should be drawn from the German legal culture for the EU legal order (and for EU law)?

I touch upon this in my recent book, and in other publications, for example, the ones in which I advocate development of a doctrine of "soft" stare decisis in European law. I am also working on an article on the subject at present. In short, judges schooled in the Continental tradition tend to

write formalistic judgments that do not reveal the real (policy) reasons for the judges' decision. In order for their judgment to be persuasive in other European (and other) jurisdictions, they need to spell out the values, interests, policies, etc. which led them to decide the case the way they did. This is not to say that British, Irish, and Scandinavian (who are in many ways more like common lawyers than Continental lawyers) judges are immune to formalism.

7. What is the status of public/private law division in comparative law?

It is still very strong, but this too is eroding, which is for the good.

8. What role does comparative law play in shaping of a transnational law? And also connected to the above question: is there such a thing like transnational public law?

Of course there is transnational public law! Only positivists have trouble seeing it because it doesn't fit with their conceptions of what law ought to be, rather than what law really is.

9. What is the Transatlantic perspective (from US) for the EU legal order? In that respect (and in an EU constitutional perspective), are there any lessons that might be drawn from the US legal history?

There are countless lessons, and in the other direction too. Americans have always argued in favour of a United States of Europe, but that view is extremely simplistic.

10. And a final question: Which advice/recommendation would you give to young researchers in (EU) law?

Do well on your examinations, particularly those in domestic law. Even if not relevant to your examinations, be conscious of the policies, interests, politics, economic, religious,

moral etc. content and values of your law, and the influences of these values on the determination of the facts, and on the determination, interpretation, and application of the law. Take classes in jurisprudence (legal theory and methodology), history, law and society, etc. Study at least one semester/term in another country, and pay attention to the similarities as well as the differences. After all, people around the world are genetically almost exactly the same, and culturally very similar. Gain at least a good reading knowledge of at least one foreign legal language.

And never forget that law is in and about people.

Thank you very much.

IMELDA MAHER

Imelda Maher moved to the University College Dublin (UCD) in 2006 to take up the newly established Sutherland Chair of European Law. She previously worked at the London School of Economics, the Research School of Social Sciences, Australian National University (where she was Director of the Centre for Competition and Consumer Policy), Birkbeck College, University of London, and Warwick University. She has also held Fellowships or visiting appointments at the Institute of Advanced Legal Studies, London, Sydney University School of Law and Lund University, Sweden. She is a member of the Advisory Board of the Economic and Social Research Council Centre for Competition Policy, University of East Anglia. In 2008 she gave the prestigious general course lectures on economic governance at the Academy of European Law, European University Institute, Florence.

She is a member of the editorial board of the European Law Journal *and of the* Irish Yearbook of International Law *and is general editor of* Legal Studies*, the journal of the Society of Legal Scholars of the UK and Ireland. Professor Maher is academic director for the new UCD Sutherland School of Law building and programme coordinator for the LLM in European Law and Public Affairs. She is a graduate of the UCD School of Law, holds an LLM from Temple University and a Barrister-at-Law degree from the Kings Inns. She was elected a Member of the Royal Irish Academy in 2011 and is a founding member of the European Law Institute.*

First of all we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

Law is an undergraduate degree in Ireland and I studied for a BCL in University College Dublin (UCD). The degree was doctrinal in nature, with comparative law and legal history a feature of many courses.

I secured a scholarship to attend Temple University in the US and acquired an LLM. The LLM programme was small so it was a wonderful environment in which to develop intellectually. The engagement with the JD students in their classes and experiencing and participating in the classic Socratic Method to teaching found in US law schools was challenging and rewarding.

After the LLM I decided to return to Ireland and complete the Bar – a two year programme. In my second year, I secured a lectureship (a one year contract) in UCD and thoroughly enjoyed the experience. A chance meeting with a UCD alumna working at an English university prompted me to apply and I secured a lectureship at Warwick University. EU Law had only a group of about 10 students when I arrived but shortly after the subject grew in popularity as students realised its significance for their careers and it was then made a requirement for the legal professions. Now, it is now usually one of the largest courses in any law degree in the UK or Ireland.

2. You have remarkable record of professional mobility. Could you please provide young researchers with certain lessons drawn for your personal experiences? What would by the gains and (potential) shortcomings of (young) legal students and professional's mobility in EU?

Coming from a small jurisdiction with a small number of university law faculties there were very limited opportunities

for a tenured position when I first went away. A couple of years after I left there was expansion in the sector but I realised that I had much to learn still in the UK. I had moved from a doctrinal school to a law in context school and realised there were many ways of approaching legal scholarship. I was fortunate enough to encounter some of these 'up close' as I also worked in the Law School in Birkbeck College, University of London which had a sizeable number of post-modern scholars before moving to the London School of Economics. I also spent two years on secondment at the Research School of Social Sciences at the Australian National University heading up a research centre on competition law, funded by the Australian Competition and Consumer Commission, working in a strongly inter-disciplinary environment.

Moving provides perspective and I realised that the same activities (not just research but teaching, the way a law school is run, how faculty engage with their students, assessment, expectations on staff, attitudes to gender and other forms of difference, hierarchies) can be approached in very different ways and it is a strength to move from one place to another and bring the benefit of varied experiences to your place of work.

The downside is that, especially if the move is overseas, it takes time of adjust personally and professionally to a new environment - finding housing, working out where the photocopiers are, what the research conventions are, etc. So, research timetables necessarily suffer but the hope is that the return from the boost of energy and excitement that comes from a move pays off.

It has been very rewarding to return to Ireland after nearly 20 years away – and to be at my old university, UCD, especially as the first ever woman to hold a professorship in law here. At the same time, moving back to one's own country is still a transition especially after so long away.

A move usually means more pay and often promotion. The downside of moving jurisdiction is that pensions rarely travel

and while this may not seem important when in your late twenties it is very important as you grow older.

3. Is the Lisbon Treaty, two years since its entry into force likely to be substantially amended? In other words, is the current global financial and economic crisis liable to lead to a new "constitutional" establishment of the European Union?

I am extremely wary of the word 'constitutional' applied to the EU. I think of the legal order as constitutionalising but not yet 'constitutionalised'. I have moved from one country (England) where Euro-scepticism is a strong theme in public discourse and increasingly in political discourse, to another state (Ireland) where concerns about democratic accountability in the EU and incursions on the sovereignty of a small, post-colonial state, are reflected in the often heated debates prior to the constitutional referenda on EU Treaty reform. While the Irish have sometimes voted a second time on the same Treaty revisions, this is less tenable in the future. And major reform that necessitates a referendum in the UK following the EU Act 2012, will be difficult to achieve which raises the complex question of what status the UK will have in the EU in five years time. If reform is limited to the Euro zone, then the UK may not need to have a referendum on it but Ireland is likely to and there needs to be very persuasive arguments to persuade the voters that these changes are necessary.

4. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

Economic crisis is a threat to the EU – not just its legal system. There is a tension – as in all polities – between the need for effective/efficient government/governance and the need to ensure effective accountability and legitimate exercise of power. The risk at times of crisis is that the balance leans

more heavily towards effective government and less towards effective accountability (including democratic) accountability. A need to constantly interrogate and reflect on the values that underpin the EU and the responses to crises is needed. One of the difficulties with the EU has always been that one clearly articulated imperative is market integration – however market integration in many ways is value-less.

5. A more general question: What about the public/ private law divide in the current landscape?

I think one response to the increasing fragmentation and specialisation of regulation and government and the emphasis on effectiveness, has led to the incorporation of private actors into governance methods. This has led to the blurring of the public/private divide in the EU and elsewhere. This can for example ensure that the better knowledge of sectors can be harnessed by government to ensure better regulation. The risks are those of regulatory capture, opaque governance and at best, ineffective accountability structures. A reappraisal is needed of how accountability mechanisms can/should apply and just as new means of straddling the public/private divide have emerged in regulation, so are more creative responses needed for parallel accountability structures. I have written a little on these issues see: Imelda Maher; (2009) 'Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network'. Comparative European Politics, 7: 414-434; Imelda Maher, (2007) 'Economic Governance: Hybridity, Accountability and Control'. Columbia Journal of European Law: 679-703.

6. What is the role of comparative law in EU competition law?

I am not a comparative lawyer though like most scholars, I have some familiarity with how the law works in the jurisdictions I have worked and studied in and this does impact

on how I view my own field. I have written that US economic thinking (and hence antitrust law) can be highly influential but that influence is - and should be - mediated and nuanced which is what comparative lawyers so eloquently and so often remind us (Imelda Maher, "Regulating Competition" in C. Parker, J. Braithwaite, C. Scott and N. Lacey (eds) Regulating Law OUP, Oxford, 2004 pp. 187-206). I currently have a PhD student working on collective redress in competition law in the EU – a four state comparison and one issue emerging from this research is that there is perhaps too much emphasis on the (very different) US experience and not enough on the diverse range of practices found within the EU (see Jocelyn Delatre, 'Beyond the White Paper: Rethinking the Commission's Proposals on Private Antitrust Litigation' (2011) 8(1) Comp L Rev, 29-58).

Comparative law is important as one methodology for informing the development of EU Law. This is highly relevant in the context of the projects undertaken by the newly established European Law Institute which aims to improve the quality of law in Europe (not just in the EU and in fact is independent of the EU); see www.europeanlawinstitute.eu/.

7. Human rights seem to gain more and more importance in EU competition cases. Are there human rights for corporate bodies?

Formally yes – though the question suggests a question as to whether or not such legal persons should have human rights. I have another PhD student (Anna-Louise Hinds) exploring this issue drawing on the extensive regulation literature on effective implementation of legal norms and how a balance can be struck with procedural rights so often invoked by firms challenging competition law decisions. This will provide a new perspective and interesting analysis on this issue.

8. In connection to the above issue – that of corporate bodies, some argue that the multinationals are some kind

of Goliath compared to the national Competition Authorities. Is this statement true?

The answer to this question requires some empirical work that can work on a number of levels: comparing the size of the legal departments, the number of external lawyers used in a case; then an analysis centred around concepts of power that compare e.g. the corporate power of the multinational corporations with the exercise of executive power by national competition agencies; an analysis also needs to be made of the legal tools available to national competition agencies for enforcement and the more difficult question (at least more difficult to research and evaluate), of the political status of the agency within the state – is it marginalised, is it subject to political controls? How well resourced is it? Is it independent but largely ignored by government which in fact shows little or no commitment to implementing effective competition regimes within the state? This is just a sample of what would need to be addressed to answer the above.

9. What role does politics and economy play in judgment delivered by EU courts in the field of competition?

Competition law is one of the few (if not the only) fields of law that can only be defined by reference to another discipline – economics – hence it is trite to say that economics informs CJEU judgments in the competition sphere. There is – as is reflected in the literature – a concern about how economics informs those judgments.

Politics is a more difficult issue and relates to the wider literature on judicial politics. What I would say, is that there can be a tendency to view courts (including European courts) as agents within a principal/agency analysis and there is a need to be sensitive to the importance the rule of law and the issue of status for courts in general and superior courts like the European courts in particular in this analysis.

10. What is nowadays (still) soft law in the field of competition?

The word 'still' suggests that because soft law is capable of having legal effects e.g. by restricting the scope of action for the Commission which is binding itself in issuing guidelines, it no longer can be construed as soft law. I would disagree with this view seeing soft law as still distinct from hard law – most conspicuously in relation to how it is adopted but also in how it is regarded by the CJEU where the Court seems willing to take account of it but only in so far as it represents a more specific articulation of general principles of EU law such as legitimate expectation (See Oana Stefan, Soft Law in Court, AH Alphen aan den Rijn, Kluwer). Also, while the ECJ has indicated that national courts must have regard to EU soft law (Case C-322/88, Grimaldi [1989] ECR I-4407, para 18), it is not clear what this means in practice.

11. We would like to turn to the rather „fashionable" issue of remedies for breaching the EU competition rules. What is the true, practical meaning of cases like Courage v Crehan, Manfredi and so on? Are the national remedies effective?

This is not a specific focus of my research at the moment so I will reply briefly. The CJEU, consistent with its approach is other areas of EU law, is keen to see EU law applied effectively which necessarily means ensuring effective remedies. However, there is some distance to be travelled between the articulation of the principle and its implementation. Regard also has to be had to national legal cultures. What I would say is that in Ireland, the maxim 'do business first, sue later' applies all the more strongly where the business community is small. There is no capacity for collective redress at the moment in Ireland which could be addressed.

12. Are there any "grey" areas in the field of EU competition law concerning the issues of rights and remedies?

I won't answer this question as I am not sure of its parameters.

13. A final question: Which advice/recommendation would you give to researchers in (EU) law?

Publication matters. Aim for top peer-reviewed international journals that are blind peer-review – one top quality article counts for a lot. With blind peer reviewing your status as a relatively new scholar is not important. Do your research to see which journals are the ones you cite most and hence are most likely to be a good fit for your work. Make sure to keep to the house style and remember that busy (and hence very successful and widely cited) journals have a very high rejection rate. Reviewing takes time and it can take several months before you get back reviews. Often even with a reject, reviewers will provide very helpful comments on how to improve and these should be taken on board. Also, successful journals have very long lead times to publication but increasingly now publish articles electronically before they appear in hard copy. Consider publishing (fairly well worked up) working papers on sites such as SSRN and give papers at conferences and workshops – welcome feedback on your work and see research as a strange mix of solitary work and active engagement. One final thought – always remember who your audience is when writing or presenting.

EU Law is constantly changing which for the new researcher means that there are new fields emerging so it is possible to make a distinctive contribution.

For me, the boundaries of law are the most exciting places to work – where law does not provide answers or where law can only be understood by reference to other disciplines (economics, politics, and sociology).

GIUSEPPE MARTINICO

Ph.D. (2008) at the Scuola Superiore Sant'Anna (Pisa) with a thesis on the impact of European Welfare on the relationship between the EU's centre and its periphery; postdoctoral research, STALS Senior Assistant Editor (www.stals.sssup.it) and teaching EU law and European Constitutional Law.

Adjunct Professor (professore a contratto) at the University of Pisa (2008-2009): seminars in EU Law, International Law on Development Cooperation, and European and Comparative Constitutional Law. Visiting researcher at the University of Barcelona, Université de Montréal, University of Geneva, King's College, London, and the Tilburg Institute of Comparative and Transnational Law (TICOM).

TICOM Invited Fellow, in Tilburg, and Researcher on specific projects at the Centre for Studies on Federalism in Turin.

European University Institute (Florence) Max Weber Fellow 2010-2011.

Postdoctoral Fellow (García Pelayo Fellow) - Centro de Estudios Politicos y Constitucionales, Madrid - Spain (from March 2011).

"The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe", Routledge, London, 2012, is his most recent book.

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

Would you like to point out major influences during your "formative years" (concerning also methodology)?

First of all I must say that I am still in my formative years in law, I am a junior academic and I am still trying to learn as much as I can. That is why at the beginning I was reluctant in releasing this interview.

My background is really "parochial": I was educated in Italy, in the same institution from the bachelor to the PhD, the Scuola Superiore S. Anna of Pisa which is a sort of School of Advanced Studies.

The Scuola S. Anna was forged on the model of the "École normale"; when being student there one is asked to attend courses both at the University of Pisa and at the Scuola S. Anna and to comply with some higher (for the Italian University panorama at least) standards.

That experience was very relevant to me because of the multidisciplinarity of the courses there. In those years I tried not to limit my attention to the courses offered by the Law School but I also attended courses in Political Philosophy or Political theory for instance and had the opportunity to exchange my views with students of other disciplines (Political Science, Economics mainly). This explains my interest in the works of authors like Chantal Mouffe, Søren Kierkegaard and Edgar Morin, not exactly legal scholars…

Moreover, being a student of the Scuola Superiore Sant'Anna gave me the opportunity to have financial support for research stays abroad (England, the Netherlands, Spain), allowing me to compensate - especially in the doctoral years - that "parochialism" which I mentioned before.

I have a wonderful memory of those years and the dialogue with other former students of the same institution is still ongoing.

Pisa is my "academic motherland" from this point of view.

At the same time, after 9 years in Pisa (4 years for the degree in Law, three years of PhD and two years of postdoctoral fellowship) I felt it was necessary to move. Actually, it was not a big change from a mere geographical point of view - I moved to Florence getting the position of Max Weber Fellow (MWP) - but it was a turning point for me. I had the possibility to work at the most important place for European Studies and with outstanding scholars such as Miguel Maduro and Ernst Ulrich Petersmann.

Once at the European University Institute (EUI) I immediately realized that the MWP was something more than a very good post-doctoral programme. I found a fantastic research environment where everyone can express (and develop) his skills at best, thanks to the attention, professionalism and friendship of a community of people genuinely committed to a profound cultural mission.

Being part of the MWP community has been a privilege, I arrived at the EUI in a crucial moment of my professional life and working with that community and being surrounded by it has made everything easier.

Currently I am working as Garcia Pelayo Fellow at the Centro de Estudios Politicos y Constitucionales, another fundamental step in my short academic career. It gives me the possibility to "feed" the multidisciplinary nature of my research, going beyond the limits that a simple law-focused education normally presents.

I have met many important people during these years and I tried to learn something from everyone. The rigorous approach and the attention to the activity of the courts have been transmitted to me by some of my professors: Alessandro Pizzorusso and Paolo Carrozza are probably the most important people in this respect. Their idea of legal integration through the activity of the Courts is still at the heart of my research interests.

I also had the privilege to work with Bruno de Witte, Sabino Cassese, and Monica Claes, for instance, for occasional projects during my research periods abroad. I am deeply indebted to them.

Ernst Ulrich Petersmann and Julio Baquero Cruz gave me the chance to teach in languages different from mine, another turning point in my career.

However, I would say that still today the best comments I receive on my works are those of my colleagues that are at my same age, maybe because of the lack of formal barriers between us. Being frank always helps in our job.

2. Even if you have an impressive professional background in an international field, you are familiar with the Italian legal order. Therefore, we would like to ask you what should learn a professional coming from a new Member States from the experiences of a founding Member State of the EU.

It is a very difficult question, in order to provide it with an answer I should be also familiar with the new Member States of the EU and unfortunately - apart from a superficial knowledge limited to the constitutional frame of these countries - this is not my case.

I will thus limit myself to saying something about education in Law Schools and scholarly tradition in legal studies in Italy; I think it might be more interesting.

In general, the Italian University system is not one of the best of the European continent for different reasons: lack of funds, bureaucracy, lack of confidence in young people, only recently a system for evaluating the research and the teaching of the Faculty has been introduced, lack of transparency and I could go on with a long list….

However, despite all these problems, the Italian University is able to give a strong education to his students; this was at least my experience.

The Italian legal scholarship is unfortunately not well recognized at the international level, but the young generation of scholars has started using English for his works, and recently there have been a number of initiatives (for instance those launched by J.H.H Weiler at the New York University with Roberto Toniatti and Sabino Cassese) aimed at giving visibility to the Italian legal scholarship.

Hopefully in the future our scholarly tradition will acquire more importance internationally.

3. Mentioning the fact that you have studied both European and comparative law, we would like to ask you what do you think is the link between those two from a methodological point of view? Also, how does the comparative law influence EU law?

I think the EU legal order is a "complex" one (I tried to present this concept in my new book G. Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*, Routledge, 2012). Complex comes from Latin "*complexus*" which stands for "interlaced". EU constitutional law is complex in the sense that it is the product of the inextricable interaction between the law of the Treaties and national constitutional laws.

I think EU law and comparative law are strongly connected: You cannot understand what is going on at EU level without taking into account how national states are implementing EU law. You cannot understand the basic principles of EU law without looking at the genesis of these principles at national level. You cannot understand EU law without comparing.

Once words like federalism and comparison were f-words in European Studies because of the so called sui-generis theory: The EU would be a sort of strange beast that would be impossible to compare with other legal experiences.

Luckily, after the publication of works like those by Schütze (*From Dual to Cooperative Federalism. The Changing*

Structure of European Law, Oxford University Press, Oxford, 2009) something seems to be changing as the recent renewed interest in the "Integration through law scholarship" suggests.

5. A rather "common" question: In your opinion, what are the most important developments brought by the Lisbon Treaty, more than two years since its entry into force?

I don't know. The Lisbon Treaty was born and labelled as the evil cousin of the Constitutional Treaty and very often has been accused of being insufficient for the new challenges of the EU.

Maybe my answer is conditioned by my research background but I would say that the fundamental rights issue has received important answers from the Lisbon Treaty thanks to the future accession of the EU to the ECHR (which, however, will trigger in my view new interpretative conflicts between the CJEU and the ECtHR) and the coming into force of the Charter of Fundamental Rights of the EU.

6. Could you please comment on the goals of competition among European Courts – the European Court of Justice ('ECJ') and the European *Court of Human Rights* ('ECtHR')? What would be the usefulness of an adhesion to the European Convention on Human Rights ('ECHR') as far as the European Union has already adopted the Charter of Fundamental Rights? Is there a "hidden" meaning for that?

This is a tough one! I have to go into technicalities to give you an answer.

