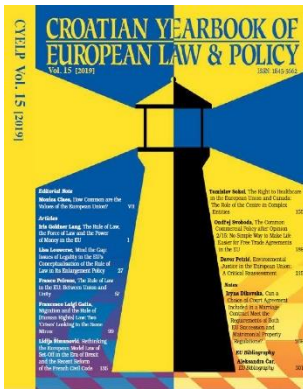




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Bruno De Witte

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Editorial note

Bruno De Witte*

HOW MUCH CRITICAL DISTANCE IN THE ACADEMIC STUDY OF EUROPEAN LAW?

What is, in the field of European Union law, the proper role of academic scholars? And how, specifically, do they and should they relate to the work of the practitioners of European law who work in the various institutions of the European Union: in the Court of Justice, the European Commission, the European Parliament, the Council of Ministers and the many other bodies and agencies? This kind of question is situated in a growing sub-field within the academic discipline of European Union law. That sub-field deals with self-reflection about the academic field itself. For instance, there are more and more contributions on the research methods to be used in dealing with EU law. There are also contributions by legal scholars on the sociology-and-politics of EU law academia. This essay fits into the latter category. It is about the sociology and politics of EU law as an academic discipline, but seen from one particular angle, namely the way in which EU law academic research is intertwined with the legal work accomplished by the European institutions.

Knowledge of European law is co-produced, on the one hand, by those whose profession is to produce knowledge (that is, scholars who are mostly based at universities) and, on the other hand, by those whose profession is to practise European law – by making, applying or interpreting European law, they also produce new knowledge. These practitioners work in law firms, in business and civil society organisations, and also, above all, in the institutions of the European Union. It is the latter group that interests me here: how does the co-production of EU law knowledge work between academics and legal practitioners based in the EU institutions?

I will look at the mutual engagement between these two groups of lawyers in two steps. The first step is to describe how the institutions act towards, and within, academia. The second step will be to look at how academics deal with the institutions. In both directions, we find that there are ‘close encounters’.

So, what are the main ways in which the EU institutions engage with the academic world, and especially with the little world of EU law scholarship?

* Emeritus Professor of European Union Law, Maastricht University, and part-time professor at the Robert Schuman Centre of the European University Institute, Florence (ORCID: 0000-0002-4034-5893). The text is based on a lecture given at Maastricht University on 7 October 2022, and the light footnoting reflects the oral nature of that lecture. DOI: 10.3935/cyelp.18.2022.477.

First, the EU institutions have always given, and are still giving, financial support to EU legal scholarship in many different ways:

- Through the funding of European Documentation Centres in many European universities, starting in the 1960s; these were made conditional upon the existence of teaching and research on European integration in the hosting institutions.
- Through the temporary funding of Jean Monnet chairs in European law, a scheme launched in 1989, and later complemented by the Jean Monnet Centres of Excellence.
- Through the funding of collective and individual research, both in the form of consultations requested by EU institutions on particular topics, and in the form of projects funded from the European Union budget, through the Horizon, Marie Curie, Jean Monnet and ERC grants.
- Through the funding of specialised academic institutions such as the College of Europe and the European University Institute, where the study of European law came to occupy a central place.
- And even through the funding of specialised journals, such as the European Equality Law Review.

It is clear that the European Union, especially the Commission, has actively and deliberately pursued the development of a specifically European dimension in the social sciences (law, political sciences, economics, history). This means that most EU law scholars, at one moment or another, have benefited from European Union funding for their research or teaching activities, and some of us, like myself, have directly or indirectly benefited from EU financial support throughout their whole career.

Next to financial support, a second way in which the institutions engage with EU law scholarship is when their members act like scholars themselves. Indeed, many practitioners of EU law are former academics, and some of them teach EU law courses at universities. Some of them publish textbooks on EU law, and articles in law journals. They give visiting lectures and speak at academic conferences. They sometimes sit on the editorial board of journals. This active presence of practitioners in the academic world of EU law has been described in the literature, most recently in an article by Päivi Leino-Sandberg.¹ There is an intellectual and social proximity between the world of scholarship and the world of legal practice, which is closer than in most other legal disciplines, certainly closer than in international law. The thin demarcation line is marked by the ritual sentence used by the practitioners from EU institutions when publishing their writings. They declare that the ‘views and opinions expressed in their contribution are personal and do not bind in any way the institution’ to which they belong. This ritual sentence is useful for the

¹ Päivi Leino-Sandberg, ‘Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?’ (2022) 1 *European Law Open* 231.

academic audience, as it signals the opposite of what it says: it signals that we should be aware that, however interesting and competent those views are, they still stem from practitioners who owe a sense of loyalty to the institution for which they work, and we should read their publication in that light.

