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*Elaine Fahey, Fabien Terpan & Rebecca Zahn*

*EUFutures Research Network launch report*

# Understanding EU legal integration/disintegration: in search of new perspectives

**4 November 2022**

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# Understanding EU legal integration/disintegration:
# in search of new perspectives

*(EUFutures Research Network Launch Workshop)*

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**Abstract:** This report summarises the UACES/ James Madison Trust EUFutures Research Network Launch Workshop entitled 'Understanding legal integration/disintegration: in search of new perspectives'.[1] The event consisted of four panels on 'Interdisciplinary research on EU law', 'Research Methods and EU law', 'Understanding the EU's integration processes' and 'Understanding EU law through soft law, discourse, ideas & beliefs', respectively. The future of EU legal integration is at a significant juncture with the departure of the UK, substantial rule of law challenges, internal and external crises, and an increasingly apathetic multilateral legal order. There is increased recognition amongst EU lawyers, who have historically limited themselves to doctrinal analysis and legal hermeneutics, that methodology plays an essential role in order to understand EU integration and shape its future. The question remains though how to connect interdisciplinary approaches to EU law, policy and politics. How should EU law (as an object) be studied? What are the respective merits of each discipline (political science, sociology, economy, history) in explaining the way EU law is created, applied, used, transformed in the process of EU integration? What is the added value of bringing together different approaches to law? In particular, how can EU law (as an academic discipline) open itself up to the methods of the social sciences and what, in return, can law offer to our understanding of EU studies more widely? In order to answer these questions, EUFutures brings together scholars for this workshop to: reflect on the future methodological direction(s) of EU law and EU integration and consider both how law could open itself up to methodologies from other disciplines, and what legal analysis could offer political, economic and historical approaches.

**Keywords:** EU law, EU studies, European integration, Interdisciplinary, Methodology, CJEU, Economic sociology of EU law, Empirical approaches to EU law, policy

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[1] See further: https://www.strath.ac.uk/humanities/lawschool/eufutures/

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**Keynote Speech**

**Researching the European Court of Justice. Methodological Shifts and Law's Embeddedness**

Mikael Rask Madsen (University of Copenhagen)

The keynote speech delivered by Mikael Rask Madsen focused on theoretical and methodological questions as to European law more broadly and in particular on the European Court of Justice (ECJ) as an object of research. This is a Court that has received an outsized attention, and probably only the US Supreme Court can compete with its scholarly attention. Historically, ECJ was not set up to be the 'midwife' of European integration. It used to be the final arbiter of some conflicts that could not be solved otherwise. This changed in the 1960s and throughout the 1970s when the institutional legal framework for the European supranational law was hammered out, making the Court eventually a very central institution in the overall project. Doubtlessly, the Court is important for European integration, but arguably it is not important because of *itself*, it is important because of its role of a host to other social, legal and political processes. Unless we accept a straightforward legal delegation idea, the authority of this institution rests ultimately on how it is engaged by other core constituencies.

Madsen presented his latest book – 'Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness', co-edited with Fernanda G. Nicola and Antoine Vauchez (CUP 2022) and his work within the iCourts project at the University of Copenhagen. The book was a product of a number of processes and was inspired by work jointly done with Antoine Vauchez for the past 22 years. Back then, a research group was set up that aimed at revolutionising European studies. Firstly, that 'rebellious enterprise' went by with 'injecting' a dose of sociology in studying EU law that was considered very avant-garde at the time. They started thinking about European law in terms of broader social fields. Secondly, they looked closer to the Weberian claim that institutions do not act, people do. In this theoretical view, European law existed as practises in certain legal fields populated by social legal actors. In order to study EU law, methodologically, one needs to understand the people involved in the individual and collective trajectories towards those spaces. They also need to understand much better the institutional trajectories as formed by people and policies. Moreover, the study group put an emphasis on the central battles over time and the historical progressions. Their work to study the field required historicizing the evolution and taking seriously how European law and institutions were fundamentally social constructions. That meant that with this framework you could study practises, including legal, and explain how they change as part of structural shifts.

In the time period while compiling the book, the editors noticed that there was an emerging scholarship, interested not in the same but in very similar issues and which has developed their own methodologies for addressing these issues. The contributors of the book share the idea that European Court of Justice (ECJ) is a moving target, an institution situated in changing social structures. In their contributions one can see an unease with the existing state-of-the-art. A lot of the original studies of the Court had the idea that it needed to be understood as a question of judicial behaviour. Previously, the idea was that Court was strategic, it exercised activism and so on, and that domestic courts were strategized in the choice of preliminary references to the Court were foreign to European scholars. Consciously or subconsciously, such a framework was imported from the study of the US Supreme Court - it certainly resembles greatly the studies of judicial behaviour of the US Supreme Court. Even though, however, it was *foreign*, eventually it became the dominant paradigm for studying the ECJ.

There are many methodological shifts addressed in the book. The contributors change a set of dominant theories, or also called 'meta narratives', through multiple lenses and ideas. All

this is based on the principle assumption that nothing is more important for the advancement of scholarship than the ability to reimagine the objects of inquiry. 'Methods' are the ways of conducting a research, but there is something that comes before that as a deeper reflection about how to construct the objects of inquiry. The books does not seek coherence, but rather it seeks contributions within a framework.

The idea of the book is that the Court is embedded not just in law but also in society and political life and we have to come up with ways of studying that. Coming back to the US Supreme Court, a lot of the studies of the latter is concerned with how this court is deeply political – it has deep political impact, it was politicised in the way it is packed, etc. The question is, again, is the European Court of Justice the same? It is obviously not politicised in the same way, e.g. in the way judges are elected, it does not have the same political impact, at least not in an immediate sense, etc. However, it raises the question about whether there are better ways of depicting that. One thing we know is that ECJ is not tucked away in faraway Luxembourg. It is part of European society and politics such that we need to come up with ways of studying it.