According to Tobias Lock, "it is to be expected that the ECtHR will give up its *Bosphorus* jurisprudence after an accession" (Tobias Lock, "The ECJ and the ECtHR: The Future Relationship between the Two European Courts", *The Law and Practice of International Courts and Tribunals* (2009) pp. 395-396, p. 375 ff.), but the picture seems to be much more

complicated because of the vagueness of the documents that are supposed to "govern" the relationship between the European Courts – namely the horizontal clauses of the Charter, the protocol on the accession of the EU to the ECHR etc. – after the EU accession and because of the imperfect correspondence between the content of the Charter of Fundamental Rights and the ECHR. This latter element is confirmed by the scarcity of references to the ECHR in the explanations of the Charter devoted to the section on "Solidarity".

Another factor to be taken into account is, again, the interpretive competition existing between these two Courts, a factor which can be inferred by looking at Article 2 of Protocol No 8 attached to the Lisbon Treaty and devoted to the accession of the EU to the ECHR. According to this Protocol, nothing in the agreement relating to the accession of the EU to the European Convention on the Protection of Human Rights and Fundamental Freedoms provided for in Article 6(2) of the Treaty on European Union shall affect Article 344 of the Treaty on the Functioning of the European Union (former Article 292 EC). Article 344 of the TFEU concerns the interpretive monopoly of the ECJ on EU law (and as it is well known, the agreements concluded by the European Communities are considered as part of the of Community – now EU – law due to the automatic treaty incorporation doctrine: "The provisions of the agreement, from the coming into force thereof, form an integral part of Community law", Case 181/73 *Haegemann/Belgian State* [1974] ECR 449; on this see: Mario Mendez, "The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques", *European Journal of International Law* (2010) pp. 83-104). Why was such an article recalled in the Protocol on the accession to the ECHR?

Looking at some communications released by the ECJ (See "Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European

Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms", available at http://curia.europa.eu/jcms/jcms/P_64268/ and the comments reported on the website *Adjudicating Europe*: (2010) http://adjudicatingeurope.eu/?p=482) on the possible accession, the Luxembourg Court seems to be worried about the accession. This might induce the ECJ to present some thorny interpretive issues involving both the ECHR and the EUCFR as questions concerning only the second document in order to preserve its interpretive autonomy. This is just a hypothesis and the future will tell us more about that. What is interesting here is to demonstrate how the results of the accession cannot be easily forecast, at least at this stage without having a clear picture of the contents of the agreement evoked by Protocol No 8.

In the economy of this story much will depend on the interpretation of another explanation that devoted to Article 52 of the Charter.

In this respect, once again, the European Union will continue to suffer from its democratic deficit, since the vague nature of those provisions that are supposed to be crucial (see Article 52 of the Charter) in the end seems to confirm the very great importance given to the judges in the multilevel system as demonstrated by the Declaration on Article 6(2) of the Treaty on European Union:

"The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the *Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention*" (Declaration on Article 6(2) of the Treaty on European Union (emphasis added).

7. From your perspective, what would be the main challenges for the current European Court of Justice?

Some years ago, with Filippo Fontanelli, I edited a pretty unlucky book edited "The ECJ under siege" where we described four challenges for the Court: the Reform Treaty, the enlargement, the relationship with other Courts and the recent threat to security represented by the rise of the international criminal network.

We are still waiting for the last say of the CJEU on the *Kadi* saga as for the last point while the other three points still seem to me crucial, especially that of the relation with national constitutional courts.

On the one hand, in recent years many constitutional courts have accepted to use the preliminary ruling mechanism and this might be seen as the beginning of a new (more) cooperative era between them and the Luxembourg Court but, at the same time, Constitutional Courts have not given up their counter-power mission, as ambivalent decisions like *Honeywell* (Case 2 BvR 2261/06, Decision of 26 August 2010) demonstrate. Whilst in that decision, the German Court acknowledged the possibility of margin of error to the ECJ, it has not renounced its role of counter-power to the Luxembourg Court in the process of European integration, even in extraordinary circumstances, and perhaps only after having 'consulted' the ECJ.

More recently, the Czech Constitutional Court has used such a menace by declaring the *Landtovà* judgment (C-399/09) of the CJEU as *ultra vires* (http://www.usoud.cz/clanek/6341). This might be seen as the beginning of a new series of constitutional conflicts.

8. Also, from an EU constitutional point of view, are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

I don't believe much in coherence or unity; I think that judicial conflicts may also have a positive function in the development of the legal system. Again, the *Solange* or *Kadi* examples are emblematic. *Prima facie* anti-systemic reactions to some established principles have actually caused the beginning of a kind of inter-ordinal negotiations that have then produced a better protection of some fundamental rights.

9. From your point of view, what were the most salient developments in the recent case-law of the European Union Courts?

Well, I would say that citizenship is the "hottest" sector in this period. The Court has been giving a number of very interesting judgements in this field (not only *Zambrano*).

Beside that, I am curious to see whether the CJEU will have a major role in the current financial crisis, national constitutional courts (especially the German one) are presenting themselves as key actors in this phase, can we think of a similar script for the CJEU?

10. Finally, we would like to ask you to assess from your personal experience the research and teaching mobility?

It is crucial today, especially if you want to do research in EU and comparative law: Once it was possible to do research by having a mere passive knowledge of the language and an indirect knowledge of the sources and of the other legal orders, nowadays this is not workable.

The logic of the common market applies to Academia as well but above all it is necessary to travel and work outside of your country in order to give a meaning to that mental openness which lies at the basis of the mission of the comparative lawyer.

Thank you.

Thanks to you!

MIRJAM DE MOL

Mirjam de Mol works as a doctoral researcher at the International and European law department of the Law Faculty of Maastricht University since September 2009. Mirjam de Mol works on a PhD thesis on 'the the Application of EU Fundamental Rights on National Law' under supervision of Prof. Hildegard Schneider and Prof. Bruno de Witte. She obtained her Degree of Master of European Studies at the College of Europe in Bruges in 1999. She studied law at the Universities of Maastricht, Uppsala and Montpellier. She graduated 'cum laude' in 1998. She worked as a senior lawyer at the Dutch Ministry of Foreign Affairs (Legal Affairs Department, European Law Division, 2003-2009). She represented the Dutch government before the Court of Justice of the EU. Until 2005 she was secretary of the Interdepartmental Committee on European Law (ICER). She furthermore worked as a lawyer at the AKD law firm (Eindhoven and Brussels, 1999-2003). Mirjam de Mol is a scholar of the Maastricht Centre for European Law (M-Cel) and a member of the Ius Commune Research School. Since July 2009 Mirjam de Mol is also deputy justice at the Dutch Trade and Industry Appeals Tribunal ('College van Beroep voor het Bedrijfsleven').

You have an impressive professional background both as a practitioner and theorist in the field of European Union law. You have acted as Agent of the Dutch government before the European Court of Justice. You are working on a PhD thesis concerning the 'Direct effect of Union fundamental rights'. You were recently rewarded with the

prestigious "Ius Commune Prize" for 2011 for an important article - "The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?"[1] - on which occasion we would once again like to congratulate you. You are also Deputy Justice at the Dutch Trade and Industry Appeals Tribunal.

1. Would you please describe the main tasks performed by an agent of a government before the European Court of Justice?

I will answer this question for the Netherlands, as the precise tasks of agents of national governments may differ per Member State. In the Netherlands the agents are both responsible for (1) the determination of the Dutch position before the CJEU as well as (2) the formulation of this position in the written and oral proceedings before the CJEU. The agents (civil servants of the Ministry of Foreign Affairs) cooperate with experts of the relevant Ministries. So for example in a case concerning pesticides the relevant Ministries could be the Ministry of Agriculture and the Ministry of Environment or in cases concerning working times the relevant Ministries could be the Ministry of Justice together with the Ministry of Social Affairs. Sometimes there can also be only one Ministry involved. For example in tax cases, mostly only the Ministry of Finance will be involved. In cases that raise 'horizontal' matters (e.g. constitutional questions such as direct effect or the scope of Union law) mostly many Ministries will participate in the preparation of a case before the CJEU.

[1] M. de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU law?' 18 Maastricht Journal of European and Comparative Law (MJ), 1-2 (2011), p. 109-135. Translated into Romanian: "Abordarea originală a CJUE privind efectul direct orizontal al principiului UE al nediscriminării: Expansionism (nestăvilit) al dreptului UE?" *Revista română de drept european* (*R.R.D.E.*), 5 (2011) p. 55-78.

In determining the Dutch position the agent very often will have to coordinate different, sometimes opposite, views of the Ministries. In this process of coordination the agent should also guard against inconsistencies of the Dutch position with other cases. With regard to the formulation of the Dutch position, the first task of the agent is to 'translate' the Dutch position to the Union level. So the agent has to make sure that the Dutch position is understandable for lawyers and judges of other Member States. This mostly means explaining as clear as possible the Dutch law, the Dutch context, and sometimes also technical aspects of certain areas of law, such as taxation law. Secondly, the agent should provide the Dutch position with juridical grounds.

The written part of the proceedings is considered as the best opportunity to put forward a clear and solid Dutch position. With regard to the oral part of the proceedings, the agent will prepare the pleadings on the basis of the written submissions of the other intervening parties. The pleadings should be in simple language and short sentences, to make sure that they can be properly translated and understood. During the hearing the agent will plead and answers questions with the assistance of one or more experts of the Ministries with whom he or she can shortly deliberate during the hearing.

2. Are there any objective criteria for deciding an intervention, especially also with regard to the participation in preliminary ruling procedures coming from other Member State or with regard to the intervention in direct cases in which the Netherlands is not involved as a party?

In order to decide upon the participation of the Netherlands in preliminary ruling procedures there are two main criteria[2].

[2] These criteria are laid down in a memorandum of the 'Inter-departmental Committee on European Law' (ICER) 'criteria voor het maken van opmerkingen': http://www.minbuza.nl/ecer/bijlagen/hof_van_justitie/nederlandse_interventies/criteria-voor-het-maken-van-opmerkingen-pdf.html.

Firstly, there must be a Dutch interest. Secondly there should be sufficient priority. With regard to references for a preliminary ruling of Dutch courts, participation is mostly self-evident. Participation in preliminary ruling proceedings of other Member State depends on whether the possible outcome can benefit or harm the interest of the Netherlands. For example in cases of Member States that have a similar national legal context or policy. Another reason for participation could be that a case can affect the discretion of Member States in sensitive fields, as for example the field of direct taxation. Also the fact that a case concerns important constitutional issue can be reason for participation. Other factors that are taken into account are the feasibility of the Dutch position or for example the existence of legal uncertainty in the Dutch legal order. It can also happen that the Netherlands does not participate in the written procedure, but decides in a later stage to participate at the hearing.

3. After *Mangold* and *Kücükdeveci* judgments certain criticism was raised towards an activist European Court of Justice. You have extensively discussed the point in your important article. But, after all, has not the European Court of Justice played an activist role since the beginnings (*van Gend* and *Costa v ENEL* cases)? Would it be imaginable a limitation imposed on the European Court? We would like to invite you also to comment in brief on the constitutional relationship between the European Union institutions from the point of view of the self-assumed gap-filling role of the European Court of Justice. On the other hand, what will be the discernible future of *Mangold/Kücükdeveci* approach? Which are the more recent developments following those two cases in the case-law of the European Court?

In my opinion the right limitation would be self-restraint of the CJEU and a constant practice of elaborate reasoned

rulings. I do in principle agree with a gap-filling role of the CJEU, for instances in cases in which Union legislation is – deliberately – unclear. However whereas the Union legislator deliberately does not act, the CJEU should in principle not intervene under the guise of the need to fill gaps. Moreover it would be eligible that the CJEU forces itself to always deliver transparent and well reasoned rulings, such also in cases in which it is difficult to find consensus among the members of the CJEU.

Mangold and *Kücükdeveci* are in my view cases in which the CJEU overstepped[3]. In these cases the CJEU accepted the horizontal direct effect of the Union prohibition of discrimination based on age, despite of the fact that this prohibition was expressed in a directive[4]. These rulings therefore circumvent the intent of the Union legislator that private parties would be bound by that prohibition by virtue of their national law and not directly under Union law[5]. Moreover the judgments lack sound reasoning with regard to the constitutional issue of recognition of horizontal direct effect. This is not only problematic from the point of view of the legitimacy of the approach, but it also created legal uncertainty.

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[3] CJEU 22 November 2005, Case C-144/04, *Mangold* [2005] ECR I-9981; CJEU 19 January 2010, Case C-555/07, *Kücükdeveci* [2010] ECR I-365.

[4] Horizontal direct effect in the sense that Union law applies as an autonomous ground for legality review (or: assessment) in national proceedings between private parties. This definition includes both exclusion effect and substitution effect.

[5] M. de Mol, 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, Seda Kücükdeveci v. Swedex GmbH', *European Constitutional Law Review* (2010) 6, pp 293-308, at p. 306. Romanian translation: 'Kücükdeveci Hotărârea Mangold revăzută – Efectul direct orizontal al unui principiu general al dreptului UE', *R.R.D.E.*, 4 (2011), p. 57-71.

With regard to the future of the *Mangold/Kücükdeveci* approach; I hope that the CJEU will give clarification on the main uncertainties such as: Will the approach also apply in situations that fall within the scope of Union law, but outside the context of equal treatments directives? Is the approach limited to the principle of non-discrimination or will it also apply to other fundamental rights? Is the approach confined to the so-called horizontal exclusion effect or will it also extend to horizontal substitution effect?

Dominguez appeared to be a case that would shed light on the *Mangold/Kücükdeveci*-approach[6]. The central constitutional question on which the CJEU had the opportunity to rule in this preliminary ruling case is that of the horizontal direct effect of the Union right to paid annual leave, laid down in Article 31(2) of the Charter. The case could have been an opportunity for the CJEU to answer the question whether the Charter as such, is apt of having horizontal direct effect. Advocate General Trstenjak pleaded against such capability of the Charter[7]. However the CJEU in that case was deafening silent[8]. The CJEU did not refer to the *Mangold/Kücükdeveci*-approach or to the Charter. The next opportunity on the issue of horizontal direct effect of the Charter would be the pending cases *Reimann* and *AMS*[9].

[6] CJEU 24 January 2012, Case C-282/10, *Dominguez*, not yet reported.

[7] AG Trstenjak 8 September 2011, Case C-282/10*, Dominguez*, paras. 71-88.

[8] M. de Mol, 'Dominguez: A deafening silence Court of Justice of the European Union (Grand Chamber). Judgment of 24 January 2012, Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre)', *European Constitutional Law Review* 8 (2012), pp 280-303. [Romanian translation forthcoming.]

[9] C-317/11, *Reimann* (reference of German Landesarbeisgericht Berlin-Brandenburg on Article 31 of the Charter) [more recently, the case was removed from the register on 22 October 2012 (ed.)], and C-176/12, *AMS* [*Association de médiation sociale*] (reference of the French Cour de Cassation on Article 27 of the Charter), pending.

4. How "horizontal" will be the horizontal direct effect for the relevant provisions of the Charter of Fundamental Rights of the European Union?

Article 51 seems to exclude horizontal direct effect of the Charter. The Charter is explicitly only declared to be binding upon the Union public authorities and the Member States, and not upon private individuals. However since the CJEU in *Mangold* and *Kücükdeveci* accepted the horizontal exclusion effect of the general principle of non-discrimination based on age, it seems realistic to assume that Article 21 of the Charter has the same kind of horizontal direct effect as the general principle of non-discrimination. This would mean that the Charter as such is apt of having at least horizontal exclusion effect. I suspect that this effect will not be confined to Article 21 of the Charter.

On your question how horizontal this effect will be: For now the CJEU has only accepted horizontal exclusion effect. The step towards the acceptance of horizontal substitution effect should not be seen as the logical next step, but as a major step. Whereas in case of horizontal exclusion effect it is still possible to argue that through the intervention of a national public act (vertical element) the Member State is still the only legal subject of Union fundamental rights, this will not hold regarding horizontal substitution effect. Private parties would become addressees of Union fundamental rights. In the light of the constitutional traditions common to the Member States and of Article 51(1) of the Charter the acceptance of substitution effect would certainly be (even more) controversial.

5. What about the scope of application of the Charter? In other words, are discernible any significant developments in the case-law of the European Court of Justice in that perspective? In connection to that, what are in your opinion the most important cases delivered by the European Court of Justice in 2011?

The scope of application of the Charter follows from Article 51(1) of the Charter that defines the field of application of the Charter as such. This provision signifies that the Charter does not apply in purely internal situations. According to this provision the provisions of the Charter are only addressed to the Member States when they are implementing Union law. The Explanations relating to Article 51(1) of the Charter clarify that the case-law with regard the field of application of general principles of Union law applies to scope of the Charter. The scope of application of the Charter is thus the same as the scope of application of general principles of Union law. Meanwhile Article 51 sets clear boundaries by giving the binding criterion of "measures of implementation'.

The CJEU strictly applies this criterion and shows thus self-restraint. It explicitly reaffirmed that the minimum requirement for application of Union fundamental rights is that there must be a connection with Union law. For example in 2011 it did so in cases *Chartry* and *Rossius*[10]. Moreover the case-law of the CJEU shows that not every connection with Union law suffices to trigger the application of the Charter. The national act at stake must qualify as an act of implementation. Examples from 2011 are *Vino II* and *Gueye and Sanchez*[11].

Another interesting case from 2011 with regard to the scope of application of the Charter is *Dereci*[12]. Unfortunalely this case is rather unclear. My understanding of the case is that the Charter can apply to national measures that qualify as a denial

[10] CJEU 1 March 2011, Case C-457/09, *Chartry* [2011] ECR I-819. CJEU 23 May 2011, Joined Cases C-267/10 and C-268/10, *Rossius*, not yet reported.

[11] CJEU 22 June 2011, Case C-161/11, *Vino II*, not yet reported, paras. 38 and 39. CJEU 15 September 2011, Joined Cases C-483/09 and C-1/10, *Gueye en Sanchez*, not yet reported.

[12] CJEU 15 November 2011, Case C-256/11, *Dereci*, not yet reported.

of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status (à la *Zambrano*).

6. A final question concerning the research methodology in European Union law: which piece of advice would you give to a researcher in EU law from the point of view of the methodology to employ?

In analyzing the jurisprudence of the CJEU it can be very useful to ask for the decision of the referring court, the submissions of the Commission and the report of the hearing. Access to those documents is possible after the judgment of the CJEU[13]. I would like to mention the fact that the agents of the governments receive all decisions of the referring courts in their own languages. The Dutch Ministry of Foreign publishes all these decisions on the Internet right after reception[14]. This is a good opportunity to be informed on pending cases and to take notice of the views of national judges. Maybe this would also be a good suggestion for other Member States.

Thank you once again.

[13] http://ec.europa.eu/transparency/access_documents/index_en.htm.

[14] At: http://www.minbuza.nl/ecer/hof-van-justitie/nieuwe-hofzaken-inclusief-verwijzingsuitspraak.

STEPHAN RAMMELOO

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Masters degree at the Katholieke Universiteit Nijmegen (1985) and studied conflict of laws at the Westfälische Wilhelmsuniversität Münster (Germany).

He was research assistant at the University of Groningen and at the T.M.C. Asser Institute of European and International Law in The Hague. He conducted research at the Max Planck Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht in Hamburg, Germany. He is the author of inter alia "Das neue EG-Vertragskollisionsrecht. Die Artt. 4, 5 und 6 des Übereinkommens über das auf vertragliche Schuldverhältnisse anzuwendende Recht vom 19.6.1980. Eine rechtsvergleichende Analyse objektiver Vertragsanknüpfungen, Carl Heymanns Verlag (PhD thesis), Köln/Berlin/Bonn/München 1992, and "Corporations in Private International Law. A European Perspective", Oxford University Press, Oxford (etc.), 2001. Together with fellow researchers in various EC Member States he published 'Grenzüberschreitende Gesellschaften', Carl Heymanns Verlag, Köln/Berlin/München 2005. He waas also involved in cross-border research on EU Commission's Company Law Actions Plans, as well as in international lecture programmes on European Company Law.

Visiting professor at the China European Union School of law Beiijng.

His editorial board membership comprises the Maastricht Journal of European and Comparative Law, and the NIPR Law Review, published by the T.M.C. Asser Institute of European and International Law in The Hague.

First of all we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

What is the place of EU law in your research interests? How did you arrive at EU law? Would you like to point out your major influences concerning methodology during your career?

From 1979 to 1984 I studied Netherlands law at the *Radboud University Nijmegen* in the Netherlands. During one of the courses in my graduation year I was fascinated by the discipline of Private International law (PIL). Unexpectedly, I noticed that, except for the then still EU Convention on Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters, at that time PIL still was national law. In the awareness of the fact that the Single Market was to be accomplished within just a few more years and that such a market would be successful only on the condition that PIL was to be harmonized at EU level I welcomed the opportunity to go abroad for a semester at Law Faculty of the *Westfälische Wilhelms-Universität Münster*, Germany. Exchange programs being far from common those days, I attended a series of lectures but mainly concentrated on writing a thesis on the then draft for a European Convention on the Law Applicable to Contractual Obligations (1980 Rome Contracts Convention). Having returned I accepted a PhD position at the Law Faculty of the *Rijksuniversiteit Groningen* in the Netherlands. With a view to the 'Europeanization' of PIL I prepared research in the

Max Planck Institut für ausländisches und internationales Privat- und Wirtschaftsrecht in Hamburg, Germany.