A third way in which the EU institutions seek interaction with academics is by organising direct dialogue on a topic of common interest. My impression is that this happens more frequently than before. The European Commission, the European Parliament, and the European Central Bank regularly organise ‘policy dialogues’ or ‘workshops’, in which European policy initiatives are discussed by academics and members of independent think tanks – in other words, here the EU institution acts in listening mode.

In all these three modes of interaction, the European institutions have no problem in keeping a critical distance from what academics write or say. In fact, the European institutions do not depend on legal scholarship in the same way as they depend on scientific expert knowledge, for example on the question of climate change or energy prices. The main reason for this is that the European institutions have their own legal expertise in house. The Commission, Council, the European Parliament, and the European Central Bank have their own legal services, and many of their other officials who are not part of the legal service do have a legal training. And the Court of Justice is, of course, entirely in the hands of jurists, both among the judges and among the *référéndaires*. This diminishes the need to reach out for academic input to find solutions for their daily legal problems.

It does not mean that academic research is considered entirely superfluous. It may occasionally have a policy impact, and sometimes we see concrete evidence of this.

But, generally speaking, we do not know to what extent EU law practitioners take note of, or are being influenced by, academic research. Even if they do, the translation of such influence into the content of EU law depends on internal hierarchies and the political choices imposed through them. Notes by the legal services of the EU institutions do not refer, or only very exceptionally, to legal writing. We do, however, find numerous references to academic work in impact assessment reports that accompany new proposals for EU legislation. The Court of Justice never refers to legal writing in its judgments, but some Advocates General refer to academic writing, and many scholars are secretly proud when one of their writings happens to be cited in an Opinion of an Advocate General, especially when cited approvingly.

Let me now look at the other side of the divide, at the way in which academics engage with the work of the European institutions.

The reasons why legal scholars are seeking close encounters with the EU’s institutional life are diverse. The main, and most obvious, reason is

that EU law scholars based at universities also teach EU law. Teaching in law schools is supposed to reflect the state of the law, and the state of European law depends on what the European institutions do. So, EU law scholars must necessarily take an interest in the activities of the legal practitioners in the EU institutions in order for their teaching to be relevant. Through their teaching, they diffuse legal knowledge to new generations of jurists and that knowledge will then indirectly affect the work of the EU institutions when some of these students become practitioners in the EU institutions. This is what one could call the traditional virtuous circle of EU knowledge production. The institutions make, apply, and interpret EU law, and the academics systematise it and transmit it to their students so as to prepare them, in turn, for making and applying EU law. It explains why a lot of EU legal writing is in explanatory mode. As EU law developments are often confusing and complicated, academics see it as their task to present developments in a structured way. Even though such presentations may include some critical comments, their primary purpose is expository. There is nothing wrong with this. I have done a lot of this kind of writing myself, including not so long ago an article on the Covid recovery plan Next Generation EU (NGEU), where my principal task was to explain what the European Union institutions had actually been doing, legally speaking, in those hectic Covid-dominated months of 2020.²

However, not all of us need to do this kind of work, and certainly not all the time. The fact that we have to know what the EU institutions do in order to properly teach EU law does not mean that our own research must be in this explanatory mode. Many scholars, instead, approach the work of EU institutions in a critical mode or in legal change mode, in order to advocate improvements in European law.

Such advocacy scholarship, in EU law and other fields, has recently been the object of a debate that was sparked by the publication of articles by Komarek and Khaitan.³ I do not want to engage with that debate here, but my general view is that it is perfectly appropriate for legal scholars to advocate legal change. Jurists have always done this. This is reflected in the famous and age-old distinction between the *lex lata* and the *lex ferenda*. Traditionally, legal scholars would describe the law as it stood after some new judgment or new piece of legislation, and then, towards the end of their piece, they would either say that they were entirely happy with these developments, or they would present their own, better, legal view that should be adopted in the future: the *lex ferenda*. What has changed in recent times is that advocates of legal change are supposed not just to state their own preferred views but also to make a sustained argument

² Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635.

³ Jan Komarek, 'Freedom and Power of European Constitutional Scholarship' (2021) 17 European Constitutional Law Review 422; Tarunabh Khaitan, 'On Scholactivism in Constitutional Studies: Skeptical Thoughts' (2022) 20 International Journal of Constitutional Law 547.

why those views are sound, possibly by reference to insights from social science or political philosophy. And, of course, advocacy should never lead us to ignore or distort the legal reality. Advocating reform of the law presupposes a sharp understanding of what the current state of the law is, because otherwise the advocacy will lead to nothing.

