




CORE ANALYSIS

Enchantment and critical distance in EU legal scholarship: what role for institutional lawyers?

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Abstract

The legal experts working for the European Union (EU) institutions facilitate EU policy-making activities. But no less importantly, they also shape the evolution of EU law. They have an established presence in EU legal academia and exercise authority through epistemic means. In this role, they make an important contribution to defining the scope and meaning of EU law and the limits of institutional action. Previous research demonstrates that this contribution is largely perceived in positive terms; as ‘clarifying facts’. Yet, as Union officials, institutional legal advisers are bound by Staff Regulations, which prohibit them from acting against institutional positions. This article investigates the role of institutional legal advisers in EU legal academia, placing it in the broader context of the self-image of EU legal scholarship and its ‘enchantment’ with the EU as a political project. It finds that the borderline between institutional strategy and academic research often gets blurred. It argues that EU legal scholarship should maintain a critical distance from the institutions that it studies and re-define its self-identity as a reflective and critical rather than legitimating force. This would contribute to strengthening the EU by enabling democratic debate about its policy choices and their possible alternatives.

Keywords: EU law; EU institutions; legal expert; EU academia; academic freedom

1. Introduction

In EU policy-making activities, EU institutional legal advisers are everywhere.¹ They participate in the drafting of new legislation, supervise its application and defend it in Court litigation. Beyond this important daily routine, they also have a deeper, more structural role in shaping the evolution of EU law. They have an established presence in EU legal academia and they exercise authority in academia through epistemic means, such as authoring textbooks, teaching, writing articles and commentaries, and through participation in editorial work and peer assessment. In this process, they contribute to defining the scope and meaning of EU law and the limits of institutional action. In all these tasks, the institutional legal advisers are, as Union officials, required by Staff Regulations and their employment contract to promote the interests of the Union.² This creates a tension that is the focus of this article. It describes and examines the role of institutional lawyers in legal academia and places it

¹P Leino-Sandberg, *The Politics of Legal Expertise in EU Policy Making* (Cambridge University Press 2021).

²Regulation No 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ P45/1385, art 11.

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in the broader context of EU legal scholarship. While doing so, it also discusses the self-image and the (lack of) autonomy of EU legal scholarship.

Each EU institution employs legally trained experts in various functions. Lawyers serve as judges, advocates general and référendaires (legal secretaries) in the Court of Justice. Each political EU institution has its own legal service.³ The largest institutional legal service may today be that of the European Central Bank (ECB).⁴ Legal experts working in legal services facilitate the expression of political will and provide the legal form for it while also constraining institutional action and defending the institution before the courts. A legal service is not an independent final arbiter of law but serves its client, the institution. In addition, the institutions have many legally trained experts working as policy officials. In the Commission, for example, as many as 60–70 per cent of desk officers working on anti-trust files may be lawyers, while it would be closer to an equal split between lawyers and economists on files concerning concentrations or merger issues.⁵ In DG Trade, many officials working on World Trade Organization (WTO) issues are lawyers.⁶ In DG JUST (Justice and Consumers), consumer and criminal law matters, in particular, tend to be dealt with by lawyers.⁷ Lawyers also work in the Secretariat of the Council and the European Parliament (EP) Committees. A small part of all these lawyers is actively engaged in academia – but they constitute a powerful group that merits a closer look.

Earlier historical socio-legal studies have demonstrated the instrumental role of these lawyers in the EU integration process. These studies have also discussed the specificities of the field of EU law, which involves an ‘intense circulation of Euro-lawyers in between the various EU-implicated academic, bureaucratic, political and jurisdictional settings’.⁸ There has always been a frequent flow of individuals ‘from one sub-field to the other, with university professors becoming judges or members of the Commission or Council legal service and vice-versa, and many persons exercising both functions simultaneously’.⁹ Référendaires are often on leave from the European Commission and plan ‘to return or take up academic positions with their knowledge of EC law considerably enhanced by inside information’.¹⁰ The border between academic and non-academic profiles has always been porous in EU legal scholarship. It has been described as a ‘weak’ field where the political and the scholarly act as ‘linked ecologies’.¹¹ In their path-breaking study, Schepel and Wesseling (1997) argued that EU legal scholarship is a homogeneous field where the writings of judges and officials are barely distinguishable from those of academics, who see their role more in facilitating European integration rather than providing

³There are roughly 150 lawyers working in the Commission Legal Service, around 50 lawyers in the Council Legal Service (CLS) and some 70 in the Parliament Legal Service. See the Rules of Procedure of each EU institution: Council Decision of 1 December 2009 adopting the Council’s Rules of Procedure [2009] OJ L325/35; Rules of Procedure of the Commission (C(2000) 3614) [2000] OJ L308/ 26, last amended through 2011/737 Euratom: Commission Decision of 9 November 2011 amending its Rules of Procedure, [2011] OJ L296/58; Rules of Procedure of the European Parliament, 9th parliamentary term (January 2021), available at <https://www.europarl.europa.eu/doceo/document/lastrules/TOC_EN.html> accessed 11 January 2021.

⁴An interviewed legal adviser working for the ECB evaluated the staff of ECB Legal Service to be ‘certainly more than 100’ (Respondent 27), but the number has increased significantly since the interview took place.

⁵Interview with a former member of the Commission Legal Service (Respondent 44).

⁶Interview with a former deputy director-general of the Commission Legal Service and principal legal adviser to the Commission (Respondent 51).

⁷Interview with a member of the Commission Services (Respondent 55).

⁸A Vauchez, ‘The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)’ 2 (2) (2008) *International Political Sociology* 128, 139.

⁹B de Witte, ‘European Union Law: A Unified Academic Discipline?’ (2008) EUI Working Paper RCAS 2008/34, 3.

¹⁰S J Kenney, ‘Beyond Principals and Agents. Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the US Supreme Court’ 33 (5) (2000) *Comparative Political Studies*, 593, 595, 606.

¹¹See S L Mudge and A Vauchez, ‘Building Europe on a Weak Field: Law, Economics, and Scholarly Avatars in Transnational Politics’ 118 (2) (2012) *American Journal of Sociology* 449.

a critical counterbalance and debating its limits.¹² Following the way a similar phenomenon has been investigated in international law, I describe this commitment as ‘enchantment’ with the EU as a political project.¹³ Enchantment leads to the disappearance of critical distance, and requires disenchantment:

Either one adopts some external critique of that ‘overall scheme’—with the risk of losing one’s audience and having to justify that ‘external’ view against an a priori reluctant audience. Or using the ‘internal’ contradictions, gaps and inconsistencies in the overall scheme of things so as to seek to affect a change.¹⁴

This article attempts to both provide an external critique and initiate a debate about the role of institutional lawyers in EU scholarship. It first presents an external view of the place of EU institutional experts and institutions in EU legal academia (Section 2). It then discusses the constraints that the academic contributions of EU officials are subjected to and the relevance of these constraints for academic freedom, protected under Article 13 of the EU Charter of Fundamental Rights¹⁵ (Section 3). The article analyses the nature of contributions EU legal experts publish, the positions of responsibility institutional lawyers hold in academic outlets and how these outlets handle questions of academic integrity and potential conflicts of interest (Section 4). The article takes it as an axiom that the academia fulfils its societal function only if it remains independent of both political authorities and economic powers.¹⁶ The EU is no exception: it constitutes both a political authority and an economic power. Yet, EU law and lawyers often conceal its political nature,¹⁷ presenting EU legal expertise as objective knowledge involving no choice. Countering this tendency, I take it for granted that the interpretation of law involves considerable discretion – in general, and in particular in the context of the EU – and the use of political value judgements.¹⁸

The article provides a snapshot of EU legal scholarship today, building on existing research and my own empirical material. While limited, the latter points to new unexplored questions. I use 63 semi-structured and anonymised interviews conducted in the European Parliament, Commission, Council (including Member State administrations), the European Central Bank and the European Ombudsman’s Office from 2015 to 2020.¹⁹ The respondents include three former judges and a number of former *référéndaires* of the European Court of Justice (ECJ), but most of them

¹²H Schepel and R Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’ 3 (2) (1997) *European Law Journal* 165, 176. More recently, see R van Gestel and H-W Micklitz, ‘Why Methods Matter in European Legal Scholarship’ 20 (3) (2014) *European Law Journal* 292, 298; P Leino-Sandberg and M Ruffert, ‘Next Generation EU and its Constitutional Ramifications: A Critical Assessment’ 59 (2) (2022) *Common Market Law Review* 433.

¹³M Koskenniemi, ‘Enchanted by the Tools? An Enlightenment Perspective’ 35 (3) (2020) *American University International Law Review* 397, 400. Koskenniemi’s analysis builds on Max Weber’s original idea, of course, but the writings used in this article are those of Koskenniemi where he applies Weber’s idea in the context of international lawyers.

¹⁴*Ibid.*, 422.

¹⁵‘The arts and scientific research shall be free of constraint. Academic freedom shall be respected.’

¹⁶‘The university is an autonomous institution at the heart of societies [...] To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power.’ *Magna Charta Universitatum* (1988) initiated by the oldest European universities and signed by 904 universities from 88 countries, <www.magna-charta.org/resources/files/the-magna-charta/english> accessed 11 January 2022.

¹⁷Provoking Shapiro to define it as ‘constitutional law without politics’. See M Shapiro, ‘Comparative Law and Comparative Politics’ 53 (2) (1980) *Southern California Law Review*, 537, 538.

¹⁸On this, see E Korkea-aho and P Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022).

¹⁹The interviews have been anonymised and transcribed, and are saved with the metadata removed on a safe cloud server in accordance with the requirements of the data management policy of the University of Helsinki and the Academy of Finland. Due to constraints flowing from the requirement of respondent consent, the interview data cannot be made publicly available. The access to documents and information request data received from the EU institutions is on file with the author. The method has been explained in more detail in Leino-Sandberg (n 1) ch 1 and E Korkea-aho and P Leino, ‘Interviewing

stated that they are not able to speak about their work in the Court.²⁰ While quoted with reference to their current or most recent affiliation, most respondents have served more than one institution and their self-identity is that of a legally trained EU official. While their work is defined by its current institutional context, their professional identity often builds on many institutional (and academic) layers. As for pronouns, I have opted for ‘her’ and ‘she’ regardless of actual gender.

In addition, the data includes a number of access to documents requests and more general information requests sent to the institutions through the Europe Direct service and to the editors of leading EU journals in 2021. I received replies from several editors, of whom some requested anonymity; for this reason they are all but one (Daniel Sarmiento) quoted anonymously. Some journals did not reply when I enquired about their policy on academic integrity as regards EU officials. In addition, the study builds on quantitative and qualitative analysis of the contributions of institutional lawyers to the leading journals in the field from 2014 to 2021. Most of the data has been collected on various internet sites and is thus dependent on what I found and what publishers have chosen to make available. My hope is that the article initiates a debate on the systemic impact of the institutions on EU legal scholarship. Its purpose is not to single out individual contributors or their potential biases, or express doubts about their lacking expertise or ethics. I believe that the EU legal academia should maintain a greater distance from the institutions that form a key part of its subject matter, and re-define its self-identity as a reflective and critical force, rather than one mainly focusing on legitimating EU action.