These ideas about studying 'an embedded court' in social, political, and legal context, is an issue that Madsen has explored extensively over the past years. A decade ago, the iCourts Project / Research centre was established to study as its object the rise of the international judiciary, including the ECJ, but not only. Its goal is to examine the increased power of international courts in global and national governance with the pursued impact to provide the first, agenda-setting analysis of the new role of international courts in both law and politics. During their work, it became evident that a core part of making a methodological reflection is taking the first step that goes before methods, and that is defining the object of the study.

In Madson's own research, there are four elements that are always present: (1) Dialectics of action and context; (2) Structural contexts; (3) Legal agency and institutions and (4) A four dimensional analysis: Law, institutional design, agency and context. Courts are structures in structures and structuring structures. In other words, the courts like the US Court of Justice operate in structures, yet they are also structuring structures themselves in the sense that they do impact those very structures in which they operate. This is a core element for any study to understand the dialectics of action and context. It also means, sometimes it gets misunderstood in the more lawyerly circles that, even though courts are independent in a legal sense, they are never, sociologically speaking, independent. Furthermore, how can we explain the legal agency of the court? For instance, one could import and re-establish ideas of judicial behavior and test against them. However, these institutions are fragile institutionally, also meaning that the impact on certain agents and agency is far greater than expected, hence you need to understand that legal agency and how it resolves in institutional practices. One the way of doing that is to bring in the trajectories of the very individuals there and figure out what kind of people actually populate these spaces and where they come from, etc.

However, in terms of methodology and empirical materials, there are some implications. The material should be very varied. Naturally, you start with (1) legal materials, e.g. treaties, statutes, rules of court, travaux préparatoires and (2) historical sources (primary and secondary). But then you turn to (3) case-law and suddenly you are no longer in the situation where we can just pinpoint a few remarkable cases that changed and influenced the state of art. For example, the ECJ had delivered more than 25,000 judgments. You need to choose between the impossible task of reading all of them, or alternatively come up with methods that enable you to cover them. In other words, you need to develop something more quantitative in various ways. Yet, another problem is that when you study these institutions, some sources are nowhere to be found, unless you start (4) conducting interviews. The black box of the institution and what is, in fact, happening there, cannot be found in positive sources but could be revealed when you start talking to the judges. But again, given the size of some courts, you need to build clever methods for studying that, e.g. other quantitative methods, such as

surveys (5).

Madsen concluded by saying that one need not to worry that much about methods, but rather focus on defining 'a good project', because once you have it, the methodological choices and reality will inevitably delimit it organically. He encouraged others to take a step back and define 'the object' as a first step, because, in his views, methods should necessarily be the second step in the research process.

**Session I**

**Interdisciplinary research on EU law**

**1.   Beyond the scope of law: Reflections on interdisciplinary research and the challenges of making it happen**

Paul Copeland (Queen Mary University of London)

Copeland started his presentation by offering his reflections and thoughts on doing interdisciplinary research. His first point was that EU studies lends itself to interdisciplinary research and for those in the social sciences, understanding EU law is often the first step of research. Secondly, interdisciplinary research in EU studies is often greater than the sum of its parts. Thirdly, often social scientists do not write like lawyers and collaboration needs to be mindful of that. Moreover, different terminology can also be confusing. In his experience, the collaboration with scholars from other disciplines, in particular legal scholars, had been very productive, due to e.g. the different perspectives and the different methodological understandings In other words, sometimes social scientists and lawyers speak a different language and write completely differently which is both a barrier and a challenge. His fourth and final reflection was that embedding social science methodologies at postgraduate taught and postgraduate research level for those studying socio-legal studies remains important.

Copeland then turned to his own interdisciplinary research, more specifically on the impact of EU employment policy both during and beyond EU membership. One of the questions is why the UK was so opposed to EU employment policy, given that the EU's competence in the field is one of minimum standards. In reality, the pace of agreement on EU directives has been relatively modest. The balance of competencies review estimated that there were two directives per year and a lot of them included revisions to existing legislation. If you put that in the broader context of the single market, this is a relatively minor area of European integration. What made the UK's opposition to EU employment policy unique was that Governments from the two main parties at Westminster – Conservative (1979-1997, 2010 – present) and New Labour (1997-2010) – were consistent in their opposition to integration.

UK opposition to EU employment policy can be puzzling. There are areas in which UK employment law exceeds EU minimum standards, including entitlement to more generous annual leave, the right to flexible working, and more generous maternity as well as paternity leave. New Labour introduced the UK's minimum wage in 1998 while the EU's Minimum Wage Directive agreed in 2022. UK Government's argued that EU law was going beyond UK minimum standards, several directives fall into this category including the Working Time

Directive, the Posting of Workers Directive, The Temporary Agency Workers' Directive, and the Transfer of Undertakings Regulations. The UK went to great lengths to oppose such legislation, as demonstrated during the negotiations of the Working Time Directive. But why there were such strong objections, especially since the Balance of Competences Review in 2014 reveals that there is very little impact of EU employment in the UK in terms of cost to British business.

Just studying 'the law', could leave one trying to solve the puzzle with little or no success, and it is here where a discourse analysis can provide useful insights about the state of art. The UK has a particular ideological growth model in which successive British Governments have emphasised improvements to the functioning of the market as a necessary condition of economic growth. This powerful discourse started with Margaret Thatcher's concerns at the signing of the Single European Act in 1986 and the extension of Qualified Majority Voting in health and safety legislation. Thatcher's very particular position is one which successive Governments continued during the UK's membership of the EU. This position was carried through by John Major and Tony Blair. They continuously referenced the idea of EU employment law threatening British competitiveness.