However, many people consider that EU legal research, taken as a whole, is not sufficiently critical of the work of EU institutions. The close ties between EU legal scholars and legal practitioners, which I described before, is not something of the past but continues to exist today and is a source of concern for some observers. For example, in the article by Päivi Leino-Sandberg mentioned above, she writes that 'EU legal academia should maintain a greater distance from the institutions [...] and re-define its self-identity as a reflective and critical force, rather than one mainly focusing on legitimating EU action'.⁴

At this point, I think we have to admit that most EU law scholars do feel supportive of the European integration project, not for career reasons, and not because of pressure exerted on them, but because of their personal trajectory. Many European law academics work in other countries than their own and, if not, have spent years abroad. They may have grown up in multinational families, or created such a multinational family themselves. For them, their own life is connected to the European integration process, and to the new opportunities and experiences it has created and facilitated. But even if you have spent all your working life in, say, Spain or Croatia, the choice to become a scholar of European law is not an innocent one. It typically comes with a commitment to the project, to a sense that the European Union, as an organisation, is a very useful one, in that it helps all its member states to face common challenges, and that it helps – in some way – to preserve personal freedom and the welfare state.

In my own case, I realise that this basically supportive stance towards European integration has influenced my thinking and my writing. It led me to participate in research projects launched and funded by the European institutions. It also led me to support legal choices made in Brussels or in Luxembourg which others found legally problematic. For example, last year, I published the article in the *Common Market Law Review* on the Covid recovery plan that I mentioned before. It was entitled 'The European Union's Covid Recovery Plan: The Legal Engineering of an Economic Policy Shift'. As the title implied, I considered that the adoption of the recovery plan had been made possible by creative legal engineering from the side of the EU institutions and their legal services, but I argued that this legal creativity was acceptable and had been done for a good cause. More generally, in my view, the European Union needs to have the capacity to act in order to face numerous challenges that affect all its member states: the Treaty framework occasionally makes this

⁴ Leino-Sandberg (n 1) 256.

difficult, and some legal creativity is then not only acceptable but actually desirable. Others have criticised this position, by emphasising that our main task, as academics, is to critically control whether the Court and the EU's political institutions respect the constitutional framework which the member states established when negotiating the European treaties.⁵

I submit that one should not be apologetic about having sympathy for the European integration project and showing this in one's work. But this does not mean that we should not keep a critical distance from the work of the EU institutions and from the views expressed by legal practitioners in the academic domain. That distance comes most naturally when academics write about the kinds of things that practitioners do not write about and are nevertheless important for the construction of knowledge of EU law, such as theoretical reflections on the nature of the European legal order, or on the nature of the EU's economic constitution. But that critical distance should also be there when scholars engage in their main activity, which is to explain and comment on what is going on concretely in the field of EU law.

That critical assessment can be both internal and external. The internal one is by those who work on questions of EU legality by identifying the legal quality of the reasoning in a judgment or of a legal choice made by a European institution. The external one is by those who work on the question of EU legitimacy by examining the conditions under which rules of EU law emerge, or the impact that EU law rules have on social reality.

The *internal* critique is ubiquitous. All EU legal scholars practise it. In fact, I really wonder why it is still said that most EU legal scholars uncritically support the Court of Justice. If one looks at case comments in any of the EU legal journals, the majority of them are quite critical of the Court's reasoning. To simply reiterate what the Court decided, and to silently approve its reasoning, has become the exception and is, indeed, frowned upon in academic circles. Critical comments have become the rule, and have become a sign of scholarly distinction. This also applies to the work of the other EU institutions: when new EU legislation is proposed or adopted, scholarly analysis is, more often than not, accompanied by a critique of the legal logic or consistency of what was done.

External critique of the functioning of the EU institutions is less common, but it is a growing part of European legal scholarship. It looks at the conditions under which EU law rules or judgments emerge or at the impact that they have on social reality, both inside and outside Europe, or at their distributive consequences. That kind of work looks at European law in its broader political, economic, or cultural context, and often engages with interdisciplinary approaches. In many academic settings, this kind of work is nowadays encouraged. In some countries, it is

⁵ See, also with reference to the EU's Covid recovery plan, Päivi Leino-Sandberg and Mathias Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 433.

still frowned upon, because it is considered not to be the proper way of doing legal research. But this is not, I should add, because of any pressure from the side of the European institutions. Indeed, my feeling is that EU legal scholars are, these days, in almost all European countries, freer than ever in choosing the object and method of their research, of doing doctrinal work or law-in-context, in being supportive of what the EU institutions do, or not. European law today is a pluralist academic field, and that is a precious thing.



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