2. The field of study

A. Euro-law associations as vehicles for legitimising institutional practice

EU legal advisers have always made a significant contribution to academic discussions on EU law. In the Commission, involvement in academia was seen as a conscious strategy, especially in the early days. The first Commission Legal Service Director, Michel Gaudet, is quoted as having given the following advice to the members of his service: ‘Tenez toujours dans votre tiroir un projet d’article.’²¹ At that time, many institutional lawyers pursued careers in law schools and had solid connections in the academic world, in particular with the Free University of Brussels where Commission officials were frequently lecturing.²² The Commission lawyers’ association with universities cemented the Legal Service’s place ‘as a cornerstone of the legal community’.²³ Members and référendaires of the ECJ have also been active contributors to this community, even though less is known about their role and institutional strategy.²⁴

A particular forum for these contacts were the Euro-law associations. The Commission made a great deal of effort to facilitate their work.²⁵ One example is the International Federation for European Law (FIDE), which brings together national associations and ‘like-minded individuals

Lawyers: A Critical Self- Reflection on Expert Interviews as a Method of EU Legal Research’ 12 (1) (2019) *European Journal of Legal Studies* 17.

²⁰I have spent some five and a half years as a référendaire with an Advocate General at the Court of Justice, though I am not able to discuss my work in this capacity’. Interview with a former member of the European Parliament’s Legal Service (Respondent 19).

²¹This can be found in a European University Institute interview with Mr Marchini-Camia. ‘Interview with Marchini-Camia, Antonio’, *The European Commission 1973–1986: History and Memories of an Institution*, EUI Historical Archives of the European Union, Interview No 211, recorded on 6 December 2011.

²²A Vauchez, ‘Brokering Europe Euro-Lawyers and the Making of a Transnational Polity’, *LSE Law, Society and Economy Working Papers* 19/2013, 47.

²³S Ramirez Perez, ‘The Legal Service’ in E Bussiere et al, (eds), *The European Commission 1973–1986: History and Memories of an Institution* (Publications Office of the European Union 2014) 115, 117–18.

²⁴See Kenney (n 10) 600.

²⁵K J Alter, ‘Jurist Social Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975)’ (Fall 2007) *EUSA Review* 6.

who were in positions to facilitate legal integration'.²⁶ Their activity is 'devoted to the study and development of the law and institutions of the European Community'²⁷ and aims 'to bring together lawyers who are interested in European Law and the laws of the European countries'.²⁸ This work is not characteristically academic in nature, but involves 'practitioners including academics, in-house lawyers for large corporations, members of European and national governmental institutions, and interested professionals'.²⁹ Their work had a clearly ideological dimension: FIDE participants could engage with institutional members and be 'encouraged and inspired to take their project into their offices, and thus to directly participate in the process of European legal integration'.³⁰ The FIDE website explains that the Federation has 'influenced the creation of a new academic field so-called European Law that would be most relevant in legitimising the practice of the Court of Justice of the EU'.³¹ FIDE members would engage in convincing national courts and legal elites to adopt European Law.³² The role of the Commission was strong:

the Commission could ask FIDE to author reports on various aspects of European law and in return the former would finance the basic costs of running FIDE. Throughout the 1960s, Gaudet would continue to advise FIDE and the national associations on what academic topics should be discussed, as well as on the general co-ordination of their activities.³³

The Commission was also active in providing funding for both conferences and a number of European law journals emerging from this context in the oldest Member States, including *Rivista di diritto europeo* (1961), *Common Market Law Review* (1964), *Cahiers de droit européen* (1965), *Revue trimestrielle de droit Européen* (1965) and *Europarecht* (1966).³⁴ No similar investments have been made later in the newer Member States.

Today, FIDE is by no means the only gathering for EU academics, nor is it the academically most ambitious venue for discussions concerning developments in EU law. It continues to bring together 'Friends of Institutions and Development of the European Union and its Law'.³⁵ The biannual FIDE Congress is a forum for discussing EU law developments, building on reports and 'responses of the rapporteur of EU institutions, who may be a top lawyer with the European Commission, the Council of the European Union, or the European Parliament'.³⁶ Institutions continue to be well represented in FIDE:

Traditionally, the president of the Court of Justice of the European Union is present at the FIDE Congress and also gives a key note speech. [...] Many judges and advocates-general

²⁶*Ibid.*, 7.

²⁷Statutes of the FIDE (International Federation for European Law) Art 1, <http://www.fide-europe.org/xms/files/ABOUT_FIDE/Statutes_of_FIDE_FIDE_V3.pdf> accessed 11 January 2022.

²⁸*Ibid.*, Art 4.

²⁹Alter (n 5) 6.

³⁰*Ibid.*, 6–7.

³¹<<https://www.fide-europe.org/>> accessed 11 January 2022.

³²M Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' 21 (3) (2012) *Contemporary European History* 375, 384; Antoine Vauchez, 'The Transnational Politics of Judicialisation: Van Gend en Loos and the Making of EU Polity' 16 (1) (2010) *European Law Journal* 1.

³³Rasmussen (n 32).

³⁴Alter (n 5) 6; Rebekka Byberg, 'The History of Common Market Law Review 1963–1993,' 23 (1–2) (2017) *European Law Journal* 45.

³⁵J Laffranque, 'FIDE—Uniting Great Minds of European Law: 50 years of the International Federation for European Law' (2011) *XVIII Juridica International* 173.

³⁶*Ibid.*, 177.

participate in the congresses as session chairmen and audience members, as well as speakers. The legal services of other institutions of the European Union (the European Parliament, Council of the EU, and European Commission), led by their director generals, are also represented.³⁷

B. EU legal scholarship today: the enchantment continues

The EU as a legal-political project continues to provide roles for judges, other institutional legal experts and academics, even if their hierarchical status in the joint mission may be different. For the academia, associating with those exercising institutional power offers an attractive avenue to influence.³⁸ Many EU legal scholars find the writings of EU officials instructive, for example when explaining institutional argumentation behind individual cases. Channels of privileged access are important when information about EU policy-making continues to be selective. This applies in particular to Court litigation and the handling of legal questions within the institutions.³⁹ Lacking knowledge may also lead to missing a touch of reality; therefore, it becomes tempting to think that ‘keeping scholarship only for scholars can end up being a self-defeating strategy (for scholarship)’.⁴⁰

Various interfaces between legal academia and the EU institutions exist today. Legal scholars participate in Commission working groups and act as service providers within the European law-making machinery under the guidance of the European Commission,⁴¹ to an extent that, in certain sectors, legal research seems to have transformed into an element in the law-making process where the Commission determines the output already in the tender.⁴² External legal experts act as ‘service providers “with a twist”’. While providing expertise, they also advance EU policy objectives especially when their expertise is used strategically to provide the Commission action with symbolic complementary legitimacy in national contexts.⁴³ Micklitz sees expert groups of this kind as an ‘exceptional symbiosis’ between scholars, practitioners and public officials of the European Commission’.⁴⁴ In areas such as competition or the regulated sectors, a relatively small community of legal experts interacts closely with the regulator. These areas typically demand high levels of specialisation, which gives institutional lawyers a privileged position.⁴⁵ The revolving door phenomenon in the area of competition policy has recently led the European Ombudsman to open an inquiry into the Commission’s policy in the area.⁴⁶

The impact of the institutions also takes the form of the power of the purse. The Commission, in particular, is in charge of extensive amounts of research funding, and its funding calls have a

³⁷*Ibid.*

³⁸In relation to international lawyers, see M Koskeniemi, ‘Between Commitment and Cynicism: Outline for a Theory of International Law as Practice’ in Martti Koskeniemi, *The Politics of International Law* (Hart 2011) 271, 291–2.

³⁹See Leino-Sandberg (n 1) ch 4.

⁴⁰This point was made by Daniel Sarmiento.

⁴¹H-W Micklitz, *Legal Professionalism and (Legal) Expertise in EU Lawmaking* in Korkea-aho and Leino-Sandberg (eds) (n 18).

⁴²See H-W Micklitz and A A Villanueva, ‘REFIT or Rethink – The Politics of EU Research – A Grand Misunderstanding?’ in Esther Van Schagen and Stephen Weatherill (eds), *Better Regulation in EU Contract Law: The Fitness Check and the New Deal for Consumers* (Hart 2019), 37–60; H-W Micklitz, ‘The Intellectual Community of Consumer Law and Policy in the EU’ in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart 2021).

⁴³S Jacquot, ‘Small Decisions? The European Commission and the Transformation of the Role of Legal Expert Groups: The Case of Gender Equality and Non-Discrimination’ 58 (3) (2020) *Journal of Common Market Studies* 1.

⁴⁴Micklitz (n 42) 92.

⁴⁵This point was made by Daniel Sarmiento.

⁴⁶‘How the European Commission manages “revolving doors” moves of its staff members’, CAS OI/1/2021/KR, <<https://www.ombudsman.europa.eu/en/case/en/58428>> accessed 11 January 2022.

direct impact on research agendas. Various genuinely European universities⁴⁷ are known to receive significant funding from the EU – even though exact amounts are difficult to trace.⁴⁸ The other EU institutions also influence research and interact with researchers. The European Parliament’s Research Service ‘provides a comprehensive range of products and services, backed by specialist internal expertise and knowledge sources in all policy fields, so empowering Members and committees through knowledge and contributing to the Parliament’s effectiveness and influence as an institution’.⁴⁹ Some of these studies later emerge as academic articles.⁵⁰ One should be careful not to draw simplistic conclusions, but it is clear that financial interests act as a strong incentive for self-selection and self-adaptation. My own experience from these tender processes⁵¹ is similar to the finding of Micklitz quoted above: expertise is sought from experts whose research agenda is known to support institutional positions, and the output is meticulously guided through all stages of the process.

The most active institution in this regard is, however, the ECB. Its Legal Research Programme aims ‘to foster analysis of areas of law relevant to the ECB’s statutory tasks, and to establish closer contacts with scholars’.⁵² The 2022 Call is directed to researchers at all levels of seniority, who are offered scholarships of €5,000 for conducting legal research and publishing an academic article on one of the topics pre-selected by the ECB.⁵³

The selected Scholars will be invited to a seminar to be held at the ECB in spring 2022, to present their proposal against the background of their previous research in the relevant field. This seminar is intended to establish a productive relationship between the ECB’s Legal Services and the Scholars, and to provide Scholars with constructive feedback on their research subject from practitioners in the field.

The scholars need to submit a draft of their paper to the ECB for review and are ‘expected to take the remarks and suggestions of the ECB’s review into consideration’, following which they are ‘expected to seek publication of the research paper in a well-recognised, internationally renowned

⁴⁷These include the College of Europe, the European University Institute, the European Institute of Public Administration, the Academy of European Law (ERA) and the Global Campus of Human Rights organising the European Master’s in Human Rights and Democratisation.

⁴⁸For example, EIPA states on its website that ‘We are supported by the EU Member States and the European Commission.’ <<https://www.eipa.eu/about-us/>> accessed 11 January 2022. ERA and EUI course programmes mention that they have received funding from the Erasmus+ programme, and ERA also mentions on its website that it is ‘supported by the European Union’. The EMA in Human Rights and Democratisation website mentions that it is ‘Co-funded by the European Union’.

⁴⁹<<https://www.europarl.europa.eu/at-your-service/en/stay-informed/research-and-analysis>> accessed 11 January 2022.

⁵⁰See, eg, M-L Sánchez-Barrueco, ‘At the Crossroads of a Frozen Conflict: Political Oversight of the Council’s Administrative Budget by the European Parliament’ 58 (2) (2021) *Common Market Law Review* 333, which states that it is based on previous research by the same author with Stephenson, ‘Council discharge by the European Parliament – Finding solutions’ written for the European Parliament in 2017.