Having defended my PhD thesis 'Das neue EG-Vertragskollisionsrecht', etc., Carl Heymanns Verlag Köln/Berlin/Bonn/München, 1992) I was appointed lecturer at Maastricht University, just a few weeks after the Maastricht summit was held. I broadened my fields of interest by further conducting research on European company law (notably the freedom of establishment for companies and firms under – today – Articles 49 and 54 TFEU). This research track *inter alia* resulted in 'Corporations in Private International Law. A European perspective.' (Oxford University Press, Oxford, 2001). From the point of view of methodology the Treaty of Amsterdam inspired me to advocate an 'integrated approach' of the then EC Treaty, PIL and substantive law notions.

Up to now the 'cross-roads' of EU law, PIL and (substantive) company law has fascinated me. From the year 2008 onwards there is the ever increasing globalization trend. As associate professor at China European Union School of Law (CESL) in Beiijng, China, I was and still am involved in intensive lecturing programmes on company, insolvency and comparative law.

2. On the other hand, we would like to ask what are the (professional) gains of mobility?

These gains cannot be underestimated, not just in view of comparative law but also in respect of a better understanding. Law, after all, is about the interrelationship between individuals 'entering into legal relationships' that may vary from contracts to family relationships, but also, unfortunately, 'involuntary' creditors, whose claims arise from being tort victims. Scale enlargement may not lead to fears. Neither should it place those who daringly cross national borders in a disadvantageous position when compared to those who decided 'to stay at home'.

3. What is the role of soft law in company law? Is it possible to state that codes of conduct are a kind of surrogate for a consistent legislation and for any mandatory rules? Does the current legal framework (pertaining company law) contain stricking differences concerning the legal force: from soft law to EU regulations?

From the late eighties of last century onward (cf. UK, Cadbury Code) Corporate Governance and, more widened in their scope as they endorse the interest not only of shareholders and managers but also other stakeholders (employees, environment, etc.), so called CSR Codes (Corporate Social Governance) grew 'popular'. Important as they are, these Codes may suffer from their lack of 'binding power' nature. In that respect one may observe that inasmuch they may complement laws, it is unlikely that they build up a vast set of *mandatory* rules, as notably these laws require involvement of Parliaments (i.e. not just 'interest groupings'). Nevertheless, and this may be considered as a source for further progress, courts on the occasion show willingness to 'incorporate' these Codes in their judgments. Furthermore these Codes often are 'incorporated' in Acts of Parliament (cf. the French Codes).

4. How do you asses the role played by private international law in EU regulations. Is there a regulatory paradox? In this context, what are the chances of a genuine European company, as a viable instrument for doing business in the EU?

This question contains two pivotal, yet quite different elements. European PIL, to start with, 'builds up' a coherent set of rules comprising jurisdiction rules, rules on the applicable law (conflict rules) and recognition and enforcement not only for contractual but also non-contractual relationships (EU Regulations Rome I and Rome II) and, what is more, family law relationships (divorce, maintenance, etc.). The paradox is,

however, that sometimes a highly detailed set of conflict rules (cf. the 'catalogue' contained in Article 4 of 'Rome I') does provide for less rather than more legal certainty, as matters of characterization or 'overlaps' may stir parties to request for preliminary rulings in the CJEU (cf. the Rome I cases adjudicated by the CJEU: *ICF-MIC Balkenende and Koelzsch, Voogsgeerd*).

As regards 'genuine European company (types)': barely two decades ago it would be unthinkable to assume that any such EU 'business vehicle' would turn out to be successful. Academic world and practitioners would be rather sceptical, not to say pessimistic. In December 2004 a conference was held at Bonn University (Germany) where uncertainty reigned, from the very first days the European public limited liability company (SE: *Societas Europaea*) had seen the light. Less than ten years after, we notice that reputed business conglomerates (cf. BASF, Mann, Allianz, just to mention three out of many more) took up the challenge by 'flagging up' their business conduct as 'European'. It is an understatement to say that the SE has become a viable EU law company type indeed. And this is not where the story ends. In a later stage the European Cooperative Society (SCE) reached status of law, and now, 2012/2013 we are awaiting the European private limited liability company SPE (*Societas Privata Europaea*). Still, PIL is needed to establish questions falling out of the substantive 'scope' of the SE and SCE Regulations (cf. liability schemes of company officers, cross-border jurisdiction, etc.).

5. Could you please describe the role played by the European Court of Justice in the field of freedom of establishment for companies? And more generally, what might be the consequences of the judicial activism of the Court?

From the late nineties of last century onwards (*Centros*), the CJEU undisputedly set the path more than once in the area

of freedom of establishment for companies… and firms (cf. limited partnerships as in the *Cartesio* case). In the context of this contribution I would like to point at just two out of many more 'breakthrough' cases. The draft for a 10th EU Company Law Directive being in a dead-end street, the Court stirred EU legislator by adjudicating the *SEVIC* merger between a German and Luxembourg company in a 'merger friendly' spirit. In July 2012, the Court in *Vale Epitesi* followed the same 'strategy' by allowing a company duly established in a Member State to move its registration office to another EU Member State. Once again it is now for EU legislator to continue work on what was presented as a draft for the 14th Company Law Directive on the Cross-border Transfer of a Company's Registration office. One may indeed speak of 'judicial activism'. The downside of this 'strategy' may however well appear to be that the multi-party relationship – this is after all one of the main characteristics of companies – is too complicated to be ruled by a 'sweeping rule' allowing for cross-border migrations.

6. What about the use of preliminary references in the field of company law? Is there an abuse in using this kind of procedure?

This ultimately depends on how the word 'abuse' is defined. A mere academic interest was uncovered in the *Meilicke* case on the second EU Company Law Directive on minimum capital requirements for public limited liability companies. Still, even this case should, in my opinion, not be rebutted for being 'not genuine', as the preliminary questions reached in were inspired by business practice. Furthermore, any threat of abuse is counterbalanced if one realizes that parties involved would have to postpone business plans, while awaiting the outcome of preliminary stayings for about two years.

And now, from the other side (i.e. from the point of view of the ECJ): Are there any dangers (or contrary –

opportunities) for the Court of Justice in relying excessively on facts of the main action or national law in delivering its judgments?

For some reason, I do not fear serious trouble. While recalling the facts 'scrutinized' by Advocate General Jääskinen preceding the aforementioned *Vale Epitesi* case on the cross-border transfer of a company's registration office, I sincerely believe that 'the job' (i.e. providing for legal certainty in the EU) is being carried out quite meticulously.

7. Concerning also the preliminary ruling procedure: Are cases like *Centros* or *Cartesio* liable to be suspected of being fictively conducted? May the future associates in a company wait almost two years for the ECJ to deliver a judgment, in order to start doing business?

Again, I'd like to recall earlier lines. As to fictively conducted business, I furthermore would like to recall the relatively unknown and 'delisted' case of the *Kozijnenkoning*, preceding the *Inspire Art Ltd.* Case. It is beyond dispute, however, that the Commission's consultation round held in 2007 showed a sincere interest of business world in cross-border company migration as an 'overwhelming' majority of about 79% (!) showed in favour of harmonized legislation in the field involved.

8. Which advice/recommendation would you give to young researchers?

Every now and then I recall my very first and hesitating steps in the area of comparative law, PIL, and cross-border 'education'. In the starting days I sometimes felt discouraged by the complexity of 'finding my way' through unknown (at that time not digitalized!) libraries, bureaucratic institutions, and so on. Apart from that, I had to experience another setback, namely a phenomenon which has been described as 'language

fatigue': in the very beginning stage an overkill of concentration used to make me feel 'clumsy' more than once.

Another quite frustrating experience was that once I graduated I met scepticism in any occasion I would express my expectations on the importance of PIL in a European context 'in the very near future, let's say fifteen to twenty years from now', and, later, in view of cross-border company law developments. As a youngster I lacked patience required to await developments that in my view should have been accomplished far earlier.

Nonetheless these uncertainties, any opportunity to 'discover' a universe of ever integrating legal systems should be embraced. Even though at first sight 'an excursion into the unknown' doesn't seem to bear fruit, it often does, many years after! My advice would therefore be: never hesitate, just 'jump into it'!

Thank you very much.

NORBERT REICH

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Professor in Hamburg (1973-1982); Professor in Bremen (1982-); Emeritus (2005-);

Director of the Centre of European Law and Politics in Bremen (Zentrum für Europäische Rechtspolitik - ZERP) (1982-1991); Rector of the Riga Graduate School of Law (2001-2004); Dr. h.c. Helsinki University (2000).

Visiting Professor in Montpellier, Fribourg, Keele, Lucerne, Tartu.

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law. What were your models in (EU) law?

I studied law in many jurisdictions (Germany, USA, Switzerland, later Russian SSR) in the sixties. At this time, EEC law only had a very limited importance (competition law, regulation of certain markets, only little free movement law). In the seventies, after the Paris summit of 1973, EEC law turned to such "social" subject matters like environmental, consumer and non-discrimination law which aroused my interest. In, 1982, I became managing director of ZERP (Zentrum für Europäische Rechtspolitik) in Bremen which was concerned with doing research and practical implementation of a "Social Europe".

2. You have an impressive professional background. You have acted as a Professor and expert in many countries and legal cultures. Therefore, we would like to ask what are the (professional) gains of mobility?

Thank you. I enjoyed teaching in many jurisdictions, working with young highly motivated students. I was confronted with the challenge which EC/EU law concepts put before traditional national law in such areas as free movement, competition, non-discrimination, and consumer protection which remained my main areas of research and teaching. This fact is, by the way, also true for German law where many fault lines can be found to different EU law principles.

3. Could you please provide us with a brief picture of the main challenges for the European Union as a legal and political system two years after the Lisbon Treaty came into force? In other words, what are, from your point of view, the most significant changes brought by the said Treaty, both predictable and "hidden"?

As far as the EU "acquis" is concerned, Lisbon had and will have in my opinion only a very limited effect. The formal adoption of the EU Charter of Fundamental Rights from 1.12.2009 on should not be overestimated, because the Court of Justice of the EU (CJEU) already referred to it before 2009, and there is no EU specific individual complaint mechanism to enforce the Charter. This still depends on national law. Whether this will change with an accession of the EU to the European Convention of Human Rights (ECHR) remains to be seen.

4. In connection to the above issues, could you please describe the recent trends concerning the nature of EU law?

And also, are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

This difficult question makes an easy answer impossible. I think there will be a trend towards more "constitutionalisation" of EU law in general, which may work in different directions which cannot be foreseen today, eg. more "centralisation", but also the opposite in the sense of a true "federalism."

5. From your perspective, what would be the main challenges facing the current European Court of Justice?

Again, difficult to answer. The main task will probably be the balancing of policies, interests, and conceptions between the central (EU) and the national (Member State, but also regional) levels. The CJEU will probably take a case-by-case incremental approach, as it had done before, hopefully with less prevalence of the central level.

6. Could you please describe in short your opinions on the current tension between market (i.e. fundamental freedoms) and social rights? For example, after *Viking*, *Laval* and so on. Is the EU a social market economy?

With regard to the *Viking/Laval* cases, I refer to two papers of mine:

- N. Reich, *Fundamental Freedoms vs. Fundamental Rights: Did Viking get it wrong?* In: Europarättslig Tidskrift, 2008, 851-873,

- U. Bernitz/N. Reich: *Comment, Arbetsdomstolen of 2.12.2009 on the Laval Saga*, Common Market Law Review 2011, 603-623.

In my opinion, the "Economic Constitution" of the EU could be described as a "liberal market economy" with certain social elements, but not as a genuine "social market economy". It is still the Member States that are responsible for the "social" – a responsibility however greatly limited not only by budgetary constraints, but also by the imperatives of free movement and regulatory competition!

7. On the other hand, is the human rights doctrine a proper instrument to employ on the single market?

Only to a limited extent insofar as it strengthens individual, but not necessarily social rights.

8. Concerning also the single market of the EU and the case-law of the European Court of Justice, we would like to ask you to comment on the use (by the Court) of the proportionality analysis to scrutiny national measures. Are there any significant developments in the recent case-law of the ECJ?

Again, I refer to a paper of mine which discusses the importance of the proportionality principle in the case law of the CJEU: *How proportionate is the proportionality principle? Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ*, paper presented at the EUI conference on the ECJ and the autonomy of Member states, 20-21 April 2009, published in Micklitz/De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2012, 83-112.

9. And more generally, we would like to ask you to comment on the recent developments at the European Court of Justice in the field of fundamental freedoms? In other words, what are – from your point of view – the most significant cases delivered by ECJ lately?

Again a difficult question which needs a detailed analysis. I suggest you concentrate on three areas (besides the *Viking/Laval*-saga):

- Member State restrictions on games of chance (e.g. C-409/06 *Winner Wetten*);
- Health services and free movement (e.g. C-372/04 *Yvonne Watts*);
- Access to education (e.g. C-73/08, *N. Bressol*).

10. Is the recent case-law of the ECJ concerning EU citizenship fulfilling the promise of a "Civis europaeus sum" (following the great words of the AG Francis Jacobs)?

Yes, I think so. I refer to a paper of mine which I presented at the RGSL[1] on 6.7.2012[2].

11. A final question to you: what research methodology would you recommend to young researchers in EU law?

I would encourage case studies of CJEU judgments, including opinions of AGs referring to:

- Analysis of the specific methodology of EU law in contrast to national and international law;
- Relationship between primary and secondary law;
- Interpretation of secondary law according to constitutional principles (fundamental rights, international law, primary law);
- "Hard law"/"soft law"/mixed (expert) systems in the EU law making process;
- "Procedural autonomy" vs. "effectiveness"of remedies.

Thank you very much.

[1] The *Riga Graduate School of Law (ed.)*.

[2] *The Concept of Union Citizenship: Present Position*, paper forming part of the third edition of Reich, Understanding EU Internal Market Law, 2012, § 5 (ed.).

ALBERT SÁNCHEZ GRAELLS

Dr. Albert Sánchez Graells (born 1980) is Lecturer in Public Law at the Law School of the University of Hull (UK). Albert holds an LLB in Law (Nebrija, Valedictorian) and a BA in Business Administration and Management (Nebrija, Valedictorian), as well as a European Doctorate in Law (Autónoma de Madrid, summa cum laude). Prior to joining Hull, Albert was Lecturer in European and Commercial Law at the Law Faculty of the Comillas Pontifical University (Madrid, Spain), as well as Director of its Master in International and European Business Law. Albert has spent significant research time at the Library of Congress (Washington, USA), the Center for Competition Law and Policy of the University of Oxford (UK) and the Law Department of the Copenhagen Business School (Denmark). His teaching and research interests are in law and economics, especially regarding competition and public procurement law. His main publication to date is "Public Procurement and the EU Competition Rules" *(Hart Publishing, 2011).*

You are the author of a PhD thesis – "Public Procurement and the EU Competition Rules" – which was recently published with Hart.

1. First of all, we would like to ask you to comment briefly on the role played by the European Court of Justice in the field of public procurement. Would you please mention certain important judgments in that field?

I think that the role of the European Court of Justice (ECJ) in the field of public procurement has been extremely relevant in, at least, two sets of issues. It should also be stressed that, in some cases, the developments have been as relevant as controversial, particularly due to the relatively high political stakes that some procurement issues imply.

Regarding general procurement issues, the ECJ has framed (or better, extended) the scope of the public procurement rules in terms that differ quite significantly from the express rules contained in the 'current generation' of public procurement Directives.

On the one hand, the ECJ case law on the applicability of the general principles of the Treaties in the field of procurement - *ie* the requirements imposed by the principles of transparency, equality or non-discrimination, proportionality (and, in my view, competition) - has extended some relevant obligations in the Directives to procurement below the EU thresholds (where contracts may pose some questions as to their cross-border interest) or outside their scope (such as concessions).[93] The relevance of these developments is self-evident if we take into account that the current proposal for modernisation that the European Commission presented in December 2011 consolidates all these principles in Article 15 of the general procurement Directive and Article 29 of the utilities' procurement Directive, and introduces a brand new Directive on concessions. Hence, in this area, the ECJ has played its classic role of catalyst in the development of EU law.

However, on the other hand, the ECJ has also addressed another general issue in a radically opposing direction.

[1] See, for instance, Joined Cases C-147 and C-148/06, *SECAP Spa and Santorso Soc. coop. arl v Comune di Torino*, [2008] ECR I-3565, Case C-226/09, *Commission v Ireland*, [2009] OJ C 220 p. 18-19, Case C-95/10, *Strong Segurança SA v Município de Sintra, Securitas-Serviços e Tecnologia de Segurança*, [2011] March 17 2011, [2011] ECR I-1865.

Regarding the interaction between competition and procurement (a personal favourite of mine), the ECJ has limited the analysis of the market impact of procurement rules in two relevant aspects. On the one side, it has shielded 'pure' procurement activities from antitrust scrutiny by requiring that public buyers develop a downstream economic activity (*ie* offer goods or services in the market for consideration) in order to be considered undertakings[2]. On the other side, the ECJ has restricted the control of public economic activity by adopting and consistently strengthening the controversial *in-house provision* doctrine in virtue of which contracts granted to entities (exclusively) controlled by public bodies and that do not pursue (other) market activities are excluded from compliance with procurement rules[3]. This doctrine has been recently extended to the neighbouring issue of inter-administrative cooperation[4].

All in all, the ECJ has set a framework where, if public buyers do not interact downstream or compete in the market with private buyers, procurement activities are shielded from competition analysis (which, in my personal view, is a poor outcome because it tends to consolidate significant distortions of competition generated by the rules and administrative practices that are prevalent in procurement settings and, ultimately, diminish efficiency of the procurement system, generate a waste of public resources and result in diminished welfare).

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[2] Case C-481/07 P, *SELEX Sistemi Integrati v Commission*, [2009] ECR I-127, and Case C-205/03 P, *FENIN v Commission*, [2006] ECR I-6295.

[3] See, amongst others, Case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, [1999] ECR I-8121, Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, [2005] ECR I-8585, and Case C-324/07, *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale*, [2008] ECR I-8457.

[4] Case C-480/06, *Commission v Germany*, [2009] ECR I-4747.

On more specific procurement issues, the influence of the ECJ case law has been similarly relevant. For instance, the ECJ has developed new rules of major importance, such as the treatment of conflicts of interest in the procurement setting[5] (again, one aspect soon to be consolidated if the proposed new Directives are enacted), the setting of a clear cut separation between selection and award criteria[5] (this one, not favoured by the Commission in the 2011 proposal), the setting of limits to the introduction of social and environmental concerns in procurement process[6] (which are still in a state of flux), or the push for effective remedies that prevent *de facto* discrimination and distortions of competition[8].

2. Are there significant divergences concerning application of national legislation in the field of public procurement as perceived by the European Court of Justice? In that connection, how would you assess the role played by the preliminary references?

I think that there is a significant difference in procurement traditions and, more generally in administrative/public law traditions in the EU, and that this generates an impact in the way procurement rules are designed and enforced. Even if the degree of freedom the Member States enjoy in the transposition of the procurement Directives has been more and more constrained with every generation of procurement Directives,[9] there is still room for significant divergence. In that regard, the role of preliminary references has been (and will continue to

[5] Case C-34/03, *Fabricom*, [2005] ECR I-1559.

[6] Case C-532/06, *Lianakis and Others*, [2008] ECR I-251.

[7] Case C-513/99, *Concordia Bus Finland*, [2002] ECR I-7213, and Case C-448/01, *EVN and Wienstrom*, [2003] ECR I-14527.

[8] Case C-81/98, *Alcatel Austria and Others*, [1999] ECR I-7671.

[9] As rightly stressed by Arrowsmith, S. "The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?" (2005-2006) *Public Contracts Law Journal* 35: 337.

be) instrumental in developing a true level playing field. For instance, the preliminary rulings regarding the concept of public contract (either works, supply or services contracts) or of concession for the purposes of the procurement Directives have helped set common standards regarding the scope of the procurement Directives[10].

3. An important topic in your thesis concerns the research methodology. Is it possible to set a specific research methodology in European Union law as an autonomous field of study, or is there a need for adequate instruments to be found or developed for every subject-matter?[11]

I think that most scholars tend to agree that the classic black-letter analysis is not well suited to the study and research in EU Law. However, it is not so clear what the best alternative is and it seems unlikely that there is a magical solution or a unique formula to conduct research in EU Law. It should be stressed that EU Law comprises a mix of fields that require different types of analysis, as they are more related to other social sciences (such as political science, if we focus on Institutional EU Law, economics if we focus on EU Economic Law, or even hard sciences if we approach EU Environmental Law or Food Safety, just to give a couple of examples). Therefore, it seems that there is a need to develop tailor-made methodologies depending on the specific area within EU Law where one researches and, maybe more importantly, depending on the type of project (comparative, qualitative vs. quantitative, law and economics, etc.). In my view, the proper method for a non-comparative study in any field of EU Economic Law is to

[10] For a recent case, see Case C-348/10, *Norma-A and Dekom*, 10 November 2011 [not yet reported].