When the Conservative Party returned to power in 2010, albeit in a Coalition with the Liberal Democrats, the discourse around flexibility and competitiveness was amplified. 2010 Conservative Party Manifesto pledged to return powers from the EU that it believed should reside in the UK including employment legislation. Finally, when Prime Minister David Cameron made his Bloomberg Speech in January 2013, promising that if the Conservative Party won an outright majority at the next General Election there would be an in-out referendum on EU membership, he was vague of the specifics but mentioned the Working Time Directive as a particular issue that needs to be resolved.

What one could see is the construction of a narrative across political leaders in the UK, that EU employment law is a problem which undermines British competitiveness. Whether that is drawing on existing norms and values within the UK political economy, or is constructing norms and values within the UK political economy, we have yet to decide. But what we can see by looking at the law and then taking a discourse analysis is that there is a massive gap between the rhetoric and on the state of art. For those reasons, interdisciplinary research provided a useful lens.

## 2. Toward an economic sociology of EU law

Diamond Ashiagbor (University of Kent)

Ashiagbor framed the debate as to how economic sociology of law – namely, the taking of sociological approaches to legal and economic phenomena – is a useful lens through which to view market economy, since it enables us to appreciate how legal form and legal concepts construct the market, reflect and shape economic activity. Whether Weberian-inspired or Polanyi-inflected, economic sociology of law offers both a theoretical framework and a methodological approach – which has particular potential to shape understandings of European Union law and the EU market integration project. The paper interrogated the role of labour and labour law in the historic, and ongoing, construction of the European Union integration project. Their contention was that the resilience of the integration project is threatened by neoliberal responses to the present crises, which erode the EU's ability to institutionalize a labour or social constitution to counter the dominance of an economic constitution. EU labour law has long been a site for contestation between the market and the social, and for attempts to resolve the tensions inherent in the Union's aspiration to give a

'human face' to the market integration project or to create 'a highly competitive social market economy'. Drawing upon earlier 'theory-building' work on relationships between law, state and economy, the paper sought to apply insights of economic sociology of law on the constitutive role of law to regionalism in the broader sense, and regional economic integration in particular.

## 3. Historical sociologies and European legal integration: towards an interdisciplinary research agenda

Hugo Canihac (Université Saint Louis Bruxelles)

Canihac outlined how following the lead of W. Hallstein, European 'integration through law' has long been analyzed by legal scholarship as the steady creation of a supranational 'Community of law'. In this view, European legal integration is all about constructing a supranational rule of law, bringing increasing peace to the continent by embedding states in a strong legal framework: It is a slow, but, once initiated, powerful process. This rather teleological narrative, however, is at pains to account for recent developments in the European union (EU) – such as Brexit and political challenges against EU rules in many Member states, or the 'rule of law crisis' in Hungary, Poland or Malta. It was highlighted how historical sociology can help account for these phenomena by providing a more nuanced picture of European legal integration. More generally, it is meant to illustrate how a genuinely interdisciplinary approach to EU law can help moving beyond traditional narratives. The presentation discussed more specifically how the theory of 'civilizing processes' developed by the German historical sociologist Norbert Elias can add to this growing body of literature and provide a useful lens to read the development and contemporary issues of EU law. The civilizing process, as defined in a non-normative way by Elias in his study of the emergence of modern European states, associates a long-term trend towards social pacification of increasingly complex societies (decreasing violence through monopolization) and a trend towards individuals' self- discipline (increasing psychological self-constraints). Crucially, this was to Elias a conspicuous yet reversible trend in human history: Civilization can revert into, or coexist with, de-civilizing trends. Applying to EU legal integration these concepts inspired by the work of N. Elias opens up promising new perspectives in at least two main respects. First, it connects macro processes, such as the emergence and stabilization of a centralized normative power, and micro processes, such as the transformations of individuals' behavior. In this regard, it not only allows to locate European legal integration in a long-term process of construction of political authority in Europe. It can further directly contribute to contemporary debates trying to reconcile institutional developments within EU law and citizens' attitudes towards the EU. Second, it goes beyond 'naively functionalist' views of law by suggesting that simultaneous de-civilizing processes can be caused, or fostered, by the law – that is, it allows to regard the law as an ambivalent force in the operation of social regulation.

## 4. Critical socio-legal theories in EU citizenship: explicating the gendered elements of free movement

Adrienne Yong (City, University of London)

Yong's presentation considered how the concept of EU citizenship is an area that has seen a great deal of scholarly interest and literature since even before the Treaty of Maastricht officially established the status in 1993. In part, this is due to the proliferation of case law by the Court of Justice of the EU and codification of the legal interpretation of the concept in the Citizens' Rights Directive 2004/38. A doctrinal approach to the development of this area of law

has been the dominant one given the volume of case law that has emerged on the topic, which has become the primary way that the concept has been shaped. What has had less attention, however, is the application of socio-legal methods and critical theories – such as feminist legal theory and intersectionality – to areas of EU law dominated by doctrine, like EU citizenship. The paper aimed to highlight this methodological lacuna, using EU citizenship as the case study. What was being lost when EU citizenship scholarship is dominated by doctrinal methodology is the perspectives of certain marginalised EU citizens, specifically women. The impact on these women, often the carers of dependents or spouses of working men, is on their rights to free movement and residency across the EU. Without a critical theoretical lens examining how and why free movement and EU citizenship rights are conferred and to who, the gendered impact of the law on these marginalised women gets lost. There are benefits and challenges associated with examining the doctrine of EU citizenship from a critical socio-legal perspective. A critical lens allows us to see what disadvantages exist when economic conditions for citizenship rights are strictly applied to those outside of traditional work (namely women). The distinct added value for this approach is to be able to draw EU law out of its silo, situating legal reality in a wider context and hopefully being the first step in addressing social injustices that arise from strict doctrinal interpretations. On the other hand, changing long embedded traditionally gendered mindsets is a recognised challenge given this has what has been the basis of integration for so long. However, the overall argument was that it is important to appreciate this methodological approach in order to encourage a disruption of the norm for the betterment of the discipline of EU law, as well as our society at large.