⁵¹Studies I have conducted include Päivi Leino-Sandberg, ‘Enforcing citizens’ right to good administration: time for action’ (2013), included in: *Law of Administrative Procedure of the European Union European Added Value Assessment*, available at <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/eav_lawofadminprocedure_EAV_LawofAdminprocedure_EN.pdf>; Deirdre Curtin and Päivi Leino-Sandberg, ‘Openness, Transparency and the Right of Access to Documents in the EU: In-depth analysis’ (2016) European Parliament, available at <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA\(2016\)556973_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf)>; Päivi Leino-Sandberg and Fernando Losada, ‘How to Make the European Semester More Effective and Legitimate?’ (2020), available at <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_IDA\(2020\)651365](https://www.europarl.europa.eu/thinktank/en/document/IPOL_IDA(2020)651365)>. In the context of the final one, a great deal of suggestions were made to align the report with the Parliament’s institutional position. Recently, I have rejected one invitation due to concerns about too stringent control. All sites accessed 11 January 2022.

⁵²‘Legal Research Programme 2021’, <https://www.ecb.europa.eu/pub/conferences/html/20210106_Legal_research_programme_2021.en.html> accessed 11 January 2022.

⁵³‘Legal Research Programme 2022’ <https://www.ecb.europa.eu/pub/economic-research/programmes/legal_research/html/index.en.html> accessed 8 February 2022.

and peer-reviewed academic journal'. Articles originating in this programme have been published in leading journals.⁵⁴ In addition, the ECB's annual Legal Conference⁵⁵ is the largest regularly organised conference on Economic and Monetary Union (EMU) law and carefully managed by the ECB Legal Service, which is also in charge of editing its published outcome.⁵⁶

The closely integrated nature of EU legal scholarship is not only the result of an institutional outreach and policy but also an intellectual orientation ('enchantment') among EU legal scholars and their heavy reliance on institutional knowledge and strong identification with the project of European integration both intellectually and socially.⁵⁷ The result has been an 'academic discipline which is institutionally well-integrated and which possesses a common sense of purpose'.⁵⁸ As Micklitz argues, this 'epistemic community has been driven by the enthusiasm and the strong belief that European integration is 'good' for the citizens and the European people'.⁵⁹ Working for 'Europe' means participating in a culture, exchanging 'preferences and inclinations shared with colleagues and institutions who identify themselves with that "box"'.⁶⁰ Using such vocabulary is not an objective exercise but

is likely to highlight some solutions, some actors, some interests [...] while pushing other aspects into the background, preferring certain ways to deal with it, at the cost of other ways. What is being put forward as significant and what gets pushed into darkness is determined by the choice of the language through which the matter is looked at, and which provides the basis for the application of a particular kind of law and legal expertise.⁶¹

National lawyers not sharing this culture and language often perceive this group as ideologists⁶² – and the sentiment tends to be reciprocated. In observing that a critical scholarly stance towards the development of the EU is rare in the academia, Shaw suggests that 'the early missionaries unwittingly created a monster which now dominates its own environment'.⁶³

C. Why EU legal scholarship needs further study

My interviews suggest that the self-identity of institutional lawyers may have shifted from an ideological towards a more technocratic positioning over the years. However, the mindset of many EU legal scholars may remain largely unchanged: they see themselves on a joint mission with the institutions. Some recent research has pointed out the strong reliance of EU legal scholarship on ECJ case law,⁶⁴ arguing that there is overall a general lack of scholarship that would add

⁵⁴See, eg, S Grünewald et al, 'Digital Euro and ECB powers' 58 (4) (2021) *Common Market Law Review* 1029–56 states that it 'draws on a study submitted by the three co-authors to the European Central Bank (ECB) under its Legal Research Programme 2020 (topic 2)' but that 'Any views expressed are those of the authors and do not necessarily represent the views of the ECB or the Eurosystem'.

⁵⁵The Legal Conferences are a mix of institutional and academic speakers. For the most recent one see <https://www.ecb.europa.eu/pub/conferences/html/20211125_4th_ECB_legal_conference.en.html> accessed 11 January 2022. I was invited to speak at the event in 2019.

⁵⁶The proceedings are later published by the ECB as a book. See, eg, ESCB Legal Conference 2020, available at <<https://www.ecb.europa.eu/pub/pdf/other/ecb.escblegalconferenceproceedings2020~4c11842967.en.pdf?b70332cb34a349c717ca2d50cf1dc521>> accessed 11 January 2022.

⁵⁷Schepel and Wesseling (n 12) 176.

⁵⁸*Ibid.*

⁵⁹Micklitz (n 41); Micklitz (n 42) 65.

⁶⁰See, more generally, M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' 1 (1) (2007) *European Journal of Legal Studies* 1.

⁶¹M Koskenniemi, 'The Politics of International Law – 20 Years Later' 20 (1) (2009) *European Journal of International Law* 7, 11.

⁶²I owe this point to H Micklitz.

⁶³J Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' 16 (2) (1996) *Oxford Journal of Legal Studies*, 231, 235.

⁶⁴Van Gestel and Micklitz (n 12) 298.

new ideas, perspectives, theories and methods to what EU institutions, EU policy-makers and legal practitioners think of EU law.⁶⁵ Micklitz asks:

What exactly is the relationship between law, legal research and European integration? [...] Why is European legal research so overwhelmingly policy driven? Why is there no ‘halt’, no moment of rethinking, just moving and moving towards an ever-closer Union without knowing what that could, or perhaps should, mean? Why are there so many implicit assumptions in scholarly legal publications [...]? Is it not an important academic responsibility for legal scholars studying EU law to test these implicit assumptions instead of taking them for granted?⁶⁶

I find these questions pertinent. The specific commitment of EU legal scholars to their ‘project’ has received little attention in the EU context, but it has been critically studied in relation to international lawyers.⁶⁷ Koskenniemi describes this phenomenon as being ‘enchanted’, leading to readiness to support the project ‘independently of any clear view of how what it does relates to its ends, out of the sense that we cannot live without it’:⁶⁸

To be enchanted by a tool is to believe that there really are no other relevant problems than technical ones. The course is cast, the objectives are set, and the only question is how to reach them efficiently and without friction.⁶⁹

Due to enchantment, the participants lack critical distance, but also interest in the empirical consequences of their project: the expansion of institutions and instruments is ‘good’ and an objective in itself. This frame of ‘enchantment’ can be applied to the professional community of EU lawyers, for whom EU law acts as a ‘professional technique for the management of values, purposes, ideals’ that is frequently used as a pointer to good purposes.⁷⁰ In my earlier work I have examined the agenda of EU institutions and their lawyers and concluded that it is not particularly democratic nor inclusive.⁷¹ Rather, it appears technocratic and focused on navigating the Union efficiently through its frequent crises with dry feet and minimal external interference, all the while seeking to deepen the control by the institutions. Schepel describes how

Leur ethos est profondément pragmatique, ouvertement hostile aux idées grandioses, et soutenu par une conception clairement instrumentale du droit. Leur engagement collectif en faveur de l’intégration estompe leurs divergences politiques et leurs controverses techniques.⁷²

Like every person, EU lawyers have preferences, biases, and backgrounds, and come with ‘little backpacks of entitlements, vulnerabilities and capacities’.⁷³ A predisposition towards more integration is just as political and ideological as one towards less integration. When the legal limits of EU action are academically debated, it is important that some degree of critical self-reflection

⁶⁵*Ibid.*, 300.

⁶⁶H-W Micklitz, ‘A European Advantage in Legal Scholarship?’ in Rob van Gestel et al (eds) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2016) 262, 276.

⁶⁷Koskenniemi (n 38) 273.

⁶⁸Koskenniemi (n 13) 400.

⁶⁹*Ibid.*, 420.

⁷⁰Koskenniemi (n 60) 16–17.

⁷¹See Leino-Sandberg (n 1).

⁷²H Schepel, ‘Professorenrecht? Le champ du droit privé européen’ (2005/1) *Critique internationale* (No 26) 147, 152.

⁷³See D Kennedy, ‘It’s Not About Facts. It’s About Politics’ (First 100 Days, 11 May 2017) <<http://first100days.stsprogram.org/2017/05/11/its-not-about-facts-its-about-politics/>> accessed 11 January 2021.

survives,⁷⁴ including the willingness to ‘test implicit assumptions instead of taking them for granted’ that Micklitz called for. There are many examples of academic lawyers bending over backwards to defend ‘indefensible’ EU institutional action.⁷⁵ Such submissions typically downplay the effects and long-term consequences of such actions.⁷⁶ Yet, every proposal promotes certain objectives at the expense of others and involves political choice. In assessing them, it is important to employ expertise that originates from multiple sources, to make priorities and choices visible, to embrace critical discussion and to provide reflective knowledge on the development and effects of EU law.

The relative dominance of ‘institutional’ scholarship may not have fundamentally changed since it was first studied in 1997, which has not helped in addressing some of the EU’s most persistent problems. Its political processes remain fragile, opaque and often escape accountability. The law that forms its basis is particularly open to broad teleological interpretations, the development of which primarily fall on the institutional lawyers. The Court controls these interpretations only to a very limited extent⁷⁷ – and may actually see its role more as assisting in the process. Today’s EU shows ‘more profound and long-term signs of enduring challenges and even dysfunction and malaise’, such as its ‘persistent, chronic, troubling democracy deficit, which cannot be talked away’.⁷⁸ Legal scholars could play an important role in tackling these concerns if they saw their role in providing a basis for critical, democratic debate reaching beyond acting as a legitimating force for institutional action following the FIDE tradition described above.

One reason for why critical scholarship has struggled to emerge is the close relationship and overlapping roles of EU legal scholars and institutional lawyers. In democratic society, roles matter: A legal adviser, like a judge, is ‘expected to apply, and thus not fundamentally question, a valid legal rule at hand’. This perspective is fundamentally different from that of a scholar, whose professional task is ‘to take a critical, evaluative perspective on their legal system. [...] Scholars are expected to rethink the law: to identify rules as dysfunctional and to suggest alternative solutions.’⁷⁹ In a democratic society, the freedom of academia is specifically protected to ensure that academics are able to debate and analyse acts of authorities without fearing consequences. According to a recent Commission staff document, it ‘encompasses the right to freely define research questions, choose and develop theories, gather empirical material and employ academic research methods, to question accepted wisdom and bring forward new ideas’.⁸⁰ Protecting this freedom is deemed to be in the general interest to enable democratic scrutiny of government actions based on an analysis that is not produced by the government itself. Yet, as the next section makes visible, this is a function that EU officials cannot fully engage with.

⁷⁴P Leino-Sandberg, ‘Transparency as a Critical Research Agenda: Engaging with the EU Institutions on Access to Documents’ in Maarten Hillebrandt et al (eds), *(In)visible European Government: Critical Approaches to Transparency as an Ideal and a Practice* (Routledge forthcoming).

⁷⁵I owe this point to one of the referees. I have analysed this tendency in more detail in Leino-Sandberg and M Ruffert (n 12) 433.

⁷⁶See also M Ruffert, ‘The European Debt Crisis and European Union Law’ 48 (6) (2011) *Common Market Law Review* 1777, 1804–5.

⁷⁷See Leino-Sandberg, (n 1) ch 8.

⁷⁸JHH Weiler ‘Europe in Crisis—On “Political Messianism”, “Legitimacy” and the “Rule of Law”’ (2012) *Singapore Journal of Legal Studies* 251, available at <<https://www.jstor.org/stable/24872212?seq=1>>.