[11] Cf. also Sanchez Graells, A. "A Short Note on Methodology: An Eclectic and Heuristic Multi-Disciplinary and Functional Approach to EU Law" (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754944).

adopt an eclectic and heuristic multi-disciplinary and functional approach, with a strong emphasis in the use of economics (or, at least, its insights and rational). In any case, my impression is that methodological issues are gaining relevance in all fields of legal studies (not only EU-related), so I hope to see significant developments in this area in the coming years.

4. How would you assess the chances of success of the new proposals of amending the legislation in the field of public procurement originating from the European Commission?

I think that some of the mechanisms and solutions included in the new proposals reflect much awaited flexibility and simplification and that others just consolidate case law and/or best practices in the public procurement field (particularly some that, partially, are imposed by the new version of the WTO Government Procurement Agreement). In this regard, I expect the proposals to be adopted as Directives in a relatively short period, but not without changes. I also see some half-baked proposals (such as the introduction of the European Procurement Passport, or the Innovation Partnership), so I expect (or hope) that some of the proposals will be saved for the future[12].

5. What means should be employed to solve the paradox of connecting public procurement with cartels in the EU competition law, connection which is allowed or even encouraged?

I think that the link between the transparency and predictability of the setting created by procurement rules and the increased chances for collusion between tenders are finally being clearly recognised by contracting authorities and

[12] For further details, Sanchez Graells, A. "Competitive Neutrality in Public Procurement and Competition Policy: An Ongoing Challenge Analised in View of the Proposed New Directive"(http://ssrn.com/abstract=1991302).

competition authorities almost everywhere in Europe[13]. In my view, the means have been well determined by the OECD in a relatively recent report[14] and all it takes is for procurement authorities to raise awareness and implement those recommendations, coupled with more fluid communications between procurement and competition authorities (which could be helped by the creation of U-like competition advocates within contracting authorities and/or granting oversight powers to competition authorities regarding some types of particularly complicated or collusion-prone procurement processes).

6. You teach commercial law – a discipline of private law. In that connection, how would you assess the contribution of the European Union law in emphasising the public law nature on the private law?

I think that the division between private and public law has been blurred in many aspects and that EU Law has made a significant impact in that regard – given that the developments brought forward by the creation and expansion of EU Law have affected almost all areas of the law in the Member States[15]. For instance, competition law is a matter of public (economic) law in some countries, while it is considered private law in others (such as Spain, where I was legally trained and where I have been teaching for the last three years) and, to a large extent,

[13] As I discovered recently while conducting a comparative analysis of the enforcement of competition rules in procurement markets in most EU jurisdictions; see Sanchez Graells, A. "Public Procurement: An Overview of EU and National Case Law (from an EU Competition Law Perspective)" (SSRN: http://ssrn.com/abstract=1968371).

[14] OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping governments to obtain best value for money* [2009] (http://www.oecd.org/dataoecd/27/19/42851044.pdf).

[15] For general discussion on these topics, see the interesting book by Sauter, W. & Schepel, H. (2009) *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts*. Cambridge-New York: Cambridge University Press.

I think this is just the result of traditions or a remaining of some arbitrary decisions made when the discipline was in its infancy. Actually, I think that EU lawyers have a versatility and flexibility I their research and method that allow them to move from traditional private law disciplines to traditional public law disciplines. At least, I hope this is the case because I will be moving closer to Public Law matters in the immediate future as Lecturer at the Law School of the University of Hull. I hope I am not overly optimistic.

7. Moreover, do you think arbitration could become an effective instrument to settle disputes in the public procurement field?

I think that arbitration is an interesting dispute resolution mechanism to deal with purely contractual issues between the contractor and the contracting authority during execution of the contract (such as minor project modifications, price adjustments, guaranty issues, etc.). However, I think that oversight and challenges of public procurement procedures must remain substantially in judicial procedures that ensure universal access, full disclosure and accountability of the contracting authorities. In this regard, I do not anticipate a hatching of "arbitration in procurement" or, at least, I would not favour in issues other than purely contractual claims between contractors and public buyers.

8. What would be the significance of the theory of path dependence for explaining distortions of competition? After all, could there be "objective" business relationships (in the field of public sector of procurement)? Would that not go against the trust-based trade?

I think that path dependence is a risk in procurement (both private and public) because it relaxes quality control mechanisms and gives the incumbent a tricky (and sometimes unjustified) advantage. I do not think it is against trust-based trade to promote a periodical tendering of contracts where the

incumbent (the good or bad supplier we already know) must regain trust in its contract conditions by proving that it remains the best suited contractor and that it offers interesting, best value for money solutions. Moreover, that generates dynamic incentives for competing tenderers to offer net advantages to the contracting authority. I think that trust must not be bundled with comfort in this cases and that periodical retendering (and, eventually, periodical changes of public contractors and suppliers) is a healthy practice that prevent foreclosure effects in the markets where the public buyers sources goods, works and services - as well as preventing corruption and other undesirable conduct, by repeatedly subjecting contracts and award procedures to scrutiny and competition.

9. What are the consequences of the unfair competition in the equation "public procurement and the EU competition rules"?

Unfair competition is not dealt as such in my book, but it definitely raises an important issue in the public procurement field. However, in my view, it is of particular relevance when a situation between public and private tenders arises. In that regard, to prevent unfair competition by public suppliers of goods or services (which do not qualify for the *in-house provision* exemption), I think it is important to increase the efforts to ensure competitive neutrality, as stressed by the OECD,[16] the UK government procurement[17] and competition authorities, and others[18].

[16] OECD, *State Owned Enterprises and the Principle of Competitive Neutrality* [2009] (www.oecd.org/dataoecd/43/52/46734249.pdf).

[17] Office of Fair Trading, *Government in Markets. Why Competition Matters–A Guide for Policy Makers* [2009] (http://www.oft.gov.uk/shared_oft/business_leaflets/general/OFT1113.pdf), and *Competition in Mixed Markets: Ensuring Competitive Neutrality* [2010] (http://www.oft.gov.uk/shared_oft/economic_research/oft1242.pdf).

[18] Taylor, S. "The challenge of competitive neutrality in public procurement and competition policy: the U.K. health sector as case study" 2011 *Competition Policy Int'l* 7 (http://www.wragge.com/published_articles_7650.asp).

10. How is to crack a nut?[111] (ie how is it to be both a blogger and a professor/a researcher?)

It is definitely fun. I use the blog for three main purposes. First, to communicate with my students and continue discussions held in class or to spur new ones. Therefore, the subjects I blog about are usually close to the specific things I am teaching at any given time. Second, I use the blog to publish short opinions on matters that would never receive diffusion in more formalised academic publications, such as periodicals or books. These days, with the amount of information we are exposed to, I think that blogs are the proper arena for on-the-spot micro-commentary of news or cases that, in any case, will expire soon. Third, I use my blog to expose initial ideas I have for more detailed or serious research projects. I have found it very useful to exchange views with colleagues and other academics, which have helped me develop my research with a broader view and, hopefully, has contributed to make it better. The only, significant restriction is that I have been blogging in Spanish so far. But this will change in the summer of 2012. I hope that switching to English will make the blog an even bigger platform for legal discussion. And, therefore, even more fun.

Thank you very much.

[19] http://howtocrackanut.blogspot.com/

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First of all we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

I studied Law in Spain, at the University of Granada (1994-1999), and furthered my studies at the University Complutense of Madrid, where I defended my PhD in 2003. I spent my early formative years, from the age of 5 to 18, attending international schools in Spain, plus a three-year stay in the United States. I would say my University legal studies were very "national", mostly focused on civil, criminal, labour and constitutional law, with brief and generally poor or brief glimpses of international and EU law.

I began to focus on European issues once I started my doctoral studies. From an early moment, I chose to write a PhD on the principle of proportionality in Spanish Public Law, a topic that obviously drove me directly into the domains of EU Law. I spent the academic year of 2000-2001 at the University of Oxford, under the supervision of Paul Craig, and there I gained a full view of both EU Law and legal comparative methodology, and how they impacted on domestic legal orders. Eventually, the principle of proportionality worked for me as a laboratory of legal cross-fertilization in European Public Law, pushing me towards a more all-embracing approach to legal studies and research.

From the very beginning of my doctoral studies I was encouraged by my supervisor, Ricardo Alonso García, to research on topics different to those of my PhD. Because my PhD dealt with a principle of Spanish Public Law, I devoted my "parallel" research to other areas of the law that would eventually enrich my education, mostly EU Law and comparative studies. Therefore, by the time I finished my doctoral studies I had a rather broad interest in the law, or, better put, in the law I was interested in, which was mostly public, comparative and strongly European-focused.

Spain has a peculiar legal tradition which obviously conditioned my education and my understanding of the law. Spain lacks an autonomous legal methodology and it has benefitted in the past two centuries mostly from French and Italian legal and doctrinal sources. Spanish Civil Law has been until lately an improvable pseudo-adaptation of the French Code Napoleon, with bits and pieces of Italian influence. The same applies to criminal, tax and labour law. Academics have generally used comparative law as a source of importation and not of reflection, a feature that has made of Spanish Law a rather eclectic creature of an uncertain origin. However, for an EU lawyer this was an extraordinary environment to grow up in: there are no myths in Spanish Law, or at least no myths

attached to a sense of legal Spanish-ness. Most of our Law has been invented elsewhere and we have used foreign rules and institutions with pleasure. This approach probably explains why EU Law has been easily absorbed by the Spanish legal system and its culture, but it also explains why a young lawyer like myself had no problem whatsoever dealing with EU Law and with its application in the Spanish legal order.

2. What is the place of comparative law in EU law? What do you think is the link between those two from a methodological point of view? Also, how does the comparative law influence EU law?

The answer to this question depends on whether we understand "comparative law" as criteria of interpretation or as a source of law.

In the first case, comparative law serves as an essential tool of adjudication, both before EU and national courts. Since EU law is the product of a multinational and multilingual legislative processes, its rules are better understood in the light of national legal orders. A rule of EU Law that poses problems of interpretation, if it coexists with similar national rules, will eventually be interpreted in line with the interpretation that national courts have given of their rule. There is a strong incentive to follow what more experienced legal orders have been doing in the past, particularly when this has proved to work well (see, for example, the ECJ's case law on points of procedural law). Of course this does not mean that a comparative law argument will always show the way towards the best interpretation of a rule of EU Law, but it is a powerful tool that should not be overlooked by a lawyer arguing a case.

In the second case, comparative law acts more like a "source of law" rather than criteria of interpretation. EU Law often embraces in its rulebook this use of comparative law, as it proved by Articles 6 TEU and 340, paragraph 2 TFEU, on the scope of EU fundamental rights and the substantive rules

governing the EU's liability, respectively. In these two cases, comparative law plays a clearly creative role: it empowers legislators and judges to embark themselves in a process of law-making that takes closely into account the status of national "traditions" (not "legal orders") with the purpose of framing fully-fledged and enforceable principles of EU Law.

In general, I believe that the first understanding of comparative law has been frequently and wisely used in cases concerning the interpretation of EU law, and its development has not departed very much from what national courts usually do when faced with similar arguments of comparative law. The European Court of Justice and the General Court have perfected this practice over the years, probably due to the specific features of EU rules, and at present it is a frequently used argument both by private parties, Institutions and Member States that the ECJ accepts with no reservations.

The second understanding of comparative law has proved to be considerably more problematic. The ECJ has been invited on several occasions to innovate principles of law on the sole grounds of "constitutional traditions common to the Member States", and this process has never come through easily, either because the ECJ has taken a long time to fully develop the principle at hand (see *Francovich*, *Brasserie* and the subsequent State liability case-law of the ECJ), or simply has refused to use these rule-creating powers (see *Audiolux*, *FIAMM* and other case). There is a strong argument based on the democratic credentials of judicial institutions that drives the ECJ to act very cautiously, sometimes wisely and sometimes not.

3. A rather "common" question: In your opinion, what are the most important developments brought by the Lisbon Treaty, more than two years since its entry into force?

Besides the technical (and I would say "minor") changes introduced by the Lisbon Treaty, I believe its major development is paradoxically the entry into force of a text that is missing

from its provisions: the Charter of Fundamental Rights of the EU. The Charter legitimizes the ECJ's constant and very creative case-law developed over a time-span of over forty years, including the case-law concerning the scope of application of fundamental rights, which has been far-reaching and invasive in the opinion of some (powerful) Member States.

Although the Lisbon Treaty might appear in this point to simply introduce in written law what already existed in the ECJ's case-law, its effects go way beyond this. National courts now have a written reference that empowers them openly and clearly to protect fundamental rights when they apply EU Law, and so do lawyers when defending their clients' claims. Codification will help to make EU fundamental rights visible and, eventually, it will reinforce their presence and influence in Member States.

On the other hand, and thanks to the Charter, some Member States have decided to grant EU fundamental rights a special status that traditionally had been refused because of their unconventional and judge-made law nature. In a landmark decision in 2012, the Austrian Constitutional Court recognized the Charter as part of its parameter of constitutional scrutiny[1]. A year before, the Spanish Constitutional Court raised its first ever preliminary reference to the ECJ on a point of interpretation of the Charter[2]. It is doubtful that such a reference would have ever been posed if Article 53 of the Charter had not existed. The *question prioritaire de constitutionnalité* introduced in

[1] Verfassungsgerichtshof (Austrian Constitutional Court), decision of 14 March 2012, cases U 466/11-18 and U 1836/11-13; for a translation into English: http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf (ed.).

[2] Tribunal Constitucional (Constitutional Court), order 86/2011 of 9 June 2011, *Stefano Melloni*; http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=23243 (in Spanish); ECJ, Case C-399/11, pending (ed.).

France (and its Belgian equivalent) was a protectionist national reaction from a national legislator to stop inferior courts from applying the Charter (and the ECHR) on their own, but in the meantime this has transformed the very nature of the French *Conseil Constitutionnel*, now closer to a genuine fundamental rights jurisdiction than ever.

In addition to all of the above, the Charter has reinforced the status of European citizenship as it was known to date. It is unsurprising that some of the most relevant developments in this area or the law have occurred shortly after the entry into force of the Charter (see, for example, decisions like *Rottmann*, *Kücükdeveci* or *Ruiz Zambrano*). European citizenship is now a fully protected status, whose essence is subject to scrutiny in the light of EU Law. This would only be possible if European citizens enjoyed both political rights *and* fundamental rights and freedoms, something the Charter now makes clear and visible to all.

Seen in this light, the Charter has made explicit, and therefore effective, the source of legitimacy that the Union was lacking: protection of the individual's basic statute (strongly attached to European citizenship and the Charter). Member States had the means to exert voice within EU institutions, but not the individual. The Charter assures that such voice is to be granted, but, above all, protected.

4. Could you please comment on the goals of competition among European Courts – the European Court of Justice and the European Court of Human Rights? What would be the usefulness of an adhesion to the European Convention on Human Rights as far as the European Union has already adopted the Charter of Fundamental Rights? Is there a "hidden" meaning for that?

First, I believe it is not correct to speak of a "competition" among European Courts. The ECJ and the ECHR have never competed among each other, since their powers and aims are

clearly distinguishable. The ECJ is the interpreter of an autonomous legal order created to assure the rule of law in a process of supranational integration. On the other hand, the ECHR is an international jurisdiction entrusted with the authorized interpretation of an international Treaty, whose sole subject matter is the protection of human rights. Each Court follows different methods of interpretation, each one coherent with the goals of their respective mandates. In those areas in which there is an overlap, as it could be the case, for example, of the protection of the right of property or the right to private life (rights that frequently arise in EU agricultural law or competition law), the ECJ has always complied with the standards of protection previously determined by the ECHR. It is therefore not a relationship based on competition, but on autonomy and reciprocal deference in order to avoid jurisdictional conflicts.

The upcoming accession of the EU to the European Convention of Human Rights will have a momentous significance in many terrains. Symbolically, it will put a limit to the Union's self-construed fundamental rights by introducing an external parameter of compulsory supervision, parallel to its Member States, thus proving the Union's willingness to standardize its commitment with human rights in accordance with international standards. Legally, the accession will put the Union under strict supervision of the European Court of Human Rights, and that includes of course the ECJ, an institution that has never been subject to external jurisdictional scrutiny. In procedural terms, many issues remain unresolved and should be solved in the upcoming months or years in the course of accession negotiations.

As for the "usefulness" of accession for the Union, it is obvious that the European Convention of Human Rights is not a "useful" text for public powers, inasmuch it is designed to limit the scope of action of the public authorities, and not to empower them. The same will apply to the Union, whose status

vis-à-vis the Convention will be mostly identical to that of a signatory State. However, it is also true that a State's accession to the Convention system sends a strong message internationally and domestically that contributes to reinforce the moral standing of the said State. Accession to the ECHR is thus a source of legitimacy of a State, inasmuch it reflects a firm commitment to the protection of human rights.

In pragmatic terms, the "usefulness" of accession is a feature that will be mostly enjoyed by individuals in their relations with EU Institutions and with Member States when applying EU Law. For the first time, decisions of the ECJ rendered in appeals on points of law will be subject to scrutiny before the ECHR, as so will be the decisions of the General Courts rendered in last instance (in particular, decisions in staff cases in appeals against the Civil Service Tribunal).

For the ECJ and the General Court, the ECHR' s case-law will no longer be an authoritative reference with no legal standing in EU Law (although now strictly followed), but a source of EU Law as any other international Treaty ratified by the Union. Of course the European Convention of Human Rights is something substantially different to ordinary international Treaties, but its legal standing will be that of international law integrated into EU Law as a result of Article 218 TFEU.

5. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

At the present moment there are various threats to the unity and coherence of the EU's legal system. First and foremost, the measures enacted from 2010 onwards as a result of the economic crisis have sometimes been passed through unorthodox means, due to the exceptional circumstances experienced and the current Treaty's substantial, temporal and procedural limitations. Many of the measures have taken the

form of international Treaties ratified by the Member States outside the framework of EU Law, but with recourse to EU Institutions, mostly the Commission, the ECJ and the Council. EU Law runs not only the risk of inter-governmental fractioning, but of fractioning from the very roots of EU Law. After all, the so-called and now repealed "second and third pillars", despite their inter-governmental source, were part of EU Law. The Treaty establishing the European Stability Mechanism (ESM) and the Fiscal Compact are, on the contrary, instruments foreign to the EU legal system, but tightly linked to it as a result of institutional arrangements and in light of the evident instrumental role they play *vis-à-vis* economic and monetary EU policy.

The ECJ also faces a very specific risk of fragmentation, but more particularly of jurisdictional fragmentation. First, it is open to question whether the powers of ECJ under the Treaty establishing the ESM and the Fiscal Compact are "ordinary" jurisdictional powers of the ECJ or, on the contrary, special powers subject to special standards or criteria of scrutiny. Second, the ECJ is also facing a growing jurisdictional challenge from specialized courts of an international character, such as the EU patent jurisdictional system, whose material regulation is part of EU Law, but not its jurisdictional arrangements and legal base. In its Opinion 1/09[3], the ECJ rejected this recourse to mixed international jurisdictions in order to interpret and apply EU Law, but Member States (or at least a significant number of them) seem willing to insist on this approach.

Therefore, the risk of fragmentation can be seen from the perspective of the legal system or of the jurisdictional system. From the first angle, the perils of such development are the risk of an excessive "internationalization" of the so-called "community method" (and thus a weakening of the EU's legal

[3] 2011 [ECR] I-1137 (ed.).

system if it is devoid of primacy and direct effect). From the second angle, the current scenario is rather contradictory: on the one hand, Member States seem very willing to rely on the ECJ's authority to rule on issues foreign to EU Law (see the ESM Treaty and the Fiscal Compact), but, on the other, Member States are doing exactly the opposite in areas governed by EU Law (EU patent system). It is still early to draw any conclusions or prospective calculations, but the process of fragmentation is not other than the consequence of the EU's gradual drift towards a multiple-speed Europe. Since this development seems to be the Union's unavoidable fate, legal and jurisdictional fragmentation is expected to stay with us for quite some time.

6. From your perspective, what would be the main challenges for the current European Court of Justice? And in connection to that, which are - from your point of view - the most salient developments in the recent case-law of the European Union Courts?

The ECJ's main challenges are twofold, and in a certain way they are partly related to the issues raised in question 5. I believe that the challenges concern, (1) the need to assure the coherence and uniformity in the interpretation of EU Law, (2) the management of a growing number of cases with enough efficiency but also sufficient time, and (3) the need to guarantee the primacy of EU Law in a Union constantly expanding towards ever-growing sensitive issues, closely attached to national identities, such as criminal law, family law or taxation.

In this regard, the Opinion in case 1/09 is a good example of challenge number 1, as so are the judgments in *Melki*, *Elchinov* or *Cartesio*, cases in which the ECJ empowered national courts, even *vis-à-vis* their hierarchically superior courts, to raise references in practically any circumstance. Challenge number 2 is mostly reflected in the recent reforms of the Court's Statute and Rules of Procedures, whereby preliminary references can be treated through an "urgent procedure" that solves the case in a time-period under three

months, or appeals on points of law may be granted through reasoned orders, to give but two examples. Challenge number 3 is probably the most delicate of them all, but recent judgments prove how seriously the Court is willing to take national identities, even when colliding with EU Law. The decision in *Omega* was a first step in this direction, lately confirmed in the judgments and opinions rendered in the cases of *Sayn-Wittgenstein*, *Runevic-Vardyn* or *Melloni*.