## 4. How might designerly ways prompt and facilitate interdisciplinary understandings of EU legal (dis)integration?

Amanda Perry-Kessaris (University of Kent)

Perry-Kessaris' talk considered how questions around EU legal (dis)integration are messy or 'wicked'—that is, they are open, complex, networked and dynamic; and involve competing, sometimes incompatible, values and interests. They require collaborative, interdisciplinary approaches. But collaboration and interdisciplinarity are themselves messy. To sense and make sense of messiness requires approaches that are structured-yet- flexible—that is, structured enough to offer analytical purchase, yet flexible enough to accommodate multiple scales, contingencies, dimensions and perspectives. The paper proposed that structured-yet-flexible approaches to law can be supported by combining sociologically-informed and designerly methods. Sociologically-informed methods prompt and facilitate the systematic reinterpretation of law as a social phenomenon (Cotterrell 2018). This means attending not only to abstract and technical legal text, but also to its concrete relational context and moral subtext. It means conceptualising legal phenomena at all levels (actions, interactions, regimes and rationalities) and across all dimensions (instrumental, traditional, affective, belief, material) and forms (ad hoc and thin, long-term and trusting) of social life. In this way sociologically- informed approaches can generate spaces within which to explore and synthesise empirical and normative concerns from across the social sciences. Design-based methods prompt and facilitate collaborative experimentation (Julier and Kimbell 2016; Perry-Kessaris 2021). They do this first through processes that move iteratively between rounds of divergent (relatively 'creative') thinking in which we generate as many ideas as possible and follow where they lead; and then convergent (relatively 'scientific') thinking in which we test those ideas, whittling them down to the ones that fit best the situation at hand. Second, they prompt and facilitate collaborative experimentation by emphasising visual and material communication—that is, making drafts, models, sketches to sense and make sense of the world. In this way design-based methods can generate spaces within which to collaborate across disciplines and life experiences. For this reason they have been deployed in a wider

range of non-design contexts, including to enable citizens to co- make recommendations for the future of the EU as part of the Conference on Future of Europe (2022). In combination, the paper argued that sociological and designerly ways can generate structured-yet-flexible enabling ecosystems within in which experts and non-experts may become better, or differently, able to sense and make sense of EU legal (dis)integration.

## Session II

## Research Methods and EU law

### 6. Interdisciplinary Research Methods in EU Law: Challenges and Opportunities xxx

Giulia Gentile (LSE) and Luigi Lonardo (University College Cork)

Lonardo talked about their project for a research handbook, entitled 'Interdisciplinary research methods in EU law: challenges and opportunities (Edward Elgar, 2023 forthcoming), which contains over 20 peer reviewed chapters and followed two days of in-depth discussion with the authors held in September 2022. What the editors hope to showcase with the handbook, taking into consideration the possible limitations of the interdisciplinary studies of European Union law, is two-fold. First, that the study of EU law from various disciplinary perspectives (and their methods) enriches EU law doctrinal work, sometimes by challenging it. Second, that these insights are not only pertaining to method, but to substance.

In the handbook they consider several policy areas - holistically looking at the EU as a whole, e.g. as to foreign policy, internal market, citizenship, etc. Furthermore, the separate chapters contribute to the study of the EU legal system from various disciplinary perspective (evolutionary biology; security studies; disability studies, judicial biography, methods of political science more broadly, etc). The object is expected to be sufficiently unitary for the contributions to dialogue about a common object. However, once looked at under the magnifying glass, the object is far from unitary: it is not clear, for example, where EU administration ends and where national administration begins; whether national courts are courts of Member States or act as EU courts; where does EU law end and national or international law begin. In studying the relationship between various disciplines, the contributors seek connections, not separation both in terms of methods and of substance. They hope to achieve the same synergy, within legal scholarship, for the relationship between doctrinal and non-doctrinal methods. Interdisciplinary studies of EU law herald a shift from doctrinal scholarship to other methods, but, even though they are two different tracks, the contributors conceive them as parallel ones, i.e. not in opposition but rather fostering each other. Yet, what is the added value of this exercise, e.g. of considering evolutionary biology for the study of EU law? In general, interdisciplinarity helps in moving beyond the 'dominant paradigms', it contributes to breaking epistemic circles, for example. Interdisciplinary studies put in focus law as an element of social behavior. Finally, for interdisciplinary methods, or disciplines outside the law or for legal scholars who do not use doctrinal work, it is easier to take a normative stance on what the European Union ought to do.

One of the interim conclusions at this stage is that EU law and legal reasoning is about choices of individuals. These choices are influenced by a variety of factors, some of which could be considered *extra* legal factors. That inevitably leads to asking the question why lawyers and legal scholarship tend to neglect *extra* legal factors. That said, some of the answers of substance that the chapters provide is, for instance, that the European Union is a rationalistic structure, created to diminish the role and influence of strong emotions - the latter tended to

be neglected because the EU is a technical legal structure that was argued to be politicising governance.