⁷⁹N Jansen, ‘Making Doctrine for European Law’ in Rob van Gestel et al (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 229, 243.

⁸⁰European Commission, Tackling R&I Foreign Interference. Staff Working Document (2022) 7, available at <<https://data.europa.eu/doi/10.2777/513746>> accessed 20 January 2022.

3. Conflicting role demands: institutional legal experts as EU legal scholars

As EU officials, institutional legal experts are subject to the general rights and obligations provided for in the EU Staff Regulations, according to which:

An official shall carry out his duties and conduct himself solely with the interests of the Union in mind. [...] He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Union.⁸¹

As EU civil servants, institutional legal experts are bound by the EU Staff Regulations, which contain a number of provisions regarding officials' involvement in external activities, such as the academia.⁸² Under Article 17 a, '[a]n official has the right to freedom of expression, with due respect to the principles of loyalty and impartiality'. An official with publication plans 'whether alone or with others, [on] any matter dealing with the work of the Union shall inform the Appointing Authority in advance'. The latter then has 30 working days to consider whether the 'matter is liable seriously to prejudice the legitimate interests of the Union', and object to publication.

The Court has interpreted these provisions several times. The lead case is the *Connolly* case, which involved a Commission official working in DG ECFIN⁸³ who, during a brief leave of absence, published a highly critical book entitled *The Rotten Heart of Europe - The Dirty War for Europe's Money*, without prior authorisation. The book was followed by broad coverage in *The Times* newspaper.⁸⁴ The Court stressed that EU officials have a duty of loyalty towards the institution that they serve,⁸⁵ which reaches beyond their specific duties to the broader relationship between the official and the institution. However, the Court has also emphasised that restrictions on publication are to be interpreted restrictively, and apply only where there is a risk of serious harm to Union interests.⁸⁶ This requires a careful balancing of the freedom that an official has to express, orally or in writing, opinions that dissent from or conflict with those held by the employing institution, and the gravity of the potential prejudice to Union interests.⁸⁷ Permission could only be denied on the basis of specific, objective evidence, and is not a procedure of unlimited censure.⁸⁸

The Court returned to the issue in the case of *Cwik*, when another Commission official was invited to give a conference presentation. He applied for permission and provided an outline and a detailed plan of his lecture. He was granted permission, but was told '[t]his doesn't have much to do with economics. More classic presentation please. Pay attention to the risks of "fine-tuning"'.⁸⁹ When the lecture was later to be published, Cwik was told by his superior that its substance was too critical and thus not publishable since 'it put forward a point of view which is not that of the Commission, even though the latter has not adopted an official policy on the matter'. The superior stressed that 'outside the institution, it would be better to present a united front'.⁹⁰ This case is

⁸¹Regulation No 31 (EEC) (n 2), art 11(1). See, eg, Case T-370/15 *CJ v European Centre for Disease Prevention and Control* (ECDC), EU:T:2016:599, which concerned a member of the ECDC's legal service and referred to an 'irreparable breakdown in the relationship of trust' (para 90).

⁸²Regulation No 31 (EEC), 11 (EAEC) (n 2) art 17(1).

⁸³Head of Unit 3, 'EMS: National and Community Monetary Policies', in Directorate D, 'Monetary Affairs', in the Directorate-General for Economic and Financial Affairs.

⁸⁴In Case C-273/99 P *Bernard Connolly v the Commission*, para 48.

⁸⁵See also N/Commission, point 129, confirmé sur pourvoi par l'ordonnance de la Cour du 16 juillet 1998, N/Commission, C-252/97 P, Rec p I-4874.

⁸⁶C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paras 43, 53, 57. See also Joined Cases T-34/96 and T-163/96, *Bernard Connolly v Commission* [1999] ECR-SC I-A-87; ECR II- 463, para 152.

⁸⁷Case C-274/99 P *Connolly v Commission*, paras 43 and 57.

⁸⁸Joined Cases T-34/96 and T-163/96 *Bernard Connolly v the Commission* (n 86) para 152.

⁸⁹Quoted in C-340/00 P *Commission v Cwik*, para 3 (para 6 of the ruling under appeal).

⁹⁰*Ibid.* (para 15 of the ruling under appeal).

probably illustrative of how the matter generally would be solved within the Commission. However, exceptionally, Cwik appealed the refusal decision and won. The Court of First Instance stressed that:

In a democratic society founded on respect for fundamental rights, the fact that an official publicly expresses a point of view different from that of the institution for which he works cannot, in itself, be regarded as liable to prejudice the interests of the Communities. Clearly, the purpose of freedom of expression is precisely to enable expression to be given to opinions which differ from those held at an official level. To accept that freedom of expression could be restricted merely because the opinion at issue differs from the position adopted by the institutions would be to negate the purpose of that fundamental right [. . .] in as much as it has not been established that making that difference public would be liable, in the circumstances of the present case, to prejudice the interests of the Communities.⁹¹

Since the audience of the publication consisted of specialists, the Court did not accept that the publication could restrict the Commission's room for manoeuvre, and pointed out that the applicant had received permission to give the lecture.⁹²

Some institutions have specific rules on academic functions, which also apply to former officials. The current and former members of the Court are bound by the Court's Code of Conduct, which limits their possibilities to engage in external activities.⁹³ Court 'Members shall comply with their duty of loyalty towards the Institution' and 'refrain from making any statement outside the Institution which may harm its reputation'.⁹⁴ A process of prior authorisation also applies to Court Members, who

may be authorised to engage in external activities that are closely related to the performance of their duties. In that context: [. . .]—they may be authorised to participate in activities of European interest that relate, inter alia, to the dissemination of EU law and to dialogue with national and international courts or tribunals. In this respect, Members may be authorised to participate in teaching activities, conferences, seminars or symposia.⁹⁵

A similar Code of Conduct exists for *référéndaires*, who need to ask for authorisation for any external activities (including teaching activities, conference participation and publications) from the President of the Court, who also approves the main substance of the contribution.⁹⁶

The Commission's decision on outside activities and assignments specifies the cases where permission shall be refused, including when

(c) the activity in question is incompatible with the interests of the institution, for example because it: (i) is detrimental to the reputation of the institution; and/or (ii) damages public trust in the neutrality and objectivity of the institution; and/or (iii) gives rise to an actual conflict of interest.⁹⁷

⁹¹*Ibid.*, paras 57–8, 60.

⁹²The ECJ upheld the interpretation on appeal.

⁹³Code of Conduct for Members and Former Members of the Court of Justice of the European Union [2021] OJ C397/01.

⁹⁴Art 6.

⁹⁵Art 8(3).

⁹⁶Décision du 12 novembre 2018 portant adoption de règles de bonne conduite des *référéndaires*, received from the Court through an access to documents request.

⁹⁷Commission Decision of 29 June 2018 on outside activities and assignments and on occupational activities after leaving the Service, Brussels, 29 June 2018, C(2018) 4048 final, art 5.

The Commission's Guide on Ethics for Legal Service Staff further explains that

the right to freedom of expression is limited (i) by your duty to comply with the principles of loyalty and impartiality, (ii) by the prohibition of unauthorized disclosure of information received in the line of duty and (iii) by your obligation to refrain from any action or behaviour that might reflect adversely upon your position. [...] This requires paying due respect to the interests and position of the Commission and to its relationship with other institutions and Member States. Given the nature of our tasks, particular respect is due to the EU Courts and other courts and tribunals before which the Legal Service represents the Commission or the Union.⁹⁸

The Guide also includes more detailed limitations of freedom of expression:

[A] well-known golden rule is never to publish a text (article, blog, Twitter, Instagram, Facebook, book or other equivalent media) dealing specifically with a case or a file you have personally dealt with, e.g. as agent in a case. Moreover, when annotating a case, it is a matter of basic etiquette to avoid derogatory expressions and to word carefully comments that may be seen as critical towards the Court, a Member State or another institution – the right to freedom of expression is limited by the duty of reserve owed by all officials.⁹⁹

The Council seems to have no such policy, since its legal advisers do sometimes provide critical remarks, in particular on cases where they acted as agents for the Council and lost.¹⁰⁰ Whether this represents an indication of personal disappointment after a lost high-profile case or forms part of an institutional strategy is impossible to know,¹⁰¹ but it is known that the submissions have been published only following the process of pre-approval stipulated in the Staff Regulations.

Disclaimers are generally included in publications by EU officials to indicate that the positions expressed are personal to the author and do not represent the views of the institution.¹⁰² The Commission Guide on Ethics for Legal Service Staff specifies that:

In all cases, when expressing your views in public speeches, presentations, social media etc., unless otherwise authorised, you should make it clear that you are expressing purely personal opinions which do not necessarily reflect the views of the Commission and/or the Legal Service. You should also be aware of the need to use a suitable manner of expression and to avoid criticism of the Court and other union institutions.¹⁰³

⁹⁸Commission, Guide on Ethics for Legal Service Staff: A Complementary Guide to the Practical Guide to Staff Ethics and Conduct (issued by the DG HR, Unit 'Ethics, Rights and Obligations') (June 2018), ref Ares(2018)4060188, 1 August 2018 (on file with author) 13.

⁹⁹*Ibid.*

¹⁰⁰Driessen argues that the Court's interpretation rests on a 'rather shallow legislative foundation' in B Driessen, *Transparency in EU Institutional Law: A Practitioner's Handbook* (Alphen aan den Rijn: Kluwer Law International, 2012) 103–4, and that 'the General Court erred beyond repair' in B Driessen 'How Elastic is Article 263 TFEU? Some Comments from a Sore Winner' in J Czuczai and F. Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice: Liber Amicorum in Honour of Ricardo Gosalbo Bono* (Brill 2017) 166, 173.

¹⁰¹For a recent example, see Emanuele Rebasti, 'Return to De Capitani: The EU Legislative Process between Transparency and Effectiveness' (2021) 9(1) *Politics and Governance* 296. The paper includes the following disclaimer: 'The author was agent for the Council in the De Capitani case. The views expressed are solely those of the writer and may not be regarded as stating an official position of the Council of the EU.'

¹⁰²See, eg, T Blanchet, 'From Workers to Citizens: The Evolution of European Citizenship' 7 (2) (2016) *New Journal of European Criminal Law* 142, 142; H Kraemer, 'The European Union Civil Service Tribunal: A New Community Court Examined after Four Years of Operation' 46 (6) (2009) *Common Market Law Review* 1873.

¹⁰³Commission, Guide on Ethics for Legal Service Staff (n 98).