7. On the other hand, which role does play the purposive interpretation (generally) in law and more particular at the ECJ? Are the any „malaises" concerning this interpretation in the judgments delivered by the ECJ?

At the ECJ, purposive interpretation seems indeed to hold a privileged position in comparison to other means of interpretation (systematic, literal, historical). Is this perception grounded? And also, which might be the justification that this kind of interpretation leads finally to a new law?

Purposive interpretation is undoubtedly the Court's privileged criteria of interpretation. However, its use is not as odd as it may seem for two reasons. First, it is a standard criterion of interpretation in many domestic supreme courts of Member States, mainly constitutional courts. Second, it is the criterion that best suits the legal order of a supranational organization that works through functional and goal-oriented policies. The Union, despite its wide powers, has been granted competences to achieve certain goals strictly defined by the Treaties. The exercise of a competence can only be scrutinized in light of the objectives it pursues, and thus purposive interpretation acquires a particularly relevant role.

On the other hand, purposive interpretation fits in well with the Union's legislative dynamics. Judgments of the Court based on this criteria will continue to grant the Union's legislature a wide margin of action, as long as the objectives of a particular

policy are clearly attained. This works just as well regarding national legislators, who might be tempted to circumvent the goals pursued by a Union policy by aesthetic rules apparently Union-friendly, but obstructionist in their purpose.

8. To sum up the above questions: Would there be any risks concerning the activism of the European Court of Justice? Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

"Activism" is a word that needs some refining, at least as to provide a coherent answer to the question. I would understand by "activism" the action of a Court deciding cases on non-legal grounds, or beyond its jurisdiction, but nevertheless getting away with it. I have the feeling that the Court has not undertaken this form of judicial decision-making, maybe with one exception: in *Chernobyl* (*Parliament v Council*), where the Court granted privileged standing rights to the European Parliament in direct actions before the Union's courts. This decision went clearly beyond the terms of the Treaty, but the Court got away with it and the European Parliament saw its standing "upgraded" in a subsequent Treaty reform agreed by all Member States. With this sole exception, I believe the Court has been scrupulous and cautious, avoiding any form of extra-legal criteria in its decision-making and attaching itself very closely to the powers conferred by the Treaties.

In this regard, the preliminary reference procedure is probably the most preeminent example of "hard law" adjudication in action. National courts can only refer questions on a point of interpretation or validity of EU Law, and thus any factual analysis, whether it may be of an economic, social or political nature, will be directly rejected by the Court. During these proceedings the Court can only rule on a point of interpretation and validity of EU Law, thus leaving aside any consideration of policy. It is usually the case that references

are made with the purpose of attacking a national decision. In these circumstances, the referring court, or the parties in the main proceedings, can be tempted to raise a purely national debate to the ECJ, either on points of law or others. Because of the strict limitations of Article 267 TFEU, the Court will immediately reject any consideration beyond the strict interpretation or validity of EU Law. This contrasts with infringement procedures or direct actions, where the Court is faced with much more factual arguments that require from the Court a considerable effort of analysis going beyond the strict interpretation of rules of EU Law. So contrary to what many might think, the preliminary reference procedure is legally watertight. Of course that does not mean that this procedure will preclude the Court from taking principled decisions on points of law, but these will be strictly legal decisions and within the four corners of the Court's jurisdictional powers.

9. Could you please describe the impact the judgments delivered by the General Court has over the courts or tribunals of the Member States (compared to the judicial dialogue entailed by the preliminary rulings procedure)? And also, is there a deference of the General Court compared to the reasoning of the Court of Justice?

Because of the competences of the General Court, it is obvious that the impact of its decisions is very much limited to the circumstances of a particular case. Direct actions force the plaintiff to base its arguments only on the legality of an attacked Union measure. Therefore, the impact of these judgments on national law is not necessarily expected, unless, of course, the attacked decision serves as the basis of national legislative or administrative measures.

Due to this feature, and because of its position as a first instance court in most of the cases it hears, the General Court's reasoning is considerably different from the ECJ's. The judgments of the General Court are more detailed; they take

factual considerations closely into account, and must deal with every point raised by the parties. Also, the pressure of a potential appeal usually leads the General Court to analyze the case with extraordinary detail, particularly in light of the relevant case law of the ECJ. Therefore, there are major and very visible differences between the reasoning of both Courts.

10. What makes a judgment (particularly of the ECJ) becoming a "historical" judgment? What process does lead a judgment to become a precedent?

This is a very difficult question that has no simple answer. To put it very simply, a "historical" judgment will be decided as a result of its objective importance, as a result of ulterior developments that bring new light to the decision, or because of legal or extra-legal circumstances of a certain importance that become conditioned by a judgment.

In the first case, decisions like *Vand Gend en Loos*, *Costa v ENEL* or *Simmenthal* are obvious examples of "historical" judgments because of their objective importance.

An example of the second case can be found in the *Rheinmühlen* cases and the developments taking place in the early 2000's leading to the ECJ's decisions in *Cartesio*, *Elchinov*, *Melki* and *Kirizan*. *Rheinmühlen I* and *II*, both delivered in the early seventies, were relevant judgments, but not historical by any means. However, the tendency of some constitutional and supreme courts to supervise inferior court's decisions to raise references turned *Rheinmühlen* into a tremendously important decision, molding the relationship between the ECJ and the constitutional and supreme courts of the Member States.

The third case can be found, for example, in the *Microsoft* judgment of the General Court. A case of competition concerning the introduction of a program (the Media Player) in an operative system (Windows) became a landmark competition case because of the stakes involved in the

Commission's battle against Microsoft's dominion of the PC market in the late 1990's. The circumstances, not the legal issues, made the case a "historical" one for the General Court.

11. Are there any "grey" areas in the field of EU law concerning the issues of rights and remedies?

It would be quite extraordinary if there were no grey areas in any field of EU Law. If that would have been the case, there would be no need to have a European Court of Justice! Fortunately, the grey areas exist but are not, at least in my opinion, worrying. For a legal order that strongly depends on the good will of national courts and the efficiency of national procedures, the EU legal order has managed to provide citizens with a relatively coherent system of rights and remedies. It could be argued whether the system is efficient on its whole, and I would reply in the positive. However, there are certainly some areas in which efficiency could be improved from a micro perspective (State liability, maybe), but that is a common trait to all legal orders.

12. And a question rather uncommon: What are the duties of a legal secretary at the European Court of Justice? What role does he/she have in drafting the opinion/hearing report/judgment?

The legal secretary is an important piece in the functioning of both the ECJ and the General Court, since he or she is in charge of studying the case for the judge and drafting the decision. In the case of the legal secretaries of an Advocate General (which is my case), its task is to prepare the case and draft the Opinion.

The impact of the legal secretary's work in the final Opinion is quite a contingent issue. It depends on the degree of discretion that the Advocate General gives its legal secretary, but it is obvious that there is a strong possibility that he or she leave a personal "touch" in the final text. After all, the legal secretary

will have written the Opinion and it will thus reflect its style of writing and reasoning.

In my personal experience, I have worked for an Advocate General who was closely involved in the formal aspects of the Opinion (thus leaving the legal secretary hardly any "voice" of its own, but considerable leeway on the substance of the case), and for an Advocate General strongly involved in the substance, and not so much in the style or form. It is difficult to say in what situation was the legal secretary's "presence" more visible, but that probably reflects that the system (in my experience) worked correctly. Opinions are signed by the Advocate General and not by a collegiate formation (like the chambers of the Court), and therefore it must reflect the Advocate General's voice and ideas. The fact that the legal secretary's role might be somewhat more diluted in the case of an Opinion (at least that has been my experience) is probably a positive result that is coherent with the role that the Treaties assign to the Advocates General of the Court.

13. And a final question concerning the research methodology in (EU) law: which piece of advice would you give to a researcher in EU law from the point of view of the methodology to employ?

As an academic with practical experience at the ECJ, I would encourage researchers in EU Law to approach the ECJ's case-law with a more realist and constructive approach. One of the features I find in scholarly literature on EU Law (a trait I also incurred in before joining the Court) is a certain tendency to analyze judgments of the Court as something like the word of the Lord, an immutable message hiding profound wisdom, cleverly put in very small nuances such as the use of the singular or the plural in a noun, or in the quotation of this or this other judgment. My experience at the Court has shown me that the process of judicial-making is considerably more chaotic and contingent than what we might expect. Decisions are made

with haste, sometimes after a long discussion of a previous case, and sometimes they might even be wrong as a result of a petty mistake. These things happen, for the Court is made up of individuals who are as fallible as any other mortal. Thus, academics should be willing to address the Court's decisions with respect, but also to accept the possibility that judgments might be simply wrong.

However, during my experience at the Court I have also noticed that criticisms for the sake of criticism are generally not well received by judges, Advocates General and legal secretaries. On the contrary, in order to make a powerful critique and thus have the ability to influence future developments, scholarly literature must be critical but also constructive. Good legal literature (and the influential one, at least at the Court) is the one that spots the good things and the bad things, but also manages to show the way forward. Legal scholars must never forget that their mission is not only to systematize and explain the law in accordance with scientific parameters, but also to point at the correct paths to be taken. When the descriptive and the normative dimensions of a legal issue are separated but neatly combined, legal scholarship can prove to be at its very best.

Thank you very much!

JAN SMITS

Jan Smits holds the Chair of European Private Law at Maastricht University and is the academic director of the Maastricht European Private Law Institute (MEPLI). He is also research professor of Comparative Legal Studies in the University of Helsinki. After his study of law at the universities of Leiden and Poitiers (1986-1991), Jan Smits defended his PhD at the University of Leiden (1995), developing a theory of how contractual liability can be best explained. In 1995 and 1996 he taught at the universities of Stellenbosch and Tilburg. He then was appointed at Maastricht University, first (1996-1999) as an associate professor and then (1999) to the newly created Chair of European Private Law (the first chair for this field worldwide). At Maastricht, Jan Smits led the private law research group of the Ius Commune Research School. From 2008 to 2010, he was distinguished professor of European Private Law and Comparative Law at Tilburg University, a post he gave up in late 2010 to return to Maastricht and found the Maastricht European Private Law Institute. He held visiting positions at a number of foreign institutions, including Tulane Law School, Leuven University, the University of Liège, Louisiana State University and the Penn State Dickinson School of Law. From 2010-2012, he also held the Hague Institute for the Internationalisation of Law (HiiL) Visiting Chair on the Internationalisation of Law. Jan Smits is an elected member of the Royal Netherlands Academy of Arts and Sciences (KNAW).

First of all we would like to thank you warmly for accepting this interview.

It is a pleasure and a privilege to be interviewed. I believe that academics in today's world have to make an effort to market their ideas also outside of traditional academic journals and books. I am happy that through this interview you offer this opportunity.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

Also, is it possible to provide us with a description of your main teaching and research interests in EU law?

I studied law at the University of Leiden in the 1980's. In that time, the law study was still very traditional. It consisted mainly of big lectures with 600 students, there were hardly any courses in which you had to write a paper or give a presentation and substantively there as an omnipresent focus on Dutch law to the neglect of comparative and European elements. The big lectures were even given twice because in my year there were about 1200 students and there was no lecture hall that could host so many students at the same time. I now make it sound as if I did not enjoy studying law, but in fact I did. I felt the need to really go into depth and always tried to read around a certain topic. Some professors were able to inspire even a large audience, such as Prof. Kooijmans for international law and Prof. Chorus for legal history. I also had the privilege of being taught by Prof. Daalder, the famous Dutch political scientist. However, the real turning point came when, in the third year, there were two courses on private law that consisted fully of writing papers and presenting. This, I thoroughly enjoyed because it meant you had to go the library and find materials yourself. For most students, this was the first time they were in real contact with the teaching staff. I must say that when I think back of this situation, present-day students here in Maastricht are in a privileged position, with small group teaching and close personal contact with the staff. In 1990, I spent half a year at

the University of Poitiers on Erasmus exchange. The Erasmus programme was then only in its third year or so, but was already very popular among students. It was great to be live in a truly international community of students, although contacts with French students were not very frequent. Interestingly, all foreign students spoke French among each other!

When I returned from Poitiers, I found myself very lucky to be able to get a PhD-position in Leiden. I worked on the reliance principle in contract law, while doing many other things next to it. I found myself teaching the same classes I had attended as a student, including the intensive courses with papers and presentations. This was also the start of my interest in comparative law and legal theory and of publishing. My first published article was on mutual mistake in contract law and was based on my master thesis. It was also very important to me to find an inspiring research environment in Leiden, which is something that I have always sought for and, in a later stage of my career, have actively tried to create myself. I believe it is immensely important that there is a microclimate of junior and senior staff that regularly come together, discuss papers etc. Unlike the picture that the outside world has of academia, my work consists for 80% of talking with colleagues and students. Paper writing is usually left for the evenings or weekends.

I defended my thesis in 1995 and left Leiden. I spent a period at the University of Stellenbosch in South Africa and at Tilburg University before I came to Maastricht. I always like to tell as a joke (but it is true) that, when the first professorial chair for European private law in Europe was created at Maastricht University in 1999 and I was appointed to it, some of my old friends from Leiden asked me: 'European private law, does this exist?'

My own research interest lies not so much in EU law itself. Instead, it lies in the Europeanisation (and globalisation) of specific fields of law such as private law. EU lawyers tend to focus on institutions and on competences. This is interesting,

but it is equally important to ask how Europeanisation affects and should affect the age-old fields of law such as criminal law, administrative law and private law. My own work focuses on a number of things, and is probably characterised by a more theoretical stance. Much of my work deals with the harmonisation debate: do we need a more uniform private law in the European Union and, if so, if what form? I am sceptical about top down efforts and a great believer in the values of diversity. But in our research group at MEPLI we have all different views on this, which is very conducive for debate!

When teaching students, I always try to have them speak about their own views on a certain topic. Most of my teaching is in the European Law School programme, which means an international classroom *par excellence*. In the course I taught last year on European Integration, only three out of 60 students were from the Netherlands. This is a situation that is very difficult to find elsewhere and a great advantage of teaching in Maastricht.

2. From the point of view of the legal order you are coming from – the Netherlands – are there any lessons that might useful for a comparative perspective on EU law?

In the field of private law, the Netherlands is often seen as a model for its relatively new Civil Code that was adopted in 1992. In particular shortly after its introduction the Dutch were active in trying to 'sell' the Dutch Code to countries in central and Eastern Europe that wanted to update their existing Codes after the fall of Communism. It would be a nice project to see what has actually come from this, but it did allow many of my Dutch colleagues to do some heavy travelling. I was involved in projects in Poland, the Czech Republic and Moldova myself and found it always stimulating to exchange views on what should be put in a Code. In hindsight, what was too often missing in the discussion was sufficient attention for the context

in which the rules had to work. The Dutch Code contains quite some open-ended norms such as good faith, allowing a Dutch court to even set aside a statutory provision. This requires a great reliance on the competence of judges to do the right thing and I was not sure that the legislature in for example Moldova was willing to give this power to the courts.

3. From your perspective, what would be the main challenges for the current European Court of Justice?

The role of the Court in private law matters is fairly limited. The most important function of the Court in this field is to give rulings on the interpretation of Directives. In addition, it can of course set the limits for legislative action in this field, in particular by interpreting Article 114 TFEU. But this is at the moment not very spectacular. The main question in my view is whether the plan to create a Common European Sales Law (CESL) would not require a whole new type of European court that would be competent to deal with the facts of the case. If one believes, as the European Commission does, that parties are in need of one contract law for the internal market, it would be useful if there is also one European court that interprets the relevant rules in a competent and speedy way. I see the same challenge in patent law, where the idea of having the present Court of Justice as the pinnacle of the judicial system is not met with much enthusiasm. I am in any event in favour of creating European courts at the national level with specialised expertise on EU law that could deal with cases under, e.g., the CESL.

4. Which might be the objective pursued by the ECJ in a case when it answers a preliminary reference relying heavily on facts? Is the division of functions between courts (the national court and the ECJ) still possible in the (current) system of Article 267 TFEU? And also is there still a (genuine) division between law and facts?

On the other hand, are there any dangers in relying on national law in judgment of the Court (not concerning the relevant law, but in the rational building-up of a judgment)?

I more or less answered this question under 3.

5. To sum up the above questions: Would there be any risks concerning the activism of the European Court of Justice? Is the preliminary reference a strictly legal element or is it a mechanism significantly influenced by other factors – political, economic and so forth?

As I said, I do not see much activism in the area of private law. It would even be nice if the Court would be more active in this area and develop something like an EU private law based on the present Directives. This job will be much facilitated by the academic initiatives of the last decade in which all kinds of principles (PECL, DCFR, etc.) were drafted.

6. In the field of contracts and also of consumer protection, has the ECJ "accelerated" the autonomy of a concept that might lead to a discussion within the Draft Common Frame of Reference?

7. In other words, what are the main (legal) instruments that might be employed in order to create a genuine EU/ European private law?

If the question is how a future European private law should be developed, I can say that I do not believe very much in top down harmonisation. The idea of a binding European Civil Code that would replace the existing private laws in the 27 member states is absurd, unnecessary and lacking a legal basis in the Treaties. However, there are all kinds of measures that the European Union can take in order to achieve a more uniform European private law. For me, it all starts with a common legal culture: it would be in vain to create rules without a common understanding of what they mean. This is why I am so much in

favour of student exchanges, of creating an international classroom, of international cooperation in research, but also of exchanges among judges, etc. I believe the Erasmus programme has done more for European integration than all private law directives taken together. On top of this, the European Union is of course able to help with more concrete measures. I am a big fan of European optional instruments such as the European company, Community Trademark and proposed CESL because they leave the decision to Europeanise with the parties: if they like the optional regime, they can choose it and of they do not, they will stick to a national set of rules.

I should add that what is a 'genuine' European private law is of course a debated question. Some would say that we need a binding Code for that; others would claim that the unique feature of European private law lies in its diversity. I am more inclined to the latter position.

8. Is the public-private law division still relevant in the current legal world(s)?

It is as relevant as we make it. The European legislature does not ask whether a measure falls within the realm of private law or public law and also at the national level the distinction is increasingly irrelevant. However, we still teach our students and separate our Law Faculty departments on basis of this distinction, which I believe is wrong. But on the other hand, we need some categorisation.

9. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

This is a well-known theme. It is clear that Europeanisation leads to much fragmentation at the national level. To give a concrete example: the question of what is sale of goods will have to be answered differently dependent on whether the rule is governed by some European Directive or not. This makes it

difficult to put down the law in a consistent way in a Civil Code. This is also why many countries do not make the effort: they simply implement a new directive outside of the Code. Germany and the Netherlands are exceptions and not to their advantage. I do not believe we can really 'overcome' this threat, but we can get used to it. Again, teaching is essential. If we continue to teach our students that we have such a nice and coherent private law system, the problem persists, so we should teach them that law flows from different sources and that this leads to unavoidable clashes.

10. And a final question: Which advice/recommendation would you give to young researchers in (EU) law?

The first advice: follow your own path! What I value most in academic research is originality and, despite all the advice that you get about the direction to take, you should in the end do it your way. This is also the nicest thing about doing research: in the end you are only judged on basis of the quality of your ideas (and how you write them down). Being in academia is highly competitive because there are only so many positions and so many available pages in the top academic journals. But the most bright and original ideas come from the newcomers to the field!

The last thing I want to make clear is that this interview may be with me, but I regard research (and teaching) very much as a team effort. It is only thanks to the research group as a whole that I am able to do the things that I do.

Thank you very much.

ALEXANDER TÜRK

Professor, Kings' College, London.

Alexander Türk studied history (MA) and law (first and second state exams) in Augsburg, Germany. He obtained an LLM in European Law at the College of Europe in Bruges, Belgium (1994-95). He also holds a PhD from the University of London. He worked as Lecturer at the European Institute of Public Administration in Maastricht, Netherlands (1995-96) before joining the the School of Law in 1996 as a DAAD (German Academic Exchange Service) Lektor.

Professor Türk is Director of the LLM Programme. He is also General Editor of LexisNexis EU Tracker. He teaches on the London Programmes of the London Law Consortium and Pepperdine University, California. He is an adjunct Professor of Georgetown University, Washington.

His publications include: The Concept of Legislation in European Community Law (Kluwer Law International, 2006); EU Administrative Governance (Edward Elgar Publishing, 2006), co-edited with Prof. H.C.H. Hofmann; Legal Challenges in EU Administrative Law: Towards an Integrated Administration (Edward Elgar Publishing, 2009), co-edited with Prof. H.C.H. Hofmann; Judicial Review in EU Law (Edward Elgar Publishing, 2009); Administrative Law and Policy of the European Union (OUP, 2011), together with Prof. H.C.H. Hofmann and Prof. Gerard Rowe.

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law. You have an impressive professional background, you have studied and you are teaching in various countries. And also, what would be the gains and (potential) shortcomings of (young) legal students and professionals' mobility in EU?