## 7. The end of negative market integration: 60 years of free movement of goods litigation 1961-2020

Jan Zglinski (LSE)

Zglinski in his presentation set out how few fields have had such a profound impact on European integration as the free movement of goods, and no provision within this domain has played nearly as important a role as Article 34 TFEU, which prohibits quantitative restrictions and measures having equivalent effect between Member States. How the Court of Justice of the European Union (CJEU) interprets these notions has generated great interest among legal and political science scholars alike – so great, in fact, that it has been called a 'fetish'. This is anything but surprising. The case law on goods has exerted doctrinal influence across the entirety of free movement law and beyond; it has affected political processes at the Member State and EU level; and it has been a crucial element in the shaping of the European economic constitution and the internal market.  Somewhat in contrast to this relevance, empirical work on the free movement of goods is scarce. The most prominent investigation remains Stone Sweet's The Judicial Construction of Europe, which analysed the case law developments, the dynamics that were driving it, and its effects on internal market governance until the late-1990s. The study found a mutually reinforcing link between goods jurisprudence, litigation, and legislation. The CJEU's generous interpretation of the free movement rules in a few early landmark rulings led to a sharp rise in litigation activity, as clever traders relied on Article 34 TFEU to challenge unwanted domestic regulation. This, in turn, further fuelled judicial activism and, incidentally, stimulated European law-making, all of which ended up triggering yet more litigation. The picture painted by Stone Sweet aligns with classical accounts of the primacy of negative integration, according to which the EU is skewed towards judicial, not political governance tools. On this view, case law and litigation are the driving forces behind market integration, with the Court of Justice acting as the lynchpin of the European project. The paper drew upon a new dataset containing all CJEU rulings on Article 34 TFEU from 1961 through 2020. The findings offer a retrospective on the development of the free movement of goods over the past six decades. They will also be used to show that some of the widely spread assumptions about the field have stopped being accurate. The core thesis advanced was that the free movement of goods has undergone a significant change: cases on Article 34 TFEU are vanishing, judicially-driven market integration has come to an end. Instead, the internal market is increasingly governed by EU legislation, which provides a clearer and more stable alternative for all actors involved.

## 7. Is it possible to accurately predict the authorship of judicial decisions from text?

Michal Ovádek (UCL)

Ovádek presented their project with the following research questions: Is it possible to accurately predict the authorship of judicial decisions from text? Is this possible for courts that have an impersonal writing style common in civil law systems? Finally, to the extent that we can use machine learning to learn the writing style of judges, can we identify the extent to which the judges in a chamber contribute to the content of decisions to test theories of judicial bargaining? They attempt to find out the answer by using a new dataset of the entire universe of judicial decisions produced by the Court of Justice of the European Union (CJEU). The dataset includes all types of judicial decisions and AG opinions across the various judicial procedures in the EU. While previous work on the CJEU has utilized judicial texts, no existing

database covers all cases due to inconsistent publishing practices. Whereas some texts only appear on the Court's own website, others have been published only on Eur-Lex, the EU's central repository of law. Moreover, thousands of texts published between 1952 and 1988 are only available in PDF format and therefore require the use of optical character recognition software to convert into plain text. In addition to addressing these issues and ensuring overall quality of the text data, our database is built at the paragraph level, which opens new research avenues.

Unlike US Supreme Court justices whose individual tone and style can become immortalized in dissenting and concurring opinions, judges of the CJEU have no institutional outlet for voicing their individual opinion other than the opinion approved by the majority. Each ruling is a product of internal deliberations that are close to hermetically sealed off from public view. Knowledge of the degree of internal contestation behind individual rulings has been constructed only through painstaking historical research 50 years after the fact and only in a handful of cases. If we could train a classifier that would accurately predict authorship of paragraphs, we could then estimate the degree to which non-rapporteur judges in a collegiate setting contribute to the final opinion.

In the first step of the research programme, they experiment with different text representation techniques and machine learning classifiers in an attempt to predict the authoring Judge-Rapporteur (JR) or Advocate-General (AG) at the paragraph or document level. Although their preliminary results confirm the apparent difficulty of predicting authorship at the CJEU, they find significant variation between authors not only at the individual level but also across types of authors, time and courts.

## 8. Unseen contributors to legal integration and how to study them

Konstantinos Alexandris Polomarkakis (University of Exeter)

Polomarkakis outlined how the predominance of the Court of Justice of the European Union in the legal integration agenda has been challenged by a number of new studies lately. Although its contribution is not contested, more recent scholarship argues that other actors within and outside the Court also played a seminal role in the transformation of Europe. Some scholars even cast doubts on how successful the Court's constitutionalisation of EU law was as a process. The foregoing cannot help but highlight the ever-relevance of integration through law and the need for new perspectives to better understand and assess its processes. These are especially apposite to locate the contribution of relatively under-studied areas of EU law in that context, and of the actors involved therein. What insights, if any, can the Court's labour and non-discrimination case-law decided during the so-called proto-federal era of European integration offer us? The paper focussed on the role of seemingly disadvantaged actors, such as the litigants and their supporting stakeholders (lawyers, organisations, etc.), in EU labour and non-discrimination case-law. Drawing on Bourdieu's sociology of law to frame litigation before the Court as a legal field with varying levels of capital distributed amongst its actors, as well as on concepts such as legal mobilisation and minority social influence, the paper considers the value of an interdisciplinary approach to unpacking the contribution of actors with low levels of capital, and who operate in an area of EU law not often associated with the heyday of the Court's integration through law era, to the latter. By undertaking contextual readings of seminal labour and non-discrimination law judgments that also happened to leave their mark on legal integration, such as Defrenne II, Von Colson and Harz, and Francovich, the paper showcased how certain influential minorities were able to successfully navigate the hurdles of the preliminary reference procedure and help the Court further elucidate its transformation of Europe.