The Court has taken such disclaimers as one factor to be taken into account when assessing whether positions expressed publicly by officials can be ‘reasonably supposed’ to have been taken by an official with the authority of his office.¹⁰⁴ Of relevance is also whether the ‘official has authority generally within the sector in question’.¹⁰⁵ Based on my interviews, it is generally accepted that institutional employees are not entitled to ‘say what we like in general. Of course we cannot – we have to respect confidentiality.’¹⁰⁶

Confidentiality of internal legal analyses is a particularly strong feature of the mindset within the institutions.¹⁰⁷ This also reaches to the prospect of academic scrutiny of institutional legal opinions. Most of the work of the legal services remains confidential to prevent ‘undue pressure’ – in other words, discussion of the legal positions taken in the institutions in particular while the matter is still pending or while court appeal is deemed possible. It is the conviction of the institutions and their legal advisers that legal advice has to remain confidential to remain ‘objective’. The legal services seem particularly hostile to the prospect of ‘external pressure’ through academic debate. This matter has been recently witnessed in the *Pech* case,¹⁰⁸ which is a rare example of a situation where the Council’s internal but leaked legal analysis has provoked heated criticism among EU legal scholars.¹⁰⁹ The General Court remained unconvinced about the Council’s arguments on how disclosure of legal analysis ‘could give rise to external interference’, stressing the democratic context of the case.¹¹⁰ Yet, the Council continues to worry that public debate of the legal advice it receives might create ‘a reasonable risk that the decision to be taken would be substantially affected as a result of that pressure’.¹¹¹

The *Pech* case illustrates how, for the institutions, openness towards academia is more about transmitting institutional views and defending them in academic debate rather than opening them up to the possibility of critical discussion. My interviews suggest that legal advisers are often less worried about the institutions approving acts that are incompatible with the Treaties than they are about these weaknesses being publicly disclosed and debated.¹¹² In democratic society there is of course always a risk that policy-making becomes a target of twitter offensives or collective petitions, but that should not be an excuse for the institutions not to open themselves up for academic inquiry and critical debate conducted in a scholarly way. It is easy fall in the trap of treating the academia as negative noise that is harmful to decision-making – a framing that seems dangerous in democratic society, and easily appears as a wish to defend institutional monopoly to establish what the (supposedly apolitical) law dictates in any given case. EU law is nearly always flexible, and often enables many readings. I believe that EU policies would be strengthened if institutional analyses were complemented by other perspectives, offering ‘reliable analyses of the effects our tools have in the world, to what extent they realize the purposes we attribute to them’.¹¹³ As the Court has repeatedly established, openness allows:

¹⁰⁴Case C-470/03 *AGM-COS.MET Srl v Suomen valtio*, Tarmo Lehtinen, para 57.

¹⁰⁵*Ibid.*

¹⁰⁶Interview with a member of the Council Legal Service (Respondent 8).

¹⁰⁷Leino-Sandberg (n 1) ch 4.

¹⁰⁸Case T-252/19 *Laurent Pech v the Council*, EU:T:2021:203.

¹⁰⁹See, eg, KL Scheppele et al, ‘Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget related rule of law mechanism’, *Verfassungsblog*, 12 November 2018, <<https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>> accessed 11 January 2022.

¹¹⁰Case T-252/19 *Laurent Pech and Kingdom of Sweden v Council of the European Union* EU:T:2021:203, paras 45, 92. The Council has appealed the ruling.

¹¹¹See also the reply adopted by the Council on 6 August 2021 to my own confirmatory application 29/c/02/21, pursuant to art 7(2) of Regulation (EC) No 1049/2001, for public access to document 8721/21, paras 25–6. I have appealed the decision; see Case T-683/21, *Leino-Sandberg v Council*, available at <<https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=fr&num=T-683/21&jur=T>>.

¹¹²See Leino-Sandberg (n 1) ch 4.

¹¹³Koskenniemi (n 13) 423.

divergences between various points of view to be openly debated, contributes to reducing doubts in the minds of citizens, not only as regards the lawfulness of an isolated legislative measure but also as regards the legitimacy of the legislative process as a whole.¹¹⁴

Such a setting of course presumes that divergent points of view and alternative perspectives exist and are actively brought to the fore by the academic community. This is of a particular importance keeping in mind that the institutional lens is often narrow and provides few alternatives. Yet, ‘the institution is supposed to defend the “general interest”, a situation that can lead a lawyer to believe that his or her institution’s position is the only decent view around’.¹¹⁵ The institutional interest and the general interest do not always coincide. While the focus of the institutional lawyers is on defending the former, the academia should have a broader perspective. However, as the following section will demonstrate, even in academic outlets the institutional perspective is strongly represented. A clear difference is seldom made between the institutional and the scholarly agenda, which continue to be closely integrated in today’s EU legal scholarship.

4. How do institutional lawyers contribute to EU legal scholarship today?

A. ‘Establishing the facts’

Despite the institutional constraints described in the previous section, institutional lawyers make a significant – and undeniably much appreciated – contribution to academia. Schepel and Wesseling’s study demonstrated that a strikingly large part of the euro-law doctrine in the years from 1970 to 1995 was produced by non-academics (43.5 per cent) – primarily Commission officials (17 per cent), judges (11 per cent) and practicing lawyers (8 per cent). They report that during this period of time, only 8 of the 32 most prolific writers on European law had never worked directly for a European institution.¹¹⁶ This section gives an updated look into the contribution of institutional lawyers to academic EU legal scholarship in recent years through journals, editorial processes, teaching and textbooks.

Many institutional legal experts have an academic background, as well as a continuing personal interest in contributing to academic deliberations. They may consider academic discourses an additional channel for influence.¹¹⁷ Commission legal advisers indicate that participation in academia is no longer required by superiors and it has become increasingly difficult to find time for it.¹¹⁸ The external outreach of Council legal advisers is more limited even if they can speak at conferences and other academic events.¹¹⁹ One Council lawyer recalls

this big conference organised by the Court or something, and all the different institutions’ lawyers were going there except the Council’s. And this was kind of an eye-opener for me [...] there seems to be a lot of mingling, contacts, academic involvement with the others but we are in our little world here.¹²⁰

In particular, Commission lawyers continue to significantly influence doctrine through their academic engagements and affiliations with universities. Apart from ‘the quality and versatility of its

¹¹⁴Paras 58–9 (emphasis added).

¹¹⁵Daniel Sarmiento made this point.

¹¹⁶Schepel and Wesseling (n 12) 173

¹¹⁷On this, see Korkea-aho and Leino-Sandberg (n 19) 38.

¹¹⁸Interview with a member of the Commission Legal Service (Respondent 18).

¹¹⁹Interview with three members of the Council Legal Service (Respondents 6, 7 and 9).

¹²⁰Interview with a member of the Council Legal Service (Respondent 9).

staff,¹²¹ the Commission Legal Service owes its prominence also to its size.¹²² A member of the Commission Legal Service explained that she frequently attended academic events, not so much to influence discussions but rather to present an ‘accurate view’ of the concrete problems in the field, thus, helping to ‘establish the facts’.¹²³ This interaction is facilitated by various academic institutes. For example, the Leiden Europa Institute provides a specific format for hosting institutional lawyers through the Leiden Law Exchanges (LLX) that aim ‘to facilitate an exchange of ideas on current legal issues between academics, policy makers and other stakeholders’ – and where institutional representatives such as Ben Smulders, Principal Legal Adviser in the Commission, may be introduced as ‘professors’.¹²⁴

Legal scholarship influences the Court’s work, in particular through the opinions of Advocates General. They, as a rule, review not only past case law but also the relevant academic debate, ‘to discern a broader picture, not limited to the individual case at hand, to outline different avenues of reasoning and possibilities and, after due discussion, to place the current case therein’.¹²⁵ In some fields, rule-making, application and post-legislative guidance is in the hands of the Commission, whose lawyers’ presence in academia is also so strong that ‘when you read doctrine you only have represented the Commission’s position’.¹²⁶ This is one of the reasons for one interviewed Council legal adviser to find that the Commission’s influence on the Court is sometimes excessive: ‘They go to their academy code, the doctrine [. . .] and it’s what they found’.¹²⁷ This finding is supported by my data, even though it also emphasises the role of ECB lawyers in areas that are relevant for the functions of the central bank.

B. Contribution to journals

During the last decades, English has grown into the most important language in EU legal scholarship. An examination of three key journals – the Common Market Law Review (2012–2016), the European Law Review and the European Law Journal (2011–2016) reveals the strong presence of lawyers working for two EU institutions: the Commission and the ECJ. In the Common Market Law Review, current and former ECJ members and *référéndaires* published 11 times, Commission Legal Service members 16 times, whereas the Parliament and the Council contributed twice each, the ECB 4 times and Eurojust 3 times. There were nearly 30 book reviews written by current or former institutional lawyers. In the European Law Review, the difference was even more striking: nine reviews by the ECJ, seven by the Commission, once by the Parliament and none for the Council. From 2011 to 2016, the European Law Journal – which has enjoyed a reputation as the most critical and theoretically oriented journal in the field – only published two articles written by institutional lawyers, both working as *référéndaires* at the ECJ. The European Constitutional Law Review also seems selective in this regard: for example between 2017 and 2020 it only

¹²¹Interview with a member of the Council Legal Service (Respondent 7).

¹²²It has entire teams working exclusively on competition law and state aid, for example, whereas in the Council Legal Service these two significant areas of EU law are covered by a single person, who is also responsible for company law and many other issues. Interview with a member of the Council Legal Service (Respondent 8).

¹²³Interview with a member of the Commission Legal Service (Respondent 48).

¹²⁴See the online roundtable organised by the Europa Institute on 21 May 2021 on Next Generation EU, <<https://www.universiteitleiden.nl/en/news/2021/06/llx-roundtable-on-coronavirus-relief-fund-nextgenerationeu>> accessed 27 September 2021, with Jean-Paul Kepeenne, Commission Principal Legal Adviser in charge of the NGEU offering a key note and Ben Smulders as the first speaker in ‘Next Generation EU 2.0 – first steps towards a fiscally more integrated Eurozone?’ on 21 October 2021 at the same institute, <<https://www.universiteitleiden.nl/en/news/2021/11/llx-roundtable-titled-next-generation-eu-2.0—first-steps-towards-a-fiscally-more-integrated-eurozone>> accessed 6 December 2021.

¹²⁵M Bobek, ‘A Fourth in the Court: Why Are There Advocates-General in the Court of Justice?’ (2011–2012) 14 Cambridge Yearbook of European Legal Studies 529–61, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2119932> at 21.

¹²⁶Interview with a member of the Council Legal Service (Respondent 7).

¹²⁷*Ibid.*

published two articles by institutional lawyers: Richard Crowe's article on 'The European Budgetary Galaxy'¹²⁸ and Kieran Bradley's article on Brexit.¹²⁹ Whether this is the result of weaker institutional interest or editorial policy choice is difficult to say.

What do institutional lawyers argue in their submissions to academic outlets, and to what extent do they mirror institutional positions and argumentation? One example from the most recent years (2017–2020) would be Luca Prete¹³⁰ and Ben Smulders' lengthy article in the *Common Market Law Review* (2021), which offers an overview of the latest developments in the field of infringement proceedings¹³¹ and builds on their comprehensive 2010 analysis in the same journal.¹³² The authors' view seems to align closely with 'the Commission's consistent policy', finding that its 'intention to concentrate its resources on cases in which its action may bring an added value is, accordingly, reasonable'. They conclude that also 'the Court too did its part, when called upon to rule in those – often complex and highly sensitive – cases, by delivering rigorous, unmistakably clear and (dare we say) bold decisions'.¹³³ It is difficult to avoid the impression that the article was written to explain and defend the Commission's institutional choices. The standard disclaimer may still be true, but the institutional agenda is nevertheless clear.