I studied law in Augsburg, Germany, and passed the first and second state exams in law there. I also studied history and obtained an MA from Augsburg, Germany. The legal education in Germany follows a somehow unique model of university education (but without university degree) and exams set by the state (Bavaria in my case). The university education is strict in its methodological approach to writing, but liberal in the sense that a study plan is merely recommended and one is free to attend lectures (or not). This contrasts with the rather more formal English university education, where there is a strict timetable of lectures, seminars and tutorials. I have also obtained an LLM from the College of Europe (Bruges, Belgium), which follows this more formal model of compulsory lectures and seminars. My PhD is from the University of London, which again follows a more formal mode of studies. On balance I would have preferred a combination of German methodology of writing within a more compulsory set of lectures and seminars. Mobility is indispensable today, as legal issues do no longer stay confined to one legal system and law firms tend to reward students with multi-jurisdictional knowledge. It is also a good European tradition to get exposure to other legal systems to complement the education in one's home jurisdiction.

2. On a more personal note, we would like to ask you to assess the value of a German and English professional background as it is your case: you are familiar with both legal environments. In brief, what might be the gains from each system?

I think that the English professional education (after university) is more professionally oriented. It is not uncommon that students who have not studied law embark on a legal career (after one year taking a conversion course, law students and non-law students follow the same career path). For solicitors, the one year of following a legal practice course is followed by two years of training in a law firm. Barristers (an even more competitive profession) follow a practice course for one year and a pupillage in chambers for another. In contrast, the German legal system does not allow non-law students to enter a legal career. In many respects the German model of passing two state exams still follows the 19th century approach of educating officials for courts and the administration, rather than providing students for legal practice. In favour of the German model, German lawyers, while lacking the specialist knowledge of their English counterparts, have a well-round general education.

3. Among your main teaching and research interests there is the EU administrative law. Therefore, we would like to ask you to comment on the most significant recent developments in that field. Is there such an "EU administrative law" in its "classic" meaning? Supposing that such an administrative law does (or will) exist in the European Union, what would be the similarities and dissimilarities compared to the national legal orders?

The most significant elements of European administrative law are its dynamic and integrated nature. European administrative law changes fast and does not follow a blueprint. Its approach is often experimental, in particular as regards organisational features and procedures. This can be seen in the recent developments of agencies and networks, which are now embedded in a wider landscape of administrative action. Its unique nature of a functionally integrated system (national and European authorities participate in achieving EU objectives in organisational settings that are set up by Union law) as well as

the fragmentation of the Union executive (while the Commission remains at the centre of many administrative activities, it increasingly has to share its responsibilities with a range of agencies and networks) raises many problems of political and legal accountability. There is though still a sense of classic administrative law in this field, mainly in the case of traditional (substantive) grounds of review of administrative action, in particular general principles of law (legitimate expectations, non-discrimination, proportionality, rights of defence, fundamental rights etc.). An increasing emphasis in EU administrative law has been the greater involvement of citizens in administrative activities in the form of participation and consultation (beyond the classic rights of defence) and to provide greater transparency (e.g. with allowing citizens access to documents).

4. In connection to the above question, from your point of view, which role does comparative law play in the EU administrative law?

The comparative method is ingrained in EU administrative law. The judge-based development of general principles of law, to which EU administrative action is subject, is entirely based on a comparative approach. While the French legal influence has long dominated (in legitimate expectations or rights of defence case law), the German legal system (principle of proportionality) and the English law emphasis on natural justice (influencing procedural standards of good governance) has also been important. It should however be noted that the CJEU adopts a selective approach by considering the national notions of administrative principles, but adapting them to the needs of the European legal order.

5. What would be the current meaning and evolution of the public/private law division (taking also into account the EU administrative law)?

Private rule-making has come to be seen as an important regulatory mechanism in EU administrative governance. With the 'New Approach' in the internal market in the 1980s, (private) European standardization bodies operate as an essential complement of, or even as a substitute for, European legislation on health and safety of products. In the 1990s the European social partners have been entrusted with the development of the EU's social policy through the social dialogue and have been assigned a considerable role in the Lisbon Strategy. Environmental policy of the EU has come to rely on agreements by businesses to facilitate its objectives. Codes of conduct play an increasingly important role in data protection, commercial practices, and professional activities, as well as in corporate governance. The wide range and the increasing relevance of regulatory activities by private actors in EU administrative governance raise questions as to the rationale and the organizational structures of such activities, as well as to their legitimacy.

6. What are from your point of view the most significant changes brought by the Treaty of Lisbon (mainly but not only) for the EU administrative law, two years after its coming into force?

The Lisbon Treaty has brought about many important changes, also for EU administrative law. On the other hand, it might also be worth pointing out what the Lisbon Treaty has not addressed.

Changes:

- the emphasis on democratic principles (transparency and participation),
- the abolition of the previous pillar structure (with CFSP still playing a separate role),
- the enhancement of the role of the European Parliament and that of the European Council,

- the attempt to strengthen the external voice of the Union and perhaps of CFSP in general,
- the recognition of the Charter of Fundamental Rights as legally binding document and the mandatory accession to the ECHR,
- a classification of competences (exclusive, shared etc.),
- an attempt to reinforce the role of national parliaments and subsidiarity,
- an introduction of a formal hierarchy of norms (distinction between legislative and non-legislative acts),
- the distinction between delegated and implementing acts in Articles 290 and 291 TFEU respectively,
- the emphasis on national implementation of Union law (Article 291(1) TFEU),

What has not been addressed:

- the role of agencies,
- the weakness of economic governance (see the attempts after Lisbon to fix this).

7. Coming back to the issues of comparative law, we would like to ask you to comment on the various system of administrative justice of the Member States of the EU from the point of view of the fundamental requirements of the uniformity in applying the EU law. Does the fact that – for example – the conditions required to challenge an administrative act in courts are different at the national level bring significant consequences for the principles of equivalence and effectiveness?

The enforcement prerogative of Member States (Article 291(1) TFEU) and the corresponding national procedural and judicial autonomy can lead to considerable variations across the Union in the enforcement of Union law. However, the CJEU has increasingly restrained the autonomy of national administrations and courts through the principles of equivalence and effectiveness. While equivalence does not achieve any

uniformity within the Union (it merely allows equalises procedural elements within a Member State), the principle of effectiveness has allowed the CJEU to provide a minimum of uniformity of procedural and judicial remedies. This has been reinforced by the Lisbon Treaty in Article 19(1)(2) TEU (Member States have to provide effective legal protection in the fields covered by Union law). It should however be borne in mind that the variable access to national courts for the enforcement of Union rights (beyond the minimum requirements mandated by Union law and jurisprudence) are an inherent feature of a system of decentralised enforcement of Union law. The CJEU has however taken considerable steps to strengthen the preliminary reference procedure (Article 267 TFEU) as cornerstone for a system of uniform interpretation of Union law.

8. Also, we would like to ask you to comment which is the ("real") meaning of the statement included in Article 19(1)(2) TEU?

In connection to that, is the system of legal remedies and procedures in EU legal order so "complete" as stated in the case-law of the ECJ (since "*Les Verts*")?

As stated in section 7. above, the value of 19(1)(2) TEU is to ensure a minimum of protection of individuals to counterbalance the procedural and judicial autonomy of the Member States in the enforcement of Union law. There is obviously also another function attached to this provision and that is to provide individuals with access to national courts to challenge Union acts indirectly through the national courts where such a challenge cannot be pursued directly in the Union courts. This is important to provide a 'complete' system of remedies (*Les Verts*). This claim of the CJEU has been subject to much criticism, mainly on the basis that indirect avenues for the review of Union acts has been (at least prior to Lisbon) mainly dependent on the ability and willingness of national

courts and national legal systems to accommodate such challenges. Article 19(1)(2) TEU should help overcome any existing lacunae. It should however be pointed out to the critics that the decentralised nature of the Union's judicial architecture impose greater responsibilities on the national courts as avenues for access to challenge Union acts.

9. Could you please describe briefly the recent developments concerning the new Article 263(4) TFEU and the *locus standi* issue? Does that provision ease the access of the litigants to the General Court?

Article 263(4) TFEU relaxes the standing requirements for private parties in challenges against Union acts. For acts which are not addressed to the applicant applicants would normally have to show direct and individual concern. However, applicants only have to show direct concern, where the act is a regulatory act and does not require implementing measures to be taken. The rationale for the relaxation of the standing requirements for challenges against such acts seems to lie in providing private parties with effective judicial protection in case indirect means of review are not available. Where an act, as in the case of Directives, requires implementing measures at national level, the applicant can, even though a direct challenge before the General Court will generally founder on the requirement of direct concern, raise the invalidity of the act when challenging the implementing measures in national courts. On the other hand, if the act does not entail any implementing measures, as in case of Regulations, private parties will generally find it hard to satisfy the requirement of individual concern, but at the same time might find it difficult to access national courts to raise the invalidity of the act. In this case, direct access is granted to the General Court provided the act is of direct concern to the applicant. Difficulties will, however, arise as to the meaning of "regulatory act" which "does not entail implementing measures". At least the term

regulatory act seemed to have been clarified by the General Court in *Inuit v Parliament and Council*, which defined them as "all acts of general application apart from legislative acts". This line of jurisprudence awaits however confirmation by the Court of Justice.

Given that the vast majority of legal acts are adopted in the form of non-legislative regulations this should provide considerably improved direct access to the Union courts. On the other hand, legislative acts and non-legislative acts requiring implementing measures (such as Directives) are still subject to the restrictive conditions of the *Plaumann* formula for individual concern.

10. You have an interest in researching US legal system. We would like to ask you which are the US (legal) lessons for the EU legal order?

The US federal system provides a contrasting background to the integration project of the EU. Many important issues of an increasingly federalised system of governance with which the Union has to deal with have also been encountered in the history of the USA, be it the definition of the interstate commerce clause by courts or generally the role of the states. The EU has often found idiosyncratic solutions to these issues, which do not follow the US model. It is often important to emphasise why the EU has adopted a different approach. In many respects however the EU can benefit from the experience of legal solutions found in US administrative law. This will often not mean that such solutions can be adopted without further reflection or modification or at all, as all such solutions have to be assessed against their social and political background. It does mean however that attempts to deal with procedural due process, the proceduralisation and judicial review of agency action and so on provide important ideas for Union administrative law.

11. In the end, would you like you to point out your major influences concerning methodology during your career? Which advice/recommendation would you give to young researchers?

I think that it is increasingly important to look at issues of EU law from the perspective of different national legal backgrounds, as a German lawyer will have a take on direct effect which often differs quite fundamentally from that of a French lawyer, even though both look at the same cases of the CJEU. To be able to provide a multi-jurisdictional perspective will increasingly determine the success of an academic project. My advice to young researchers: go out and explore.

Thank you very much.

LIESBET VAN DEN BROECK[1]

Agent before the Court of Justice of the European Union and EFTA Court (2006-). Teaching Assistant at Ghent University (2009-).

Legal advisor in the area of EU law, with broad experience in defending the Belgian interests before the Court of Justice of the European Union and EFTA Court. Also experienced in teaching the basic principles of EU law and the procedures before the Court of Justice of the European Union. Particularly interested EU law concerning the free movement of persons and services.

1. In the beginning would you like to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

Would you like to point out major influences during your career? How did you arrive to EU law?

Due to certain experiences in my personal life, it was soon clear that I wanted to study law. My dream was to become a human rights lawyer, but that changed after my first class in European law. The fascinating manner in which Professor Maresceau of Ghent University explained the establishment of a union by several European countries after World War II, inspired me.

[1] First of all, I would like to stress that all views I express in this contribution are personal and do not bind in any way the Belgian Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation.

I was astonished that this Union succeeded in the creation of a single market in which goods, capital, services, and people could move freely. Ever since, my heart changed from Human Rights law to European law. After graduating with a Master in Law, I subscribed for an LLM in European Law. This specialisation year provided me with the possibility to perform an in-depth study on several areas of the European Union. During those years I developed a passion for the jurisdiction of the Court of Justice of the European Union, an institution that is able to create European law at its own initiative.

During my professional career, I realised that having a solid theoretical basis in EU law is essential. The challenge in practice is that it continously confronts you with new difficulties. Therefore, a solid theoretical basis is essential to master EU law. Moreover, the continously developing nature of this branch of law requires you to keep up to date and expand your knowledge.

Although I was full time working as an Agent of the Belgian Government before the European jurisdictions, this finding led me to grab with both hands the opportunity to write a PhD. In 2008, I started my research on the grounds of justification invoked by EU Member States and their chances of success in relation to cases of indirect discrimination based on nationality in the area of free movement of persons and services, where I try to find the coherence in the case law of the Court of Justice of the European Union. A year later, I could start as a Teaching Assistant at the European Law Department of Ghent University, another opportunity to do research and to further develop my knowledge of EU Law.

2. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be used in order to overcome them?

First of all, there are more and more threats to the unity and coherence of the case law of the Court of Justice of the

European Union, despite the fact that the Court of Justice has an exclusive jurisdiction concerning the interpretation and application of EU law (Article 19 TEU and Article 344 TFEU).

There is the *growing number of judges* having a different background, culture, national legal system and education that will make consensus among them more difficult. This will inevitably lead to more "compromising judgments" regarding the cases before them. This consensus will be all the more complicated due to the influence the agents of the different Member States, who also have their own specific background, will try to exercise on the Court.

Secondly, there is a rise of *inter-institutional conflicts*, especially because of the blurred boundaries between situations falling within the Area of Freedom, Security and Justice and the Common Foreign and Security Policy. I refer to the inter-institutional conflict between the European Parliament and the Council in Case C-130/10 concerning the adoption of amendments to Regulation 881/2001[2]. In this case, the differences between Article 75 TFUE and Article 215 TFUE became clear, as Article 75 TFUE, allowing for the adoption of measures in the Area of Freedom, Security and Justice, provides for a role of co-legislator for the European Parliament, while Article 215 TFUE, allowing for the implementation of decisions concerning the Common Foreign and Security Policy, provides for no formal role for the European Parliament, as the latter must only be informed about the adopted measures.

Further, there is also the *accession of the European Union to the European Convention of Human Rights* that can become a threat to the unity and coherence of the legal system of the Court of Justice of the European Union. An action may be brought against the EU by a state party to the European Convention of Human Rights or by an individual, for an alleged

[2] Judgment of the Court (Grand Chamber) of 19 July 2012, Case C-130/10 *European Parliament v Council*, not yet reported (ed.).

breach of the European Convention of Human Rights. Hence, after the accession the European Union will be submitted to judicial control of the European Court of Human Rights. In addition, this might also lead to an increased risk for divergent case law between the Court of Justice of the European Union and the European Court of Human Rights. It is not clear how this should be resolved if this situation occurs.

In this context another problem arises. Although the draft agreement on the accession of the Union to the European Convention of Human Rights provides for a co-respondent mechanism to ensure that the European Union and its Member State(s) concerned may be parties to a proceeding before the European Court of Human Rights, it is not yet clear in what sense the agents of the Member States will have to cooperate with European Commission when defending their interests. In addition, it must not be forgotten that the Commission and the Member States are often opponents in several proceedings before the Court of Justice of the European Union, which will probably not facilitate the cooperation amongst them.

3. From your perspective, what would be the main challenges for the current European Court of Justice?

The Treaty of Lisbon changed the judicial system of the European Union in several ways and therefore poses several challenges for the Court of Justice of the European Union.

First of all, there is the *extension of the jurisdiction* of the Court of Justice of the European Union. Following the abolition of the three pillar system, the Court is now competent for almost the entire Area of Freedom, Security and Justice, subject to certain transitional provisions. By consequence, a lot of legislation in this area can now be looked into by the Court. Seen the attribution of this highly political sensitive nature of this area of law to the Court, it will be interesting to see how the Member States will nevertheless defend their interests and how the Court will respond. Moreover, the Court is not familiar with these new fields of competence and the role of the Member

States, in particular in explaining the specific consequences of a European case at the national level, will be of the essence (paradoxly enough).

Further, there is the new text of Article 267 TFUE prescribing that nowadays also the validity and interpretation of acts of bodies and offices can be challenged and relaxing the conditions for the introduction an action for annulment. This in combination with the previously mentioned extension of the jurisdiction of the Court of Justice of the European Union, as well as the Treaty-status of the Charter of Fundamental Rights of the European Union will lead to *a significant increase in the number of new cases* introduced before the Court. This will put the Court and its well-functioning under pressure. The Court will have to navigate creatively with its assigned resources, since Member States will not be prepared to assign more means to the Court, taking into account the economic crisis. It will be interesting to see what kind of measures the Court will propose. Some examples may already be found in its new Rules of Procedure, which recently came into force, such as Article 124 which states that an extension of the time limit for a defence (two months) may be "*exceptionally*" be extended and Article 126 that prescribes that the Court "*may specify the matters to which the reply or the rejoinder should relate*". However, more needs to be done. One must be vigilant that the pressure on the parties will not become too heavy, leading to a weak defence.

Another challenge for the Court of Justice of the European Union relates to the *accession of the Union to the European Convention of Human Rights*. On the one hand, there is the desire at the political level of the Union to accede to the European Convention of Human Rights, but on the other hand, this will lead to the fact that the Court of Justice of the European Union will have to accept an external review for compliance of Union law, even of the Treaties, with fundamental rights by another Court. This way, the European Court of Human Rights will become in a sense a 'higher' Court. The existing 'friendship

relation' between the two Courts will probably change, raising the question whether the *Bosphorus* presumption that the Union protects human rights in an equivalent way as the Convention will hold.

4. How would you assess the procedure in front of CJEU? What about a comparison between the procedure followed by CJEU and the procedure of national courts (for example, that of the courts in Belgium)?

In other words, are the ever more written procedures of the ECJ liable to lead to shortcomings in the overall quality of judgments delivered by the ECJ?

According to me, the written procedures of the Court of Justice of the European Union are not liable to lead to shortcomings in the overall quality of the case law of the Court. On the contrary. Due to the written phase of the procedures, all parties have a chance to focus on what they think is important. After reading all lodged written pleadings, the Court may decide to organise an oral hearing. The fact that sometimes no hearing takes place does not need to cause any problem, as not in all cases a hearing is useful. For example, non transposition cases often do not require an oral treatment. The same goes for more straightforward cases, where most parties are on the same page.

It must be pointed out that the Court can also submit written questions after the writing pleadings have been introduced and before the oral hearing takes place. In those questions the Court focuses on certain elements which it deems unclear. This demonstrates that even without an oral hearing, the Court can be well aware of the problems raised in the case presented.

Further, there is Article 61 of the new Rules of procedure of the Court of Justice of the European Union that states that "*Where a hearing is organised, the Court shall, in so far as possible, invite the participants in that hearing to concentrate in their oral pleadings on one or more specified issues*"[3]. Also this article demonstrates that the Court shall only organise a

[3] Emphasis added by the author (ed.).

hearing when necessary and will try to focus on the points that need clarification after the submission of the writting pleadings.

5. Concerning the preliminary ruling procedure: is it a paradox that a procedure non-contentious in nature is frequently "contentious" in fact?

Maybe it is paradoxical, but is this not a logical consequence of the nature of a preliminary procedure? If the Court of Justice of the European Union would limit to setting out a general framework, the national judge would often not know what to do with it, which would deprive the preliminary procedure of all utility and would moreover increase the risk of divergent case law.

Nevertheless this statement must be nuanced. It stems from several case law that the Court, foremost in sensitive areas, does not take a clear stance on the national case and provides the national judge only with a framework. The national judge will then have to apply this framework in the pending case.

6. You are acting as an Agent of Belgium before the CJEU. Therefore, we would like to ask you to comment on successful means to defend the position of an EU Member State before that Court. Is there a "secret recipe" on that?

There is of course no "secret recipe", but nevertheless certain things can help winning your case.

First of all, make sure your written and oral pleadings are well-organized. This means avoiding long sentences, be precise, carefully structure your arguments and dot not make it too long.

To get your arguments across, it can be useful to work with practical examples in which you explain the consequences at the national level.

Another tip: when the Court asks questions and the answer is negative, try to suggest a solution to the Court of the European Union. From experience I have gathered, the Court prefers a positive response.

More specific concerning the oral pleading, it is important to try to keep the attention of the 'audience'. It is always useful to explain the structure you will follow. Also try to speak slowly and build in natural pauses. This offers the translators and 'audience' some breathing space. Inserting questions might also help to keep the 'audience' alert. After carefully preparing your pleadings, you must also be prepared for further questions. Although it is hard to predict the kind of questions you will receive from the Court, it is nevertheless advisable to prepare a list of possibilities. This is especially useful concerning the weaker points of the case. And last, but not least, respect the pleading time, otherwise you can bring the judges in a bad mood and then you are of for a bad start.

On the other hand, could you please describe briefly the administrative procedure for preparing the position to be defended before the Court?

In Belgium the legal service of the Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation is responsible for the defence of the Belgian State before all international Courts, with the exception of the European Court of Human Rights, which falls within the competence of the Federal Public Service Justice. Within this service, there is one department, consisting of five persons, that provides for the defence of the Belgian interests before the Court of Justice of the European Union. Each of these agents before the Court is specialised in a certain field of EU law.