**Session III**

**Understanding the EU's integration processes**

### 9. Integration through rights: sociological approaches to law

Dagmar Schiek (University College Cork)

Schiek considered how while the unique legal quality of the EEC was, in the 1970s, theorised under the notion of "integration through law", the unique legal quality of EU law is increasingly characterised by the capacity to generate rights for citizens which can be judicially enforced at Member States' level. Does this mean that "integration through rights" is the new direction for the EU? While this question has been analysed in relation to human rights guarantees from a legal doctrinal perspective (e.g. Morano-Foadi, S. & Andreadakis, S., 2020. Protection of Fundamental Rights in Europe. Cham: Springer Nature) as week as from a social movement (legal opportunity structure) perspective (Granger, M.-P., 2018. European Journal of Law Reform, 20(2-3), pp. 35-55), the paper argued that the question whether the EU can further transnational integration through rights is ultimately a sociological question. Integration through rights may succeed if the practical use of EU-derived rights generates relationships between citizens, both EU and non-EU citizens, which also enhance the practical legitimacy of the EU and its law. It used rights to non-discrimination as an example in order to demonstrate how EU derived rights may contribute to dis-integration as well as to integration of societies from this perspective.

### 10. Understanding EU Law from the perspective of Constitutional Theory

Massimo Fichera (University of Turku)

Fichera's contribution showed how constitutional theory can as a methodology contribute to the study of European Union (EU) law, and, in particular, to the dynamics of legal integration/disintegration that have growingly characterized the development of the EU? This question will be the focus of this paper, which begins from the assumption that disagreement and conflict are a central theme for any thorough constitutional theoretical debate. As disagreement is ineliminable and actually represents an inherent feature of constitutionalism, any achievement of a legal and political regime is to some extent brittle and exposed to threats. One relevant task of constitutional theory is understanding the nature and source of disagreement and possibly devising mechanisms to address it on the basis of a shared set of epistemic criteria. In fact, a typical role played by a constitutional settlement is supposed to be that of providing endurance, i.e. securing the continued existence of an institutional and political regime. The paper articulated its arguments through three steps. First, it clarified what constitutional theory as a methodology means. A distinction is drawn between theory as such and methodology on the one hand, and methodology and methods, on the other. A methodology can be characterized by several methods and choosing amongst them may very much depend on the purpose of the research and the object of study. Second, it sought to explain why constitutional theory is important for EU legal analysis. In other words, does adopting a constitutional theory angle for EU law irremediably undermine the outcome or ostensible scientific quality of our research? Is there an irremediable constitutional bias in adopting such methodology? Here the risk is that of neglecting critique. The added value of constitutional theory may be found in the first place in its normative component. In this case the risk of putting forward utopic agendas or, on the contrary, of merely rubber-stamping the status quo, is present. However, a major asset of constitutional theory is also that it allows combining insights from law, political theory, sociology and other disciplines and is thus able

to illustrate the complexity of EU integration. Third and finally, the claim of the paper was that constitutional theory as a methodology can indeed significantly contribute to the study of EU law by way of two fundamental notions: reflexivity and design. Reflexivity is necessary to address the question of how to be secure as a transnational polity and what it means for the EU to be secure. The epistemological value of such endeavor is related to our reflections on the nature of law itself. Design is geared to outline the contours of a legal order that is able to address disagreement in a satisfactory manner. In a novel environment like the transnational legal world, design will be inevitably conceived by trial and error. In this case the risk is that of underestimating the impact that this may have on citizens' lives.

## 11. Beyond integration through law: legal integration as system building

Jacob van de Beeten (LSE)

Van de Beeten started with outlining his three interrelated claims. Firstly, traditional accounts of law and integration are no longer able to account for the current circumstances in the legal integration process find itself. Secondly, an unspoken assumption in these narratives and the Court's case law is that legal integration is a form of legal system building. And thirdly, conceptualizing integration should go beyond legal system building.

EU legal scholarship still relies to a large extent on the vocabulary and concepts developed in the foundational period of the integration process. One does not have to try hard to find references to Hallstein's *Rechtsgemeinschaft*, Pescatore's *law of integration* or the *Integration Through Law* project in contemporary scholarship or the case law of the Court. Whilst having played a major role in the development of the EU legal order, these accounts are no longer adequate for analytical, normative and political reasons: a) Analytically, they do not sufficiently consider the continuing role and relevance of Member States in the integration process (that was part of their initial success). b) Normatively, they are no longer convincing, because the traditional 'civilising' role of law is increasingly contested and the EU itself has increasingly become a "coercive" power itself in light of the increased sanctioning and conditionality instruments (Von Bogdandy 2018). c) From a political-integration perspective, it seems increasingly problematic to rely on law to overcome politicization. The idea of the EU as a legal community suggests combatting politicisation with more juridificiation, whereas juridification might well be part of the cause of increased politicisation (De Witte 2018). A final shortcoming is that these visions were premised on "monism", i.e. the idea that law (system) can reconcile all the various objectives (teloi) pursued by EU law, as well as the different values (ethos) pursued by the integration project.