The strong institutional input by ECB legal experts is equally noteworthy.¹³⁴ For example in 2020 the *European Law Review* allocated many pages to leading ECB legal experts. Chiara Zilioli, Director-General of the ECB Legal Service, argued for an international approach to tackle the challenge of crypto-assets and presented four alternative approaches that the legislator should now reflect upon.¹³⁵ Again, according to the footnote, 'The views presented in this article are personal and do not in any way commit the ECB, its decision-making bodies or management', but she acknowledges the assistance of a number of ECB lawyers in preparing it. In another article, Lo Schiavo presents views that are 'purely personal and they are in no way intended to represent those of the ECB' when analysing the ECJ's approach to the market operator test (MEO) under Article 107 of the Treaty on the Functioning of the European Union (TFEU) in particular in the banking sector. In his view, 'the Court seems to adopt an excessively formalistic approach and to complicate further an already complex and intricate test in EU law'.¹³⁶ Both articles seem to relate to matters with which the authors are directly involved as ECB officials. This may be what an ECB lawyer I interviewed had in mind when she explained how her colleagues often act as 'lobbyists for the ECB in Brussels':

Because the ECB's position in Brussels on those topics where there is some regulation that might impact the central bank function is not too strong [...] we have to really make an

¹²⁸'The European Budgetary Galaxy' 13 (3) (2017) *European Constitutional Law Review* 428. Crowe is Head of Unit, Lawyer Manager in the Secretariat-General of the European Parliament – Legal Service – Directorate for Institutional, Budgetary and Staff Affairs – Institutional and Budgetary Law Unit.

¹²⁹'Agreeing to Disagree: The European Union and the United Kingdom after Brexit' 16 (3) (2020) *European Constitutional Law Review*. Bradley is a former legal adviser to the European Parliament, former judge of the EU Civil Service Tribunal and former special adviser to the CJEU on Brexit.

¹³⁰Référéndaire at the ECJ, former member of the Commission Legal Service, and Guest Professor at the Free University of Brussels, VUB.

¹³¹L Prete and B Smulders, 'The Age of Maturity of Infringement Proceedings' 58 (2) (2021) *Common Market Law Review* 285.

¹³²L Prete and B Smulders, 'The Coming of Age of Infringement Proceedings' 47 (1) (2010) *Common Market Law Review* 9.

¹³³Prete and Smulders (n 131) 330–1.

¹³⁴See also C Zilioli and M Ioannidis, 'Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies' 59 (2) (2022) *Common Market Law Review* 363.

¹³⁵C Zilioli, 'Crypto-assets: Legal Characterisation and Challenges under Private Law', 46 (2) (2020) *European Law Review* 251, 265.

¹³⁶G L Schiavo, 'Examining the Nature of the Market Economic Operator Test (MEO) under Article 107 TFEU: FIH Holding and FIH Erhvervsbank' 45 (4) (2020) *European Law Review* 540, 552.

effort to make sure that the outcomes of various legislative initiatives reflect the central bank's specific functions.¹³⁷

It is difficult to envisage that engagement in academia, produced in a team with colleagues, would have a fundamentally different function.

It is difficult to find cases where, in particular, Commission legal advisers question or challenge the reasoning of Court decisions. Accordingly, when writing about Court opinions, Commission legal advisers tend to focus on analysing them and placing them in context, as instructed by the Commission ethical guidance quoted above (Section 3). As regards Council legal advisers, one recent example is an article written by the director responsible for economic and financial matters, de Gregorio Merino on the legal architecture of Next Generation EU,¹³⁸ which illustrates well some core issues regarding the relationship between institutional legal services and EU legal scholarship. The article was published in *EU Law Live*, which explicitly states as one of its principles that its

writers, including its external contributors, do not represent the interests of third parties nor do they write under remuneration to defend a position in the interest of a third party. All our external contributors accept this policy and commit to abide by it.¹³⁹

How is this principle to be interpreted when the author is a person in charge of the legal design of the particular policy that is the subject matter of the article? According to Daniel Sarmiento, editor-in-chief of *EU Law Live* (and also a professor, practitioner and a former *référéndaire* at the ECJ¹⁴⁰), the principle quoted above was formulated more with private lawyers in mind, who are known to frequently write in their own name while defending the interests of a client, and may also be paid for it. Sarmiento continues:

In the case of public officials the system is a bit more tricky, because the principles request that the author does not write following instructions of a third party, but nothing stops an author from writing in his or her own capacity, with contents that do not undermine their employer's views or position. This is quite frequent in black-letter law articles, in which, for example, a Commission official gives his or her views on a judgement of the Court. That interpretation might not be the one that the Commission eventually invokes in the future, but the author will have undergone an internal verification procedure, and if the contribution was green-lighted, that means that his or her position is not undermining the Institution's interests. Thus, there can be situations in which the official writes in his or her own capacity, without following instructions, but in a way that does not undermine the interests of his or her employer.

Sarmiento argues that what is of essence is that the author publicly discloses her place of employment, which should help the reader in position to evaluate what position the author will defend. Many officials would probably argue that despite their institutional position, their writing is the result of personal reflection; therefore, there is no tension. Sarmiento concludes: 'I would be, as a rule, supportive of relying on the views of institutional players, but as long as these are taken into account as personal views, not as the reflection of an institutional position.' However, in EU legal scholarship, it happens with some frequency that the institutional affiliation and constraints of the

¹³⁷Interview with a member of the ECB Legal Service (Respondent 27).

¹³⁸de Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution', *EU law live*, Weekend Edition No 50 (2021), at 1.

¹³⁹<<https://eulawlive.com/our-principles/>> accessed 11 January 2022.

¹⁴⁰<<https://www.ie.edu/law-school/faculty-research/faculty/daniel-sarmiento/>> accessed 11 January 2022.

author are later forgotten – for example the article by de Gregorio¹⁴¹ and the contribution of Prete and Smulders’ quoted above¹⁴² have later been employed by others as scholarly support for normative developments without questioning their background or origin.

It also seems safe to assume that institutional lawyers only publish when they agree with the institutional line of argumentation. Council legal advisers report that the institutional response is generally positive: the author sends a draft to her superior prior to publication and if no objections are raised, she is free to proceed.¹⁴³ This is not necessarily an indication of a liberal publication policy by the institutions. It seems obvious that a legal adviser, as any sane person interested in peaceful workplace relations and career advancement, would think twice before submitting for greenlighting an article that contradicts the institutional position and ‘best interest’, and which the superior would be duty bound to deny. To say this is by no means to disparage the integrity of institutional lawyers; rather, it is to recognise that they too are human beings, and that they operate under a particular structure of incentives and obligations. This may or may not affect the way a certain article is written, but it certainly affects the selection of views that eventually see daylight in the form of a published article. For a journal, the ‘appearance of independence’ should also matter – how will publications geared towards assuring a certain normative outcome affect the authority of the journal on the other side of the political divide? Several respondents mentioned in particular one journal in the field of EU law that is considered to have fallen victim of such bias.

The strong influence of Commission lawyers has sometimes been perceived to be so overbearing as to leave little space for diverging positions in EU scholarship.¹⁴⁴ In my interviews, Council lawyers have pointed out how this may lead to a ‘certain imbalance in the views and it would seem like all academics think that it’s fantastic to have exclusive EU competence and that’s the only thing to go on’.¹⁴⁵ Colleagues in the other institutions see this in connection with the Commission mission statement of furthering integration: ‘you can also say that the Commission’s Legal Service has to think ahead and therefore publishes ahead’.¹⁴⁶ More recently, the ECB seems to be following this example. For some institutional lawyers, academia may also become a tool to fight such bias. A former EP legal adviser explains how

I have long carried a parallel activity in academia, both in teaching and in publications. [. . .] Commission lawyers dominate the academic production of the institutions in this field, and it was partly in reaction to this quasi-monopoly that I have devoted quite a lot of spare time over the years to fighting the spread of the Commission’s legal perspective by unofficial means.¹⁴⁷

C. Participation in editorial boards and review of submissions

Institutional officials also act as editors and participate in editorial boards of journals. Jan Klabbers has analysed the power involved in various academic functions and notes how

¹⁴¹See B de Witte, ‘The European Union’s COVID-19 recovery plan: The Legal Engineering of an Economic Policy Shift’ 58 (3) (2021) *Common Market Law Review* 635, which makes several references to the arguments.

¹⁴²See Kelemen and Pavone who have used this article as a reference to how ‘Some scholars conclude that prioritization demonstrates the Commission’s “maturity” as a law enforcer (Prete & Smulders 2021)’. R Daniel Kelemen and Tommaso Pavone, ‘Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union’, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918>, 7.

¹⁴³Interview with a member of the Council Legal Service (Respondent 9).

¹⁴⁴van Gestel and Micklitz (n 12) 299.

¹⁴⁵Interview with a member of the Council Legal Service (Respondent 9).

¹⁴⁶Interview with a member of the Council Legal Service (Respondent 14).

¹⁴⁷Interview with a former member of the European Parliament’s Legal Service (Respondent 19).

some wield more power than others (some journals are run by single prominent editors, others are a more collegiate exercise), in all circumstances power is involved: the power of deciding whether an article or book gets published, and the power to decide in which form.¹⁴⁸

The oldest journals in the field mentioned earlier provide a good starting point. The Common Market Law Review has the reputation of being the most important journal in the field, and the one that the EU judges and advocate generals read. It defines itself as the ‘oldest specialized review in the field of European law’,¹⁴⁹ and as ‘the pre-eminent journal dealing with European Union law’.¹⁵⁰ According to its house rules, submissions are subject to peer review ‘on grounds of analytical quality, sufficient support of conclusions and findings, originality, familiarity with relevant literature’. However, an ‘unsolicited article which is positively assessed in the review process may nonetheless be refused on grounds of editorial policy’.¹⁵¹ The journal has an active group of ten editors, including Ben Smulders from the Commission Legal Service. It appears customary to have a Commission representative in the editorial board, usually – based on a selection of issues in my own office bookshelf – a Deputy Director-General of its Legal Service. Often there is also someone closely affiliated with the Council Legal Service.¹⁵²

Institutional actors remain central in the traditional EU legal journals with a background in FIDE. The Direttore responsabile of the Italian Rivista di diritto europeo is Antonio Tizzano, a former ECJ judge, and its Comitato Scientifico is filled with institutional actors.¹⁵³ The Cahiers de droit européen is presently edited by Professor Jean-Victor Louis, but at least seven out of seventeen members of its current editorial board work or have worked for an EU institution.¹⁵⁴ Both of the issues of 2021 include an article written by Koen Lenaerts.¹⁵⁵ The Revue trimestrielle de droit Européen is co-edited by Jean-Paul Jacqué, the Honorary Director-General of the Council Legal Service, and Professor Etienne Pataut.¹⁵⁶ There is no information about its editorial board, but the publisher’s website explains how the journal ‘invite régulièrement des personnalités européennes de premier plan à répondre à des questions sur les enjeux et débats contemporains de l’Europe unie’.¹⁵⁷ The editorial board of Europarecht also hosts the current and former President of the ECJ and the longtime Director-General of the Commission Legal Service, Claus-Dieter Ehlermann.¹⁵⁸

¹⁴⁸J Klabbbers, ‘The Legal Scholar as Academic Expert’ in Emilia Korkea-aho and P Leino-Sandberg (eds) (n 18).

¹⁴⁹House Rules of the Common Market Law Review (2021) <<https://assets.contenthub.wolterskluwer.com/api/public/content/fea17382703c4e3fa43e489fe0985233>> accessed 11 January 2022.

¹⁵⁰<https://kluwerlawonline.com/Journals/Common+Market+Law+Review/2>> accessed 11 January 2022.

¹⁵¹‘Review Process’, <http://kluwerlawonline.com/media/CMLR_Peerreviewtext.pdf> accessed 11 January 2022.