The Registry of the Court of Justice of the European Union sends all preliminary questions and applications against Belgium to this service. After receipt, every case is immediately assigned to an agent and a co-agent. The latter assists the agent and replaces him when necessary. It is the responsible agent who must ensure that the cases are transmitted to all competent authorities in Belgium and more specifically to the euro-coordinators. Every authority in Belgium has a contact

point, an euro-coordinator, who must detect the correct file manager and provide him with all necessary documents. When the case concerns a direct action against Belgium, the application is also sent to the responsible Minister(s) asking him/them to respond as soon as possible.

In the case of a preliminary proceeding, the responsible authorities have more or less one week to evaluate the opportunity to submit written observations. Those who want to intervene, have a month and a half to provide us with a project of written observations, containing the Belgian position. When several departments express their will to submit written observations, a meeting shall be organised to coordinate the writing.

As soon as we receive the project of the written observations, the responsible agent verifies whether the position is in line with previously defended positions and whether EU law has been applied correctly. In most cases, these projects need to be updated as the departments have an expertise relating to Belgian law, but are not always familiar with EU law.

After request by the Court, there are the same departments that decide if the organisation of an oral hearing is opportune.

This procedure is also applicable for direct actions against Belgium, with this difference that the opportunity of intervention is not a point of discussion. Every application against Belgium must be answered by a defence.

If the Court organises a hearing, the competent departments who want to participate, need to prepare a draft pleading and assign a specialist in the matter. This specialist assists the agent in Luxembourg to answer the more technical questions that can be asked by the Court.

Sometimes Belgium applies Article 19 of the Statute of the Court that states that an agent may be assisted by a lawyer. It is the competent department that decides if it wishes to call upon a lawyer. If it does, its expenses must be borne by the

department that appointed him. Due to the economic crisis, the use of this possibility has decreased.

In the same vein, are divergent or parallel interests inside the same Member State liable to lead to an obstruction of a good defence?

Belgium has a quite complicated state structure. Unfortunately this sometimes leads to divergent interests. To support this, I would like to refer to case C-212/06[4] where the care insurance established by the Flemish Community of Belgium was disputed by the Government of the French Community and Walloon Government of Belgium. Although the Belgian Governement had the right to submit written observations in its capacity of a Member State in this case, it is quite obvious that this was simply impossible. This was also as such communicated to the Court of Justice of the European Union.

Besides the problem that sometimes different Governments of Belgium start a case against one another, Belgium is sometimes faced with the problem that only one of the competent authorities wants to intervene in a case. In those circumstances, the responsible agent convokes all parties to verify if the authorities who decided not to intervene do not oppose the intervention of one of the other competent authorities. If this is the case, the intervention can take place. If, on the other hand, the other competent authorities cannot agree with the position of the authority who wants to intervene, then no intervention will take place.

Another situation that can lead to divergent interests, is a preliminary ruling where one of the parties is an Belgian authority. In that case, both this authority as well as the Belgian Government, has the right to submit written observations. It

[4] Judgment of the Court (Grand Chamber) of 1 April 2008, Case C-212/06, *Government of Communauté française and Gouvernement wallon v Gouvernement flamand*, [2008] ECR I-1683 (ed.).

has been agreed that in that case only the Belgian Government submits written observations. This to avoid confusion and possible contradictions and because the observation of a Member State is considered more prestigious than that of an entity of a Member State.

Another obstruction of a good defence might occur as a result of different positions/opinions between the competent authorities. It can happen that two competent entities of a Member State decide to prepare written observations in a different direction. It is of course impossible to defend two opposite opinions in one text, lodged by the Belgian Government. The responsible agent then has the task to look for a compromise. In such cases, it is possible to draft observations that do not contain direct answers to the questions asked, but only provide for some important remarks. If even this is not possible, then no written observations will be submitted.

7. What research tools might be used in discerning and explaining the political weight employed by the European Court in its rulings?

The political weight of the rulings of the Court of Justice of the European Union can often be derived from the preparatory documents of national legislation. Governments often indicate the case law of the Court of Justice of the European Union which formed the basis of the amendment or creation of the national legislation.

Further, the political weight of the rulings of the Court of Justice of the European Union sometimes emerges during the oral hearings in Luxembourg. Member States sometimes explain to the Court that a ruling in a certain direction will lead to an abolition or amendment in a certain sense of national legislation.

8. In the same framework: at the ECJ, the purposive interpretation seems to hold a privileged place compared to other means of interpretation (systematic, literal,

historical). Is this perception grounded? And also, which might be the justification that this kind of interpretation leads finally to a new law?

Although the Court still uses the other means of interpretation, according to me, this perception is grounded. Moreover, this is often even supported and stimulated by the Member States, which start their defence or intervention by taking a look at the possible purpose of the concerned provision of EU law. This interpretation method has the advantage that all Member States are treated on an equal footing and creates more legal certainty compared to the literal and historical interpretation.

9. A question pertaining transparency: what do you think of the possibility of a policy of making public the pleadings and acts of a certain case, for example the file of a "historical" case (older, for example, than 50 years)?

Speaking in my capacity as an agent for a Member State before the Court of Justice of the European Union, I am not in favour of making public all documents relating to a case. The political landscape in every Member State changes over the years and consequently, so do the interests of that State. Although one tries to avoid the defence of contradictory interests as much as possible, this cannot always be avoided. A Member State does not want to be confronted with these conflicting interests.

Specifically for the oral pleadings, the question can be asked if it is possible to make oral pleadings public. The parties pleading before the Court try to send in advance an outline to the interpreters. Nevertheless, during the hearing they can still adapt their outline, for example because they were invited to do so by the Court just before the hearing or because they want to react to the pleadings of the parties who have spoken before them. By consequence, the outline can differ significantly from the final pleading and cannot be made public. The only party

who could make the pleadings public is the Court of Justice of the European Union and since it is already faced with an increasing workload, it is quite questionable if it will accept making these pleadings public.

Further, although the hearing is public and everyone can enter the Court room and take notes, dispersing a written note of a pleading is a different matter. This is not desirable as words can be taken out of their context.

10. A final question to you: what research methodology would you recommend to researchers in EU law?

In my opinion, there is not one single research methodology that can be considered as the perfect method. Therefore, I would like to limit myself to one advice: when you examine judgments of the Court of Justice of the European Union, do not try to analyse every single word. Some words for example entered the text as a response to the arguments on which one of the Member States insisted during the oral pleadings. Through its judgements the Court only wants to circulate a global message, its interpretation of EU law studied in a specific context. It is that message that we need to filter out and not every single word that entered the text of the judgment for one reason or another.

Thank you very much again.

CHRISTIAN VON BAR

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Legal education at Freiburg, Kiel and Göttingen (Germany) (1970-1974). Dr. jur. (1976); Assessor (1977); Dr. jur. habil. (Privatdozent) (1979). LL.M. studies in Cambridge/ England (October-December 1979). Acting chair in Bochum (summer term 1980) and Bonn (winter term 1980/81).

University Professor at Osnabrück since 1981. Board member of European Union Law Institute (1985-2003). Founder and Director of the Institute of Private International and Comparative Law (from 1987-2003). Founder and Director of the European Legal Studies Institute since 2003. Dean (1988/89).

Doctor iuris honoris causa Catholic University Leuven (2003); Holder of the Lower Saxony State Award (2006); Linnaeus Doctor iuris honoris causa Uppsala University (2007); Dr. iuris honoris causa Tartu University (2007); Dr. iuris honoris causa Helsinki University (May 2010).

Chairman of the Study Group on a European Civil Code (1999-2009). Member of the Commission on European Contract Law (Lando-Group) since 1992. Consultant to the UNIDROIT working group on international commercial contracts since 2005.

Editor of three law serials. Editor and Commentator of the Staudinger Commentary on the German Civil Code/ Bürgerliches Gesetzbuch. Co-Editor of the outline and the full editions of the Draft Common Frame of Reference (Principles,

Definitions and Model Rules of European Private Law). Member of the International Scientific Advisory Board of Il Foro Padano, of Europa e diritto private, of the European Review of Private Law, of Aansprakelijkheid en Verzekering, of the Comparative and International Law Journal of Southern Africa, of Gemeinschaftsprivatrecht, of International Public and Private Law (Moscow), of the Romanian Journal of Comparative and Private International Law (Bucharest), of Juridica and of Juridica International (Tartu).

Author of approximately 350 books, articles and reviews.

First of all, we would like to thank you for agreeing to have this interview.

1. In the beginning would you like to provide a short description of your formative years in law, which would certainly be very useful to "apprentices" in law.

Would you like to point out major influences during your career (concerning also methodology)?

My academic mentor in Göttingen, Erwin Deutsch, was one of the leading German experts on liability law in his time, but he also delved into private international law and comparative law. It is to him that I owe the impulse to write my doctoral thesis on a subject relevant to the internal market in the field of trade mark law and to devote my post-doctoral *Habilitation* to *Verkehrspflichten* (duties of care). The latter was concerned with a central problem in the field of liability for negligence. German case law had made a rather dramatic departure from the dogmatic foundations of the Civil Code. Thousands of judgments needed to be scrutinised, analysed and projected as a new "superimposed portrait". Subsequently there were periods abroad and many years devoted to private international law. It was only following on from this that I developed the notion that it ought to be possible to capture, portray and analyse an area of substantive law as an integrated

common European entity. I chose for that purpose the law of tort, a subject of which I had already acquired a certain grasp. A great influence on my later activities was my appointment by Ole Lando as a member of the Commission on European Contract Law. That was a formative time. Without it I would not have been able to establish the Study Group on a European Civil Code. Currently, now that the years occupied in preparing the Draft Common Frame of Reference have passed by too, I am engaged predominantly with European property law. The task here, however, is exponentially more difficult than it was with the law of tort.

2. On a more personal note, we would like to ask you to assess the value of a German professional background as it is your case in a comparative law perspective.

In Germany a professorship presupposes a so-called *Habilitation* and that in turn, besides a doctorate, means as a rule that one must also have acquired the "Qualification for Judicial Office" obtained by passing the *Assessor* examinations. The *Assessor* examinations are preceded by the so-called *Referendarzeit*, a two-year period of practical legal training with stages at the courts, with public prosecutors, with public authorities, with practising lawyers and in businesses. Achieving the law degree required before that professional phase takes at least four years (including the exam period); in practice, however, many students need markedly more time. The study and training is long, demanding and, at least in the various exam phases, tough. A strong dogmatic and methodological framework in the law necessitates disciplined thinking and promises in return a feeling of intellectual assurance. That it is occasionally only an apparent assurance is something, however, that only law students blessed with imagination notice – and those are not necessarily the ones with the best exam results. Overall I certainly still regard the German system of legal education and training as one of the best in the world. The

standard of teaching (unlike their standard of research) does not differ appreciably across the German faculties. One problem is the sheer quantity of subject-matter, which continues to grow relentlessly. However, the faculties in the post-war era have managed to maintain a high standard while educating an ever increasing stream of young lawyers. I hope that I am not allowing my "German glasses" to cloud my judgment and letting my opinion be swayed by the fact that I myself teach within it, but I do believe that the German law faculties remain well set up for their task. Our young graduates and trainees are able to hold their own everywhere and I had the impression myself after my own education and training that I was thoroughly able to hold my head up in competition with foreign lawyers of the same age. Probably the most important aspect of this education is to learn the technique of solving – often downright complicated – cases. The exams consist almost entirely of solving difficult cases using a particular method.

3. Coming to the issue of a future European private law, we would like to ask you to comment briefly on the various roles played by EU institutions. In other words, what role has to play the EU legislator and what role is assigned to the EU courts in developing such a European private law?

In principle the answers are of course determined by constitutional law. However, the concept of "European private law" is ambiguous. European private law, in my understanding, does not just consist of the legal measures of the European Union and their interpretation by the national and European courts. I understand it as embracing also the common private law heritage of the Member States which is gradually becoming visible once more. It is part of the foundation on which the private law of the Union rests and depends for its further development. That is why the courts too are able to contribute to a Europeanisation of private law, not least by making use of

the fruits of comparative legal research and informing themselves about the legal position in other countries.

4. On the other hand, what approach would be advantageous: one ascending – from the States to the supranational level or contrary from the supranational level to the States?

What role should supranational initiatives play in drafting a (future) European private law?

The answer to the first question is inescapable, namely that the one is not conceivable without the other. We need to rediscover our common European legal heritage as much as we need the regulatory intervention of the constitutional bodies of the European Union. Moreover, national legislatures too can contribute to the Europeanisation of private law by drafting new legislation on the basis of comparative legal work. If one looks into the matter more closely, moreover, one encounters a complex mesh of reciprocal relations. The development of European private law does not proceed in a linear fashion; each area of the law has to be considered separately, but without losing sight of the overall systematic connections. In private international law we have long been much further than in substantive private law, where we are further in contract law than in the law of non-contractual obligations, and in contract law we are in turn further ahead in sales law than in the law on contracts for services. Other areas, by contrast, have still to be infused with a pan-European perspective altogether. These include, for example, the law of succession and the law of property. In those areas it would be a giant success if one managed to project a single superimposed European portrayal of the material in its whole complexity and diversity, so that we could at least know on what issues we are in agreement and for which ones we want to aspire to diverse solutions.

The answer to your second question is bound up with this, I think. As soon as foundation comparative legal research has

established the basis, successive international teams can set about condensing the knowledge gained into rule form in the manner of a restatement. That is once again a step in itself - and a highly difficult one at that. It marks the end of the academic process of preparation. As regards legislation, everything then depends on the preparedness of the relevant constitutional body to make use of the scholarly texts as frames of reference for their own legislative projects. One cannot overlook in this context the fact that academia has very much more freedom than those who are politically accountable. The European Commission would doubtless like to do more than it finds possible under the current rules on competence in the Treaty on the Functioning of the European Union. The rules framed within international initiatives are able to achieve some efficacy in a quite different fashion, namely through the filter of legal scholarship and teaching which is internationally orientated and increasingly, moreover, also by senior courts making use of such academic texts as a source of inspiration in solving particular difficult questions.

5. Which is the role played by the consumer protection in establishing a European Civil Code? Has the consumer protection been used as a curtain for the judicial building of a private law?

The significance of consumer protection law is tied up in essence with the particular competences of the European Union in this field. In my view that is indeed a great problem for the further development of European private law. Consumer protection law has assumed a highly problematic pioneering role by historical coincidence. At the same time one must admittedly guard against the expression "European Civil Code": such a project will not come onto the political agenda for a long time to come. It serves more as a cipher, which should remind us all that our national systems of private law are all chips from the same block.

6. From your point of view, how important is the concept of public policy (*ordre public*) in the shaping of a European private law? Does the European private law maintain the traditional features as a private law?

Those are two different questions. The concept of *ordre public* has its origins in private international law and will remain indispensable there because private law is subordinate to national constitutional law and it will always be possible that a particular private law rule in a given country conflicts with the constitutional law of another. Family law is a case in point, but the same is true certainly also for some parts of the law of non-contractual liability. At the same time, the outcome is that legal questions whose solution penetrates the area of a country's *ordre public* remain for the time being outside the realm of harmonisation of substantive law. I see it as an initial task of legal scholarship to identify the legal issues concerned. Perhaps it may then be possible to initiate a dialogue about them. As regards the second question, in principle I would answer in the affirmative. However, we should of course also usher in a discussion of the effective capabilities and long-term potential of conventional systematic categories and terminology. And, furthermore, in today's Europe private law and public law are streams that mix more strongly than has traditionally been the case in some national systems.

7. What role does the rules of international trade law (UNIDROIT, UNCITRAL) play in the process of shaping the European private law? Could you please provide a short outline of the significant moments that have taken place at the Court of Justice of the European Union in that regard?

As I see it, the UNIDROIT contract law principles have played no role at all to date in the ECJ. The same holds for the CISG because the ECJ has no competence to interpret it. Only the Lando Principles and the DCFR have been cited and

analysed on several occasions in the Advocate-General's Opinions.

8. On a more broader context, from your point of view, what are the most notable recent developments in the EU private law? In this context, would there be a future European Civil Code?

The most important step recently has been the publication of the Commission Proposal for a Regulation on a Common European Sales Law (CESL). To date I have not seen any willingness to take on a European Civil Code. There are still far too many national egotisms opposed to the idea. I believe, however, that the idea will never entirely fade from the minds of European lawyers. It will make many things possible – what that will be, however, is something no-one can at present predict.

9. A final question to you: what research methodology would you recommend to young researchers in (private and comparative) law?

I believe that the era of "functional" comparative law has passed and likewise that of sociological and economic analyses. They gave the deluding impression of the existence of a "super science", an outstanding methodical tool, but they have spawned practically nothing tangible. We should take charge of our core business again: the development of a pan-European system and terminology which is fit for purpose and the enlargement of our store of juridical arguments for the solution of cases. The comparative lawyer should essentially do exactly the same as a jurist who is orientated solely to a national law, but with the difference that the basis for evaluation of results is broader.

Thank you very much.

EDDY WYMEERSCH

Founder member of the Financial Law Institute, Ghent University Law School.

Founder member of the European Corporate Governance Institute (ECGI); ECGI Fellow (2002); Chairman of the ECGI (2010-2012).

Chairman of the Committee of European Securities regulators (CESR) (February 2007- July 2010) and of the European Regional Committee of IOSCO. He was Chairman of the Belgian Commission Bancaire, Financiere et des Assurances (CBFA) (chief executive 2001-2007 and chairman of the supervisory board 2007-2010).

Before joining the CBFA, Mr Wymeersch has held several public functions in Belgium ("regent" of the National Bank of Belgium from 1992, member of the legislative branch of the Council of State. Between 1990 and 2001, he was a member of the board of several Belgian companies, and from 1998 the Chairman of the Brussels airport. Mr Wymeersch has been an academic at the Ghent Law School where he founded the "Financial Law Institute", and has participated in several committees advising the Belgian government, especially on financial supervision or corporate governance. In addition, he has acted as an adviser to the European Commission, a consultant to the World Bank and IFC and an advisor to several European financial institutions and stock exchanges. He has published extensively on company law, corporate governance and financial regulations. He is member of the European Corporate Governance Forum and of the European Corporate

Governance Institute. He studied law at Ghent University and Harvard Law School.

First of all we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

As a young student, one of my professors suggested me to undertake studies in the US. I applied for a scholarship, and I was admitted to Harvard Law School. I studied financial regulation, especially securities regulation, a field in which I have been active all of my life. After my return to Belgium, I passed about three years in the Belgian supervisor, but developed more interest in academic life, and engaged myself at universities of Antwerp and Gent for about thirty years. The first steps in your career may determine all the rest….

2. What is the place of EU law in your research interests? How did you arrive at EU law? Would you like to point out your major influences concerning methodology during your career?

EU law, especially substantive law (company law, financial regulation) is a core ingredient of my research, as it is the reference framework for all developments in the EU. Company law eg cannot be developed and practised without the EU foundation. Also the Treaty freedoms have had a very fundamental influence on company law developments. In financial regulation, this is even stronger the case, as most national regulations have more or less been replaced by the European one. More recently I got more interested in the institutional aspects, especially the EU action through agencies. You cannot practice any of these fields without a strong link to EU law.

3. On the other hand, we would like to ask what are the (professional) gains of mobility?

I do not understand well your question. It may mean that contact with different parts of the EU has clear benefits. In my practice I have always acted as a transmission factor between Northern and Southern legal culture, coming from a transition country and having access to the law of North and South in the original language. This has been very valuable in comparative work, but also in European developments in which I took an active part.

4. What is the role of soft law in company law? Is it possible to state that codes of conduct are a kind of surrogate for a consistent legislation and for any mandatory rules? Does the current legal framework (pertaining company law) contain stricking differences concerning the legal force: from soft law to EU regulations?

Soft law is a useful addition to hard law: it allows for finer solutions, ensures ownership by those who have to implement the law, and for adaptability. Its weakness is due to its weak enforceability and therefore instruments to that effect have to be developed. A still unpublished study, to be published by Italian Assonime, will deal with this subject later this year[1]. But the times are for hard law, especially in financial regulation. And one understands why; self-regulation has proved of little use in policing the financial world.

5. How do you asses the role played by private international law in EU regulations. Is there a regulatory paradox?

[1] Corporate Governance Committee (Italy), *Annual Report*, 29 November 2012, http://www.assonime.it/AssonimeWeb2/dettaglio.jsp?id=242815&idTipologiaDettaglio=1429; report available on the Borsa Italiana website: http://www.borsaitaliana.it/borsaitaliana/regolamenti/corporategovernance/annualreport2012.en_pdf.htm (ed.).

In this context, what are the chances of a genuine European company, as a viable instrument of doing business in EU?

On the one hand PIL will always be necessary as many laws continue to be national, even after having been exposed to the harmonisation directives. The EU statute – SE, Private company, foundation, cooperative, etc. – do not introduce a European system of company law, but in fact are techniques for mixing EU common rules, with national rules that remain applicable in those fields that have not been regulated in the EU statute. A genuine Europe company does not seem to me an objective to be pursued, as most company law issues remain national. On cross border matters, the EU should step in more vigorously, as these issues often cannot be settled at the national level. I refer here to the European Company Law Experts statement on the Future of Company Law; see at http://ssrn.com/abstract=2075034.