The Court and EU legal scholarship have traditionally engaged with integration as a legal order building enterprise. Pescatore, Hallstein and the *Integration Through Law* project framed integration as an order building enterprise in which the creation of a legal system was assumed to serve the aims and objectives of the integration process. The charachterisation of the European Community as a new legal order was thus highly performative in nature, which is not always sufficiently appreciated. In framing the EC in this fashion, legal questions could be approached from a systemic perspective, allowing the Court to frame and decide legal disputes not from a perspective of justice or from the objectives to be achieved but rather in light of the requirements of the legal system itself. The constitutionalization process can be understood as an exercise in legal order building, in which the Court relies on systemic arguments to frame the relationship among EU institutions and between EU institutions and the Member States. An example of this systemic reasoning is, for example, found in the development of general principles of EU law by relying on a deductive method that focuses on what is "inherent in the system of the Treaty" or "in the light of the general system of the

Treaty." (Joined cases C-46/93 and C-48/93; Joined cases C-6/90 and C-9/90). This systemic orientation is also evident in what Lasser has identified as the meta-teleological reasoning of the AG and the ECJ. In fact, the denominator "meta-teloi" is somewhat misplaced, because the teloi do not refer to the objectives pursued by the integration project, but instead are all aimed at stabilizing the EU legal system. This is evident from the meta-teleological objectives Lasser identifies: effectiveness, uniformity, legal certainty, and judicial protection. In his own words, these are "broadly systemic meta-purposes" which underpin judicial reasoning with reference "to the purposes, values, or policies that should motivate the EU legal system if it is to be a proper legal order." (Lasser 2009).

In traditional narratives of legal integration, this legal order building enterprise is seen as a necessary means to realise the EU's objectives and values. Integration thus itself is defined as being a legal order building enterprise. This is the frame that in Van de Beeten's view should be questioned, for three reasons: a) The way it frames the difference between (legal) system and the lifeworld of integration. b) Premised on monism (all objectives, values and systemic requirements can be reconciled). c) It offers a decisively narrow view of what integration is about (namely the creation maintenance of a legal system). Recognising the system building dynamic is a first step, which can then lead to doing EU law in a way that is more attentive to the way in which EU legal concepts frame the social, economic, and political dimensions of the EU.

## 12. The role of business model differentiation in the enforcement of the Digital Markets Act: A methodological perspective

Giulio Kowalski (City, University of London)

Kowalski outlined how the Digital Markets Act ('DMA') constitutes the European attempt to regulate digital platforms. More specifically, it could also be considered as a political stance against the seemingly unrestrained market power of so-called "big-tech" corporations, with a view to tame them and make global hi-tech markets more contestable and fair. The obligations included in Articles 5 and 6 constitute the DMA's core. Such obligations automatically apply to all undertakings qualifying as "gatekeepers" without necessary individualisation to the peculiar features of their business model, that is their monetisation strategy. Limited –- and discretionary – tailoring of some obligations is allowed by Article 7 DMA resulting in an overall "rigid" framework. Competition law and economics scholarship have increasingly highlighted that the rigidity of the DMA runs counter to the evidence that different business models generate different incentives and, consequently, different market behaviours by gatekeepers. For instance, an ad-funded internet business (e.g., Google) monetises its product ecosystem through advertising and has strong incentives to protect and enhance its ability to generate, harvest and exploit user data. Conversely, operating systems or app stores raise different concerns (e.g., placing obstacles to developers operating across platforms, making distribution through other channels difficult). In light of the above, a normative question would arise: do differences between gatekeepers' business models justify a more bespoke DMA enforcement to remedy gatekeepers' harmful market behaviours? However, the normative question is highly dependent on a methodological one: how to bring together law (economics and) business management? Indeed, to understand whether the law should differentiate between different platforms' business models it is necessary to first define the concept itself of "business model" and the alleged differences between various forms of monetisation strategies. The presentation discussed the multidisciplinary interaction between legal and business management science to address the normative questions raised by a legal critic of the DMA. In other words, the article predicates the central importance of methodology for legal research and how it can help to adapt and translate insights coming from different disciplines into operative legal principles that might allow the design and implementation of more

effective, bespoke remedies through the DMA. It first attempts to provide a concrete definition of the concept of business model adopted by gatekeepers acting as platforms and ecosystems. In this regard, it focussed on how the "AI Factory" – what Iansiti and Lakhani define as the set of systems and processes based on data, machine learning algorithms, modular architecture, and testing that has allowed gatekeepers to reach an unprecedented level of scalability, a broader scope and more effective learning – has impacted gatekeepers' ability to monetise their assets. Furthermore, the interaction between the business model of digital companies, their new architectures and their governance will also be examined. Secondly, it demonstrated that different business models foster different incentives and possibly conducts, using Apple's and Google's contrasting monetisation strategies as case studies.

## Session IV

## Understanding EU law through soft law, discourse, ideas & beliefs

### 13. Discursive reconstruction of Brexit and the UK in the EU Soft Law 2016-2022

Monika Brusenbauch Meislová (Masaryk University)