¹⁵²eg, in 1997 the editors included Christiaan Timmermans, Deputy Director-General of the Commission Legal Service (1989–2000). Alan Dashwood served from 1987 to 1994 as Director in the Council Legal Service. In 2002, Timmermans had been replaced by A Rosas, Deputy Director-General of the Commission Legal Service. In 2008 Jean-Paul Jacqué, long time Deputy Director-General of the Council Legal Service, had joined the editors, and the Commission was represented by Pieter-Jan Kuijper who was Director of the team for External Relations and Trade in its Legal Service. By 2011 he had been replaced by Ben Smulders who continues to sit on the editorial board.

¹⁵³RA García, SM Carbone, G Gaja, F Jacobs, J-P Jacqué, K Lenaerts, R Luzzatto, P Mengozzi, MP Maduro, J Rideau, V Skouris, G Tesaro, C Timmermans, T Von Danwitz. <http://www.dirittounioneuropea.eu/Page/t02/view_html?idp=49> accessed 11 January 2022.

¹⁵⁴They include one Court President (Lenaerts) and three officials of the Court (Adam who is also a professor at the University of Ghent, Adam and Speltdoor), the European Parliament’s former Jurisconsult (Garzon Clariana) and two Members of the European Commission Legal Service (Keepeenne and Oliver).

¹⁵⁵<<https://www.jurisquare.be/fr/journal/cahdroiteur/index.html>> accessed 11 January 2022.

¹⁵⁶<<https://www.dalloz-revues.fr/revues/RTDeur-26.htm>> accessed 11 January 2022

¹⁵⁷<https://www.dalloz-revues.fr/revues/Revue_de_l_Union_europeenne-313.htm> accessed 11 January 2022

¹⁵⁸The names are found on the cover of the most recent issue of 6 (6) (2021) Europarecht 641. There seems to be no women in any kind of editorial positions in this journal.

However, as Klabbers notes above, many editorial boards are not engaged with the day-to-day running of journals. An interviewed member of a board explained that he had never been asked for an opinion concerning individual submissions but may sometimes be engaged to collect contributions, in particular case notes, from younger researchers. One editor-in-chief (whose editorial board includes many institutional actors) explains,

our editorial board does not intervene in the decisions of NN and me. Moreover I never had - within nearly 25 years of being editor-in-chief - an intervention from the board regarding a single article. We are governed, even if it sounds a little bit pathetic, by the principle of freedom of research. Therefore you will find several articles in our volumes dealing in a critical manner with the institutions and their representatives.

In the newer English language journals the presence of institutional representatives is weaker. The *European Law Review* 'is committed to publishing scholarship of the highest quality, irrespective of the form of the piece submitted'. It 'addresses a wide audience, consisting of academics, students, members of the judiciary, practitioners, officials and policy-makers. We invite submissions from anywhere in the world irrespective of the status or background of the author.'¹⁵⁹ Its editors are full-time academics, but the editorial board includes some names with an institutional affiliation.¹⁶⁰ In the *Cambridge Yearbook of European Legal Studies*, editors -in-chief and editors are all full-time academics; in the *European Constitutional Law Review* there are no institutional lawyers among editors-in-chief or editors, while some judges sit in its advisory board. In the *Yearbook of European Law* all four editors are academics, and no public information exists about the composition of its editorial board. Institutional lawyers sometimes sit in advisory boards; Koen Lenaerts' name appears particularly often in these contexts.

In my inquiries, I have tried to map whether institutional lawyers sitting in an editorial board would participate in decision-making. One editor from a journal with institutional co-editors answered: 'We accept or reject articles on behalf of the Board as a whole, and the composition of the Board is well known.' A particular example of a sectoral journal with a strong institutional input is the *Journal of European Competition Law & Practice* where one of the two editors-in-chief (Gianni De Stefano) works for the European Commission¹⁶¹ and two of the seven editors (Martin Farley and Pascal Berghe) are from the Commission Legal Service.¹⁶² Many sectoral journals' editorial boards only host people with academic affiliations.¹⁶³ Based on my inquiries, the contribution of institutional lawyers is sometimes seen as a way of making sure that there is a general interest element in editorial choices, especially if the board also includes members working in the private sector. Who gets to sit in editorial positions has recently been the subject of public controversy in the context of the *European Law Journal*, which, therefore, is not included in the most recent data. The call from its resigning editors-in-chief¹⁶⁴ for academic autonomy and freedom quickly gathered the support of the editors/editorial boards of those journals in the field who seem to be run by full-time

¹⁵⁹Editorial: On Departure(s) Brexit; EU law; Law journals' 26 (5-6) (2020) *European Law Review* 1.

¹⁶⁰<<https://www.sweetandmaxwell.co.uk/Product/Academic-Law/European-Law-Review/Journal/30791372>> accessed 11 January 2022.

¹⁶¹<<https://concurrences.com/en/authors/gianni-de-stefano>> accessed 11 January 2022.

¹⁶²<https://academic.oup.com/jelap/pages/Editorial_Board> accessed 11 January 2022.

¹⁶³Such examples include *European Company Law*, *European Review of Contract Law*, *European Review of Private Law*, *Maastricht Journal of European and Comparative Law*.

¹⁶⁴J Mendes and H Schepel, 'What a Journal Makes: As we say goodbye to the *European Law Journal*', <<https://verfassungsblog.de/what-a-journal-makes-as-we-say-goodbye-to-the-european-law-journal/>> accessed 12 January 2022.

academics¹⁶⁵ who stressed that integrity and independence is essential to the quality of any academic journal and must be protected. Yet, the debate in this context was limited to a discussion of independence from the wishes of the publisher.

The power of editors is further increased when they also review submissions instead of external referees and commission articles on selected topics from selected authors. Some journals are known to do this fairly often; the editor of another journal replies, '[w]e commission articles from time to time but the main bulk of the articles we publish are sent to us by unprompted contributors'. In addition, editors write editorials, where it is not uncommon to make normative statements about the future direction of integration, for example.¹⁶⁶ These clearly represent editorial preferences rather than hard core legal analysis.

Klabbers also stresses the power of referees: 'the temptation often looms large of accepting submissions that agree with one's own view of the world, and reject those that do not.'¹⁶⁷ I approached some journals with an inquiry about their practice of using institutional lawyers to assess the quality of journal submissions, in particular those that are critical of institutional choices. This question proved particularly sensitive. One journal replied this is an 'internal matter'. The editors of another journal answered:

We do not usually ask institutional lawyers to referee any submissions. We have done only in exceptional circumstances, and in any case not with institutional lawyers sitting on our Board. This is for various reasons: practical (they are too busy), scholarly (they may not be as familiar with the scholarly standards we apply), and related to their role (perhaps a bit more difficult to avoid detachment from the author of and the argument made in the submission).

Overall, it seems that potential conflicts of interest have not been much considered, or that systemic questions relating to different roles and their demands are primarily referred to be solved through ethical considerations by the individual concerned. As one editor-in-chief indicated, 'they are fairly scrupulous when they write in areas where there is a potential conflict of interest'. But is a conflict of interest really so easy to manage? How is an institutional lawyer expected to react to a submission that questions the institutional premises or is overtly critical of the agenda to which he is both institutionally and personally committed? If a journal submission debates institutional policy choices in a less flattering light, would an EU official be wholly unaffected in his consideration of the benefits of bringing the matter to public attention for broad public analysis and debate? Klabbers continues,

the problem is often not so much related to the quality of a piece per se, but to the premises on which it is based – if these are deemed unacceptable by a reviewer, then the reviewer may be tempted to discard the contribution altogether, even if on its own premises the piece may be exemplary.¹⁶⁸

D. Contribution through teaching and textbooks

Teaching is a significant part of epistemic authority:

Effective teaching in law cannot be done without taking a stand, without embedding things in a broader worldview [. . .] Much the same applies to the writing of textbooks and, to a lesser

¹⁶⁵European Constitutional Law Review, European Law Review, Maastricht Journal of European and Comparative Law, Legal Issues of Economic Integration and the German Law Journal.

¹⁶⁶See, eg, J Snell, 'The Bank, the Court, and the Crises' 44 (6) (2019) European Law Review 739; Alicia Hinarejos: 'Editorial Next Generation EU: On the Agreement of a COVID-19 Recovery Package' (2020) European Law Review.

¹⁶⁷Klabbers (n 148).

¹⁶⁸*Ibid.*

extent perhaps, research papers and monographs. In particular the reach of textbooks is often underestimated: the writer of a popular textbook reaches thousands of students every year, far more than even the most widely publicised research paper or monograph, and imprints on impressionable readers a view of the world.¹⁶⁹

Institutional lawyers teach EU law at various universities and are appreciated for their practical knowledge of its operation. Most of their part-time work is dedicated to teaching, and many carry proportionately a large teaching load, being regularly responsible for key courses in EU law. There are no statistics available on how many institutional lawyers also act as part-time or guest professors, but the functions of many of them are publicly known. Commission lawyers seem to be the most active in this regard. There is no complete public account of their external functions, but, for example, Ben Smulders holds positions at at least five universities;¹⁷⁰ Piet Van Nuffel is Associate Professor of European Law at KU Leuven (since 2008);¹⁷¹ and Julio Baquero Cruz is also Visiting Professor at Sciences Po (Paris) and at Universidad San Pablo CEU (Madrid),¹⁷² Herke Kranenborg is Professor in European Data Protection and Privacy Law at Maastricht University, according to LinkedIn,¹⁷³ for half a day per week, and spends the rest of his time with the same questions in the Commission Legal Service.¹⁷⁴ When asking Council lawyers about their academic functions, they name a Hungarian professor Jenő Czuczai¹⁷⁵ and Jean-Paul Jacqué, the latter as ‘of course an absolute authority on institutional legal matters, but he is very much oriented towards the French-speaking world’.¹⁷⁶ Overall, academic functions seem less common than in the Commission. A Council lawyer who was engaged in teaching for five years explains that, ‘the internal rules for the Secretariat are not encouraging that type of activities’.¹⁷⁷ Many judges have earlier and ongoing academic functions. For example, Marc van der Woude, President of the General Court, is also a professor at Erasmus University Rotterdam, with a background in the Commission Legal Service and DG Competition.¹⁷⁸ The website of the General Court provides a list of all external activities of the Members of the General Court in 2021.¹⁷⁹ The 23-page document lists various ‘Activities of European interest’ at universities and public institutions around Europe. As regards the ECJ, Judges Koen Lenaerts¹⁸⁰ and Geert de Baere¹⁸¹ continue as professors at KU Leuven. Its Institute for European Law explains specifically on its website that ‘[a]s several of its current and former members have been or are working for the institutions of the European Union, the Institute has always had a close working relationship with the European institutions’.¹⁸² The Free University of Brussels (VUB) has several part-time

¹⁶⁹*Ibid.*

¹⁷⁰He is Guest Professor at the Free University of Brussels (VUB), a visiting professor of law at the College of Europe in Bruges and Università degli Studi di Parma, closely affiliated with the Leiden Europa Institute and also teaches at the Université Paris 2 Panthéon-Assas. <<https://www.asser.nl/about-the-asser-institute/whos-who/BenSmulders>> accessed 11 January 2022.

¹⁷¹<<https://www.law.kuleuven.be/eur/en/Staff/00015061>> accessed 11 January 2022.

¹⁷²<<https://institutdelors.eu/en/tous-les-contributeurs/julio-baquero-cruz/>> accessed 11 January 2022.

¹⁷³<be.linkedin.com/in/herke-kranenborg-4512a210> accessed 11 January 2022.