6. Could you please describe the role played by the European Court of Justice in the field of freedom of establishment for companies? And more generally, what might be the consequences of the judicial activism of the Court?

The role of the ECJ has been crucial, especially in the freedom of establishment field. It has broken through the deadlock that characterised this field for 50 years, and therefore this should be applauded. At the same time the court is not a legislator and cannot decide in general terms. Member States should follow up on the Court's reasoning, but often cannot resist following a nationalist, egocentric path. The Court might then have to step in again.

7. What about the use of preliminary references in the field of company law? Is there an abuse in using this kind of procedure?

There is certainly no abuse: the number of cases is quite limited and the decisions have all been quite important. Once more, the Court is able to overcome the restrictive attitudes adopted by the Member States, and open the door to real European solutions. There is no reason to limit access to the court.

8. Concerning also the preliminary ruling procedure: Are cases like *Centros* or *Cartesio* liable to be suspected of being fictively conducted? May the future associates in a company wait almost two years for the ECJ to deliver a judgment, in order to start doing business?

Abuse of the court procedures is generally not evident and might be struck down by the court. The preliminary rulings procedure has the advantage of establishing a balance between the national jurisdictions, and the interpretation by the ECJ, that is only binding on the legal point. One sometimes sees national courts giving a very restrictive interpretation to the ECJ reading of the law, leading to the finding that the ECJ recourse is a technique of gaining time, especially in criminal procedures (see the insider trading case of *Spector*[2], where the Belgian court finally dismissed the entire process).

9. Is the public/private law division still relevant in the contemporary legal world?

It has always been a more or less artificial divide, although deeply embedded in the legal tradition. On the one hand one sees that legal principles apply to both, while on the other the rationale of public law is the general interest, the organisation of society. And in that sense has to have precedence over

[2] Judgment of the Court (Third Chamber) of 23 December 2009, Case C-45/08, *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* [2009] ECR I-12073 (ed.).

individual interests. But that does not mean that in private relations individual interest should always take precedence.

10. Which advice/recommendation would you give to young researchers?

Work hard, keep your mind open, travel around our wonderful continent, and make sure you understand its history and work for its future.

Thank you very much.

JACQUES ZILLER

Jacques Ziller (Lic. Law University of Paris 2, 1973, Dipl. Pol. Sc. Institut d'Etudes Politiques de Paris, 1974, Ph.D. Paris 2 University, 1986), is Professor of European Union Law at the University of Pavia, formerly Professor of Public Law at the Universty of Paris 1 Panthéon-Sorbonne and at the European University Institute, Florence. He has published over 145 academic articles and he is the author or editor of 40 books, among them *Les Nouveaux Traites Europeens: Lisbonne et Apres*, Paris, 2008, *Il Nuovo Trattato Europeo*, Bologna, 2007, *The European Constitution*, The Hague 2005, *The Lisbon Treaty – EU Constitutionalism Without A Constitutional Treaty?* (with Stefan Griller), Wien-New York, 2008, *The European Constitution: Cases And Materials In EU And Member State's Law* (with Giuliano Amato), Cheltenham, 2007, *The European Constitution And National Constitutions: Ratification And Beyond* (with Anneli Albi), Alphen aan den Rijn, 2007, *Après Enlargement - Legal And Political Responses An Central And Eastern Europe*(with Wojciech Sadurski and Karolina Zurek), Florence/Warsaw, 2006, and *The Europeanisation Of Constitutional Law In The Light Of The Constitution For Europe*, Paris, 2003.

First of all, we would like to thank you warmly for accepting this interview.

1. As a first question, we would like to ask you to provide a short description of your formative years in law, which is certainly very useful to "apprentices" in law.

I studied at Paris II as well as at the Paris Institute of Political Studies (*Sciences Po.*). I have a PhD in law from Paris II University (*Doctorat d'Etat en droit*, 1986), post-graduate diplomas (*Dipômes d'Etudes supérieures*) in law (1974) and political science (1975), the graduate degree of the Paris Institute of Political Studies, as well as a graduate degree (*Licence ès lettres*, 1973). I also studied in German language and literature at Paris IV University and have a graduate degree in literature (*Licence ès lettres*, 1977).

2. Also, is it possible to provide us with a description of your main teaching and research interests in EU law?

I am teaching general EU law, i.e. as well institutional law as material law to students in their second/third year and in their fifth year. My main research interests in EU law are treaty making and amendment, EU administrative law, since recently European economic and monetary union, and a very specialised topic, i.e. EU overseas law.

3. From a point of view of a law Professor, which is the relationship between a "domestic" branch of law and the EU law?

If I understand the question well, I would say that EU law is closest to domestic administrative and economic law, and to a certain degree do domestic constitutional law. However if one does not have an appropriate education in public international law, very big mistakes can be done by applying the ways of reasoning of domestic administrative or constitutional law to EU law.

4. You have an absolutely impressive record of professional mobility. Could you please provide young researchers with certain lessons drawn for your personal experiences? What would be the gains and (potential) shortcomings of (young) legal students and professionals' mobility in EU?

I think professional mobility is essential to a good understanding of how EU law is produced, conceived and applied. Only by knowing as many possible EU member States and their legal countries, one becomes a real EU lawyer. As important as mobility is the knowledge of several EU languages. English, though being most used, is not adapted to convey a number of legal concepts developed in contexts different from that of common law; French is indispensable in order to fully understand the ECJ's rulings; German is the language most adapted to conceptualisation of law and should be studied by more students than happens now. Italian, Spanish and now also Polish are fundamental languages; but the languages of smaller countries should not be neglected.

5. Could you please provide us with a brief picture of the main challenges for the European Union as a legal and political system more than two years after the Lisbon Treaty came into force? In other words, what are, from your point of view, the most significant changes brought by the said Treaty, both predictable and "hidden"?

The most significant changes brought by the Lisbon Treaty are not hidden, on the contrary: they are the result of the statement or re-statement in written law at treaty level of numerous concepts, principles and rules that developed in case-law, in institutional practice and in legal literature over

five decades. They should induce us to give far more attention in legal writing than we usually do to the definition of legal bases for EU action and the borders of the scope of application of EU law. This was predictable and wished by a number of members of the European Convention ten years ago. Some institutional innovations are also very important, especially the full fusion of the "third pillar" in the community method, the permanent Presidency of the European Council, the establishment of the European External Action Service, and, last but not least, the internal hierarchy of secondary law norms due to Articles 290 and 291 TFEU.

6. In connection to the above issues, could you please describe the recent trends concerning the nature of EU law?

It is difficult to identify trends concerning the nature of EU law that would be new. Direct applicability and primacy have not evolved since 50 years in a manner that would have been unpredictable, on the contrary: the consequences of *van Gend en Loos* and *Costa v. ENEL* are in the direct line of what a good analyst could have predicted at the time. What is growing is the number of languages, which should lead to new reflections on the multilingual nature of EU law (a feature almost ignored by literature), and the different manifestations of the "variable geometry" of Europe.

7. Are there any threats to the unity and coherence of the legal system of the European Union? If so, what means should be useful in order to overcome them?

The main threat, which is by no means new, is due to the different representations of the goal of EU integration. Since the Maastricht Treaty opt-outs and opt-ins have been considered as compatible with the unity and coherence of the EU legal system, but it is clear that they are putting the system under stress.

8. From your perspective, what would be the main challenges facing the current European Court of Justice?

The main challenge is for the Court to keep exercising its unifying function and to respond in a balanced way to "provocations" by some Member State's courts who either refuse to submit referrals for preliminary ruling when they should do so, or on the contrary try and use the ECJ as a source for innovation that they do not dare to bring forward on their own, hence asking the ECJ to rule when a referral is not obviously necessary.

9. Also, in connection to the above question, have you noticed any recent developments in the judicial politics of the European Court of Justice?

I would be very cautious. Many scholars assume there are afterthoughts in the ECJ's case-law without doing first the necessary work, i.e. verifying exactly the arguments of parties and observations of Member States and EU institutions that have been put to the Court, and to which the Court has to answer.

10. What are the most important landmarks in the ECJ case-law concerning the purposive interpretation? Are there any risks concerning this type of interpretation for the EU legal order?

"Purposive" interpretation has always been used by the ECJ since the ECSC court started to work. It was nothing new for somebody like Lagrange, as the French State Council used this kind of interpretation since at least three quarters of a century when he became one of the two first advocate generals together with Roemer. Purposive interpretation is not an invention of the ECJ, it is directly based upon treaty

provisions, and encouraged by the EU legislator through its practice in writing of the introductory parts of EC legislation. This type of interpretation is not a risk, but an inherent feature of the EU legal order; it is absolutely necessary in the context of a multitude of different domestic legal orders.

11. We would like to ask you to describe the main elements of a European Union administrative law. Is there such a branch of law as European Union administrative law? Which is the perspective of the European Union to impose/create such a law?

There has always been an EU administrative law, if one defines administrative law as the law of the executive function. The ECJ has started mainly as an administrative judge. EU administrative law might be defined as the principles, rules and procedures applying to the execution of EU policies by EU institutions, bodies, offices and agencies, and by Member States' institutions, bodies, offices and agencies. For the latter, EU law is being complemented by national administrative law. National administrative law is therefore under the influence of EU law, directly in all sectors where EU legislations provides for common principles, rules and/or procedure, and indirectly, through the process of "spill-over" i.e. the application of principles, rules and/or procedures which originate in the scope of application of EU law outside of its scope. There is no prospective of the EU legislator to impose any general harmonisation of Member State's administrative law; harmonisation already exists and will further develop, but on a sectorial base. That is a clear consequence of the principle of conferral and of the absence of a legal basis for transversal harmonisation. As far as EU institutions, bodies, offices and agencies are concerned, the European Parliament

calls for the adoption of a regulation on administrative procedure, based upon Article 298 TFEU. If this were to happen, such a regulation at EU level might have two kinds of indirect consequences on domestic administrative law. First, the EU regulation would probably become a series of norms of reference for new sectorial regulations that include principles, rules and/or procedures applicable by national administrations. Second, the EU regulation could become a source of inspiration for new domestic legislation on administrative procedure.

12. In connection to the above question, from your point of view, which role does comparative law play in the EU administrative law?

Comparative law has an important role in two ways. First, as for EU law in general, it is a source of inspiration for the development of concepts, principles and rules at European level. Second, when it comes to the execution of EU policies by Member States' administrations, comparative law is indispensable to have a comprehensive picture of the applicable law.

13. And also, what lessons should be drawn from the French legal culture for the EU legal order and concerning also the EU administrative law?

There has been a period, until the mid-seventies, where French administrative law had a major impact on the development of community law: the system of the remedy for annulment of Community acts, as written down in the EEC Treaty and nowadays in Article 263 TFEU was directly inspired from the French case law of the *Conseil d'Etat*; furthermore, as French administrative law was mainly a judge made law, it had a number of features that were well adapted to serve in a newly developing context. Since then, things

have evolved; there are more and more endogenous developments of EU law in general, and also of EU administrative law, which cannot be linked to one specific legal culture; furthermore, the diversity of influences on EU law has deepened, especially with the accession of Denmark, Finland and Sweden, which have brought an administrative culture which was very different from that of the other EU Member States (the UK included, whose administrative culture was in many respects very close to the French administrative culture).

14. A rather "fashionable" question since the Lisbon Treaty: Is subsidiarity likely to a "genuine" judicial review by the ECJ? Or is it just a political element? Are there any clues and trends in the recent case-law of the ECJ?

As a matter of fact, the same question was also very fashionable at the time of the Maastricht Treaty. Subsidiarity, as demonstrated by the ECJ's case law, is very adapted to judicial review of the motivation of EU acts. On merit, on the contrary there should be only few cases where questions of subsidiarity are not linked to questions of the existence and boundaries of a given legal basis, and even more liked to questions of proportionality. It seems to me that things will remain as they are, i.e. that the Court will not engage in a subsidiarity check as long as there is not a manifest error of appreciation of the legislator. With the new system of ex-ante check of subsidiarity, I think that the Court well be even more inclined to consider that it is up to the legislator to appreciate the effects of the principle of subsidiarity.

15. What about the public-private division in EU law? Is it still relevant (as it was *illo tempore*)? We would like you to comment briefly on that development.

To me this is not a relevant issue. First the scope of what is considered private law and what is considered public law varies from one member state to the other. Second, the ECJ has no competence in adjudicating on litigation between private parties, and is therefore not a "private law" judge: when the Court responds to referrals for preliminary ruling it does not adjudicate, it only gives indications to the judge *a quo* as to the content and meaning of applicable law. Third, when the EU legislator adopts regulations or directives in the field of what is considered as private law in most Member States it still acts as legislator. In domestic law one does not make a difference as far as legislative action is concerned, between private and public law – but for the content of the law. As a source of law, an Act of Parliament is necessarily "public law", and in the same way, EU acts are necessarily "public law".

16. Is there a proper legal basis for the conditionalities attached to the rule of law for the new Member States?

Yes, with the Lisbon Treaty this is clearly expressed in Article 49, second indent of the TEU. It was already clear, although in less express terms, with Article F(2) of the Maastricht Treaty, which has become Article 6(1) TEU and to a certain extent Article 2 TEU.

17. You have a French professional background. Therefore, we would like to ask you which would be (from your point of view) the most important French experience (and influence) concerning the EU institutions and also its legal order?

The most important French experience to my view is the way in which the French Supreme Courts and Constitutional Court have opened themselves to the influence

of Community and now EU law. While the *Cour de Cassation* very quickly accepted to "play the game" of primacy etc. it took a longer time for the *Conseil d'Etat* to understand that it would achieve far more in cooperating with the ECJ through the acceptance of community law principles and through the appropriate use of referrals for preliminary ruling. The present attitude of the German Constitutional Court, on the contrary reminds me very much of the attitude of the *Conseil d'Etat* between 1968 and 1989, which did not help in constructing and managing an effective legal system composed of both domestic and European law.

18. What is (becoming) EU law nowadays?

EU law becomes more and more important for daily life in the Member States, but there is not yet a sufficiently solid education in EU law in order to avoid big misunderstandings from a part of legal academia and some courts as to the meaning of and reasoning in EU law.

19. A final question to you: what research methodology would you recommend to young researchers in EU law?

First acquire a very solid background education not only in EU law, but also in the domestic law of several Member States and in public international law. Second, never forget that what seems a solid legal reasoning for a researcher with a background of legal education in one Member State may seem distorted for a researcher with another background. Third always look at several language versions of the Treaties, secondary EU law and ECJ case law: as a minimum French, German, English, and one's own native language.

Never make use of only the English version and only English language literature.

Thank you very much.

REINHARD ZIMMERMANN

Reinhard Zimmermann studied law (1972-76) and earned his doctorate (1978) at the University of Hamburg. He was admitted to the bar in Hamburg in 1979. In 1981 he was appointed to the chair of Roman and Comparative Law at the University of Cape Town. In 1988 he returned to Germany to become Professor of Private Law, Roman Law and Comparative Legal History at the University of Regensburg (Bavaria). In 2002, he was appointed Director at the Max Planck Institute for Comparative and International Private Law in Hamburg. In addition, in 2008, he joined the Bucerius Law School as Professor in Legal History.

Professor Zimmermann has held visiting professorships at the Universities of Chicago (Max Rheinstein chair), Tulane, Cornell, Stellenbosch, Edinburgh, Berkeley, Auckland, Yale, Cambridge (A.L. Goodhart Professor of Legal Science and Fellow of St. John's College) and Oxford (All Souls College). In 1996 he received the Leibniz Prize of the German Research Foundation. He holds honorary doctorates from the Universities of Chicago, Aberdeen, Maastricht, Lund, Edinburgh, Cape Town, Lleida, Stellenbosch and McGill. He has served as Dean in Cape Town and Regensburg and as Chairman of the Humanities Division of the Max Planck Society from 2006-2010. In 2011 he was elected Chairman of the Association of Professors of Private Law (Zivilrechtslehrervereinigung) and President of the German National Academic Foundation (Studienstiftung des Deutschen Volkes). He is a member of numerous academies of sciences in Germany and abroad.

First of all, we would like to thank you for agreeing to have this interview.

1. In the beginning would you like to provide a short description of your formative years in law, which would be certainly very useful to "apprentices" in law.

Would you like you to point out major influences during your career (concerning also methodology)?

I have studied law at the University of Hamburg and obtained my doctorate as well as my practical legal training in Hamburg. A major influence on my development as a lawyer and as a law professor was that I had the opportunity, at an unusually early stage in my career, to spend seven years at the University of Cape Town (South Africa) as the Professor of Roman and Comparative Law. I thus got to know a particularly fascinating mixed legal system and became familiar with Roman-Dutch as well as English law. This experience led me to regard a combination of the historical and comparative methods as highly desirable for a better understanding of our modern law, not only in South Africa, but also in Europe.

2. On a more personal note, we would like to ask you to assess the value of a German professional background as it is your case in a comparative law perspective.

German universities offer a rigorous legal training; and the two years of practical legal training expose young German graduates to the challenges associated with many legal professions. I have always had the impression through experience that young German lawyers are internationally highly regarded (even if they tend to be slightly older than their contemporaries from other countries).

3. Coming to the issue of a future European private law, we would like to ask you to comment briefly on the various roles played by EU institutions. In other words, what

role has to play the EU legislator and what role is assigned to the EU courts in developing such a European private law?

The role of the European legislature is ambivalent because the legal acts emanating from Brussels present a very patchy picture. The proposed Common European Sales Law published in October 2011 provides the example of an act that is highly problematic (see the essay in Edinburgh LR 2012, 301 ff.[1]). The ECJ in Luxembourg already has a central role to play in the development of European private law. If a Common European Sales Law should, one day, enter into effect, a major reform will be necessary to enable the Court to cope with the significantly increased workload (see RabelsZ 2011, 434 f.[2]).

4. On the other hand, what approach would be advantageous: one ascending – from the States to the supranational level or contrary from the supranational level to the States?

What role should supranational initiatives like European Law Institute play in creating a (future) European private law?

I have always argued that European private law has to grow organically; that it must be based on a genuinely European

[1] Challenges for the European Law Institute, *Edinburgh Law Review*, Vol. 16, No. 1, pp. 5-23, January 2012 [translated into Romanian: "Încercări pentru Institutul European de Drept", *Revista română de drept european* (*R.R.D.E.*) 4 (2011), p. 15-30 (ed.)].

[2] Illmer, M., Basedow, J., Christandl, G., Doralt, W., Fornasier, M., Kleinschmidt, J., et al. (2011). Policy Options for Progress Towards a European Contract Law. Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, *75*, 371-438; also available online: http://ec.europa.eu/justice/news/consulting_public/0052/contributions/247_en.pdf (ed.).

legal scholarship and that it must be the manifestation of a genuinely European legal culture. For my views on the role of the ELI, see Edinburgh LR 2012, 5 ff.

5. Which is the role played by the consumer protection in establishing a European Civil Code? Has the consumer protection been used as a curtain for the judicial building of a private law?

Consumer protection was at the heart of the general private law agenda of the European Commission. This was based, not least, on the limited competence of the EU.

6. What role does the rules of international trade law (UNIDROIT, UNCITRAL) play in the process of shaping of a European private law? Could you please provide a short outline of the significant moments that have taken place at the Court of Justice of the European Union in that regard?

The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law have been developed in tandem and correspond to each other in many respects. Both legal instruments have been highly influential, both on a national and international level.

7. On a more broader context, from your point of view, what are the most notable recent developments in the EU private law? In this context, would there be a future European Civil Code?

I would welcome a well-designed European code of contract law. The presently proposed Common European Sales Law can only be a starting point. It needs to be very significantly improved. In particular, the European Commission has not yet done its homework to achieve a true revision of the consumer *acquis*. On what needs to be done in that respect, before a Common European Sales Law is enacted, see Common Market

Law Review 2011, 1077 ff.[3] – A European Civil Code going beyond contract law is neither desirable nor feasible at the present time.

8. A final question to you: what research methodology would you recommend to young researchers in (private and comparative) law?

Learn languages, study abroad, and learn to appreciate the value of a historical and comparative perspective (and the study of foundational subjects in general).

Thank you very much.

[3] Horst Eidenmüller, Florian Faust, Nils Jansen, Gerhard Wagner, Reinhard Zimmermann, Towards a Revision of the Consumer *Acquis*, *Common Market Law Review* 48 (2011), 1077-1123 (ed).

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Lately knowledge is a power that does not stem from its quantity, but from its quality. European law is one of the intellectual forms of a dynamic and at the same time precise spirit. Not only humans are able to interpret and apply concepts and facts. Today, machines are by far more efficient – in terms of memory, data storage or searching facilities. Computers and programs are undoubtedly more efficient than human beings: but, despite of these challenges, the present volume proves that imagination, order and understanding are higher than any quantitative developments.

The dialogue is an initiatory cultural form for each and every age and for each and every kind of learning. Contemporary science, even legal science, is becoming more and more specialized, as skills become more sophisticated. The dialogue is rediscovered during conferences and debates. There is also another dialogue, hard to perceive, that is carried out through published studies and papers. The present dialogues are a follow-up of the human work of understating the reality.

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