Brusenbauch Meislová's presentation sought to build upon, update and extend earlier discussions on the discourses of Brexit (Buckledee, 2018; Donoghue & Kuisma, 2022; Freedman, 2020; Koller, Kopf & Miglbauer, 2019; Spencer & Oppermann, 2020; Zappettini, 2019) as tohow Brexit as a process and the United Kingdom (UK) as an actor have been discursively (re)presented by the European Parliament (EP) in its resolutions. It took an innovative approach to studying European Union (EU) law through the lens of discourse analysis and is interdisciplinary and multi-perspectival in nature, as it integrates knowledge from the disciplines of European studies, political science, law and linguistics. The focus on Brexit and the UK as its very originator has been substantiated by the fact that Brexit is widely acknowledged as a primary case of legal disintegration (Dyevre et al. 2018) and a critical juncture in the process of European integration (Nugent 2018), having vast political and economic implications and raising a host of pertinent questions on the EU's internal balance of power, politics, policies as well as the future (Martill & Steiger 2020; Schimmelfennig 2018). The focus on the EP is given by the essential role that it has played during the Brexit process (Bressanelli, Chelotti & Lehmann 2019, 2021; Brusenbauch Meislová 2019, 2020). Despite its resolutions being non-binding, advisory and largely symbolic (Archick, 2014), they are essential normative and political governance tools and key soft law instruments (Hart 2020), through which the EP regularly communicated its views on Brexit and exerted its pressure on the rest of the EU institutions and the UK. Working with a dataset of all EP resolutions on Brexit in the 2016-2022 period, the study surveyed the EP's discursive treatment of Brexit and the UK during: 1) the withdrawal process (2016-2019); 2) the transition period (2020); 3) post-transition period (since 2021), thereby covering all the transformative periods of the Brexit process and allowing for temporal comparisons. To this effect, the article draws on the insights of the discursive institutionalism theory (Schmidt 2008, 2020) and adopts the general orientation of the Discourse Historical Approach in Critical Discourse Analysis (Fairclough and Wodak 1997; Reisigl & Wodak 2001; Wodak 2011). Guided by Krzyżanowksi's (2010) operationalization of the Discourse Historical Approach, due attention is paid both to the linguistic aspects, in the sense of topical structures, discursive strategies and linguistic devices, as well as to the empirical assessment of more general patterns of the rhetorical treatment of Brexit, whilst simultaneously referring to numerous concrete textual examples derived from the EP's resolutions to illustrate how Brexit and the UK have been

(re)contextualized in the parliamentary soft law discourse. As such, this linguistically informed inquiry provides critical insights into how the EU has used soft law to make sense - and shape reality - of Brexit, applied it to (re)produce shared meaning(s) and legitimised, through language, its perspectives of the UK as a (non)member state.

## 14. Assessing the EU's normative power through the lens of soft law diffusion: a case study of the EU's promotion of economic norms in ASEAN

Xinchuchu Gao (LSE), Xuechen Chen (New College of the Humanities)

Gao and Chen outlined how since the inception of the concept of Normative Power Europe (NPE) (Manners 2002), there has been a vibrant debate over the role and identity of the EU based on the key assumption that the EU acts as a sui generis international actor that is capable of promoting a set of universal norms (e.g. peace, liberty, democracy, human rights, rule of law) in international politics. Whilst the NPE debate has attracted tremendous scholarly attention in the field of Political Science and International Relations, it gains relatively limited traction among EU law scholars. This is primarily due to a lack of interdisciplinary dialogue and mutual engagement between different disciplines in EU studies. The paper sought to bridge existing scholarly discussions on the EU's normative power in world politics and the EU's influence on global/regional legal order. To achieve this objective, this research revisits the concept of NPE by drawing on the existing literature of soft law – a controversy yet useful term which helps uncover the complexity of the EU's legal system while placing the impact of EU law in the wider political context. At empirical level, this research examines how the EU has promoted a set of overarching economic and market-related norms which have incrementally been translated into soft laws across multiple sectors (e.g. Cosmetic Sector, Electronic Sector, Data Governance) in ASEAN region. This research also seeks to examine the conditions under which EU norms and soft laws are accepted, contested, or rejected by external international or regional actors. Departing from most of the existing approaches to study EU law which remains highly Eurocentric, this research highlights the important role played by external actors (or the recipient of EU norms/legal system) in shaping the processes of EU norm and soft law diffusion.

## 15. Ideas in international trade: the role of programmatic beliefs in the EU and China's approaches to the WTO DSM

Salvatore Barilla (University of Edinburgh)

Barilla outlined their research question as relating to the issue of whether domestic ideas have an impact on EU Law? Can they affect the practice of EU officials in their policy decisions? How can ideas be investigated in EU Law and its external relations? Starting from these questions, the paper presented was a reflection on how international relations and critical international political economy theories can contribute to the studies of EU Law. It analysed how different theories and different methodological approaches can expand and complement the understanding of the EU legal studies. The paper considered the approaches that the EU and China have in the World Trade Organisation (WTO) as a case study. In particular, it focussed on the role of domestic ideas in the approach towards the WTO dispute settlement mechanism (DSM). The research sought to contribute more broadly to the academic debate on EU Studies and EU Law, and, more specifically, to the debate on the External Relations of the EU, as well as trade with third countries. The research project analyses a topic traditionally investigated by EU law scholars, combining theories of international relations and international political economy with a methodology that represents its interdisciplinarity. While the data

collected include 'traditional' legal documents (e.g. regulations, directives, legal remedies), the projects adopts process tracing as main methodology. Process tracing has been used as an effective method to trace causal mechanisms in projects that investigate ideas in international relations and social science in general (see Jacobs, 2014). Through the analysis of primary and secondary sources, as well as targeted semi-structured interviews to officials and experts, the broader project will explore how ideas influenced DG Trade and MOFCOM's approaches to the WTO DSM. The project looked at officials of DG Trade as main actors, comparing trade practices and regulations related to the WTO to the ones adopted by the officials of China's MOFCOM. In particular, it will be argued that DG Trade officials use the WTO DSM because it is in line with their legal tradition, considering it as the proper venue where trade disputes can be escalated without further deteriorating bilateral relations. On the other hand, it will be argued that MOFCOM is more reluctant in the use of the WTO DSM as their Confucianist legal tradition make them interpret the judicial remedy (in this case, the WTO DSM), as a venue of last resort. In the Confucianist tradition, legal disputes are seen as detrimental for the well-being of bilateral relations. The research would thus explore how a domestic shift in actors' programmatic beliefs brings to a different approach in the WTO DSM.

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