¹⁷⁴<<https://www.maastrichtuniversity.nl/nl/herke.kranenborg>> accessed 11 January 2022.

¹⁷⁵Interview with a Member of the Council Legal Service (Respondent 13).

¹⁷⁶Interview with a Member of the Council Legal Service (Respondent 9).

¹⁷⁷Interview with a Member of the Council Legal Service (Respondent 7).

¹⁷⁸<https://curia.europa.eu/jcms/jcms/rc4_170626/en/> accessed 27 April 2022.

¹⁷⁹Fourteen judges had attended the FIDE Conference in the Hague in 2021. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/tra-doc-en-div-c-0000-2018-201800890-05_00.pdf> accessed 27 April 2022.

¹⁸⁰<<https://www.law.kuleuven.be/eur/en/Staff/00003906>> accessed 11 January 2022

¹⁸¹<<https://www.law.kuleuven.be/eur/en/Staff/00063567>> accessed 11 January 2022

¹⁸²<<https://www.law.kuleuven.be/eur/en>> accessed 11 January 2022.

professors who also work for an EU institution.¹⁸³ The most notable institution in this regard is, however, the College of Europe, known as the ‘lieu central de production des élites européennes’.¹⁸⁴ Its European Legal Studies Department (Bruges campus)¹⁸⁵ lists no less than 62 visiting professors, out of whom 23 currently work or have, for an extended period, worked for an EU institution.¹⁸⁶ Its permanent professor of EU law (Sacha Garben) is ‘an official in the European Commission (legal officer, DG EMPL), currently on special leave to be at the College of Europe full time’.¹⁸⁷

One example of the presence of institutional lawyers would also be the Academy of European Law Summer School on the Law of the European Union,¹⁸⁸ convened by professors working at the European University Institute (EUI) Law Department, co-funded by the Erasmus+ Programme and broadly attended by postgraduate students in EU law. From 2010 to 2021 lectures have been given by three (former) judges and four advocate generals,¹⁸⁹ and various lawyers employed by the EU institutions including Bernd Martenczuk¹⁹⁰ (2010), Jean Paul Jacqué¹⁹¹ (2012), Ben Smulders¹⁹² (2014) Julio Baquero Cruz¹⁹³ (2015), Kieran Bradley¹⁹⁴ (2018) and Stefaan De Rynck,¹⁹⁵ Richard Crowe¹⁹⁶ and Viorica Vita¹⁹⁷ (2021). In fact, in 2021, only three of the seven speakers were full-time academics. Also more generally, the EUI involves institutional lawyers in legal education through workshops and conferences.¹⁹⁸

Institutional lawyers have written several broadly used textbooks, which have an impact on how EU law is understood and taught. The former Director-General of the Council Legal Service, Jean-Claude Piris, has produced several commentaries,¹⁹⁹ and Allan Rosas has always been an active contributor to academia.²⁰⁰ The most productive one is, however, Koen Lenaerts. *European Union Law* (Sweet and Maxwell 2011) ‘provides readers with a rigorously structured analysis of the institutional structure of the EU, its jurisdiction, its legal instruments

¹⁸³Department for International and European Law, see <<https://www.vub.be/vakgroep/iere#leden-van-de-afdeling>> accessed 11 January 2022.

¹⁸⁴See V Schnabel, ‘Elites européennes en formation. Les étudiants du “Collège de Bruges” et leurs études’ 11 (43) (1998) *Politix* 33.

¹⁸⁵<<http://www.coleurope.eu/whoswho/departement/european-legal-studies-department-bruges-campus>> accessed 11 January 2022.

¹⁸⁶K Bradley (EP, ECJ), C Bury (Commission), J Czuczai (Council Legal Service), R da Silva Passos (General Court), P Delsaux (Commission), D Hanf (EUIPO), M Maduro (ECJ), MJM Inglesias (EP), E Moavero-Milanesi (ECJ and Commission), P Niemitz (Commission), N Notaro (Commission), S O’Leary (ECJ), LO Blanco (Commission), F O’Regan (European Ombudsman), E O’Reilly (European Ombudsman), F Roccagiatata (Commission), IR Laguna (Commission), A Rosas (ECJ, Commission), S Rossi (ECJ), B Smulders (Commission), M Szpunar (ECJ), E Tornese (Commission), L Visaggio (EP).

¹⁸⁷<<https://www.coleurope.eu/whoswho/person/sacha.garben>> accessed 4 April 2022.

¹⁸⁸<<https://www.eui.eu/DepartmentsAndCentres/AcademyEuropeanLaw/SummerSchool/PreviousYearsProgrammes>> accessed 11 January 2022.

¹⁸⁹J Prechal 2011, K Lenaerts 2013, A Rosas 2021 and Advocate Generals J Kokott 2010, E Sharpston 2017 and G Hogan 2019.

¹⁹⁰Principal Legal Adviser in the Legal Service of the European Commission leading the team on budget, customs and taxation.

¹⁹¹Honorary Director-General, EU Council; Emeritus Professor, University of Strasbourg.

¹⁹²Director and Principal Legal Adviser in the Legal Service of the European Commission.

¹⁹³Member of the Legal Service of the European Commission; Visiting Professor at Sciences Po, Paris and Universidad San Pablo-CEU, Madrid.

¹⁹⁴Special Adviser on Brexit to the ECJ; Former member of the European Parliament Legal Service.

¹⁹⁵Head of Unit for Institutional & Budgetary Law, Legal Service of the European Parliament.

¹⁹⁶Former Senior Adviser to Michel Barnier, EU Chief Negotiator for Brexit.

¹⁹⁷European Integration Officer, European Commission.

¹⁹⁸See ‘Teaching Law in a European University Institute. Does it Make a Difference?’ (2005) *EUI Review* (Autumn issue), which discusses the work of the law department from many angles but curiously excluding the institutional input.

¹⁹⁹See, eg, Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2008).

²⁰⁰See, eg, A Rosas and L Armati, *EU Constitutional Law. An Introduction* (3rd edn Hart 2018).

and the main substantive principles underlying EU law'.²⁰¹ It is, according to the publisher, produced by Koen Lenaerts and Piet Van Nuffel, who are both introduced as professors, together with Robert Bray (who worked for the European Parliament from 1997 to 2017)²⁰² and Nathan Cambien, who is a professor at the University of Antwerp and référendaire at the ECJ.²⁰³ Lenaerts, Van Nuffel and Bray also co-authored *Constitutional Law of the European Union* (2005), and more recently the first two have, together with Tim Corthaut, published a textbook on *EU Constitutional Law*, which '[p]rovides a complete overview of EU constitutional law and is an excellent starting point for academics and practitioners alike'.²⁰⁴ Lenaerts and Bay also co-authored, with Dirk Arts and Ignace Maselis (both with a background in the Court), a textbook on *Procedural Law of the European Union*. It is therefore not without some justification that Politico recently listed Koen Lenaerts as the 'Doer Nr 7' in its full 'POLITICO 28 Class of 2022' stressing his profile as 'an avowed Europhile' and 'the man at the center of every tricky legal issue in the European Union'.²⁰⁵ Politico defines him as 'the president of the Court of Justice of the European Union [and] the Belgian law professor'. However, these tasks should come with conflicting role demands in democratic society. As a judge he works to promote 'activities of European interest' while as a law professor his job is not just to be knowledgeable about the law, but also to be available to scrutinise how the EU institutions (including his own) define and promote that interest.

It is of course not a problem that people with expertise in EU law write, publish, teach and speak about EU law. But their teaching transmits a particular world view, which is (hopefully!) not the same as that of a full-time academic who has spent her whole life in academia and may be concerned about issues such as the EU's democratic deficit, for example. Teachers of EU law, when selecting textbooks for their courses, make choices between these world views; and when institutional servants are presented as professors such differences are hidden rather than made visible. The intention may be good – to demonstrate that the speaker in question indeed also fulfils professorial qualifications (which, in the cases referred above, is indeed not in doubt). Yet, what is the significance of the academic title if the speaker is not free to act in this role with full academic freedom? Students have a right to access critical knowledge – after all, that is what studying at university should be about.

5. Breaking the spell: a future research agenda

This article provides a snapshot of the current state of EU legal scholarship. As such, it investigates a matter that has so far received meagre attention: enchantment in EU legal scholarship and the subsequent lack of critical distance to the object it studies. The academia needs autonomy from the object of its study in order to fulfil its role; its task is critical reflection of legal practice from the outside, not from within. The patterns that are visible in the analysis above are not just a matter of juicy professional gossip but concern a systemic issue involving a significant societal matter, which should be placed on a future research agenda reaching beyond the institutions and public sector to also encompass the involvement of the private sector in academia.²⁰⁶

²⁰¹ <<https://www.sweetandmaxwell.co.uk/Product/Academic-Law/European-Union-Law/Paperback-and-eBook-ProView/30800316>> accessed 11 January 2022.

²⁰² R Bray worked for the European Parliament from 1997 to 2017, <<http://www.europeanlawinstitute.eu/about-eli/bodies/council/robert-bray/>> accessed 11 January 2022.

²⁰³ <<http://www.uantwerpen.be/en/staff/nathan-cambien/>> accessed 11 January 2022.

²⁰⁴ <<https://global.oup.com/academic/product/eu-constitutional-law-9780198851592?cc=fi&lang=en&>> accessed 11 January 2022.

²⁰⁵ <<https://www.politico.eu/list/politico-28-class-of-2022-ranking/koen-lenaerts/>> accessed 11 January 2022.

²⁰⁶ On this, see also the Google Chair in Digital Innovation, placed at the College of Europe. See Google's Academic Influence in Europe, <<https://www.politico.eu/wp-content/uploads/2018/03/GTP-European-Google-Academics-Final.pdf>> accessed 12 January 2022.

Institutional lawyers possess a great deal of useful information and make a significant contribution to academic discussions. Yet, their formal position as EU officials means that the use of their insights is constrained by considerations of confidentiality. Since they are bound to respect institutional agendas, the use of these insights is selective and strategic and may be used to promote certain institutional objectives instead of presenting a broad analysis also involving considerations that are critical of institutional action. Their obligations as EU officials impact both their argumentation and their silences, even when no one is acting in bad faith. Strengthening the academic freedom of officials is hardly the solution – even if they were not constrained by formal rules they would still be affected by the expectations and interests arising from where they work.

I believe that the EU legal academia should re-think its purpose and have more self-confidence to maintain a critical distance to institutional contributions and conduct its academic work independently from institutional lawyers. It should re-define its self-identity as a reflective and critical force, rather than one largely devoted to promoting and legitimating an institutional agenda. This would contribute to strengthening democratic debate about the EU's policy choices and, ultimately strengthen the EU. Improving the visibility of how legal questions are handled in the institutions and Court litigation are important preconditions for such debates. Today, knowledge is too often mediated by the insiders and those who have access to them, which further strengthens their dominant position in the hierarchies of knowledge in the field.

On the side of EU academia, more consideration should be given to situations where EU officials appear in academic outlets. Should their submissions be included in refereed sections of journals, or rather be presented as notes or comments? Are ethical principles enough to address systemic questions of institutional involvement in editorial decision-making? What is the relevance of language in EU legal scholarship? Are there enough textbooks written by authors that are not connected to the institutions? What is the relationship between institutional loyalty, censorship and academic freedom? Should more attention be paid to clearly stating the affiliation of institutional lawyers when they appear in academic outlets? How should they be quoted? What is the effect of funding structures on academic freedom? How do we tell where scholarly work ends and institutional strategy begins?

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