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GUEST EDITORIAL

A farewell to arms: Some reflections on 50 years Common Market Law Review

From the very beginning, the European integration process stirred the imagination of lawyers, unlike the limited interest it aroused in other related disciplines. For economists the creation of a customs union, first for coal and steel and later for all products, evoked little theoretical interest. They had seen this before with the German *Zollunion* and later with the creation of the Benelux customs union. The situation only changed after the concept of an economic and monetary union was launched in the early 1970s; and at present, the survival of the euro and the creation of a European banking union for the eurozone form the heart of EU economic thinking.

In the world of political science, something similar could be seen. After World War II the so-called Realist school of international relations was the dominant theoretical framework. It mainly concentrated on the study of the United Nations and its impact on the existing State system. Moreover, the discipline was largely dominated by American researchers. The first studies of functional integration by Karl Deutsch and Ernest Haas remained limited to a relatively small circle of academics. As long as "real powers" remained in the hands of the well-recognized Westphalian system of sovereign States, existing power structures were not affected.

How different this was in the legal world. The "pooling of sovereignty" and the concept of attribution of regulatory powers to a new, supranational High Authority with direct impact on States and private companies alike, raised a whole series of new legal questions. What was the demarcation line between transferred powers and those where States remained sovereign? Which rules of supervision were to govern, and what legal system would apply? International law was a system to regulate the relations between States and was therefore inadequate to govern the powers of the supranational executive over the national coal and steel companies. Judicial remedies had to be developed to organize the functioning of the new European Court of Justice. National – in particular French – administrative law would become the source of inspiration in the new Treaty, with concepts such as *détournement de pouvoir* and *recours d'annulation*. Similarly the economic legislation for the coal and steel industry was to be based on existing systems of national regulatory legislation, in particular competition law, not international law. And finally a nascent parliamentary Assembly would be inspired by

parliamentary examples, governed by national constitutional law. All this formed an important source of inspiration for jurists, a newly found Lawyers' Paradise!

Against this background the idea of a new international law journal arose, which would cover the functioning of a common market.[1] As it happened, the first issue of the Common Market Law Review appeared a few months after the breakdown in January 1963 of the first negotiations between the United Kingdom and the EEC (as the EU was then) of the original six Member States. At that time, the Editors and Publishers pondered whether this major political event made any difference to their plans. They did not have to think for long. They soon felt that the need for the Review was as great as before, and perhaps even greater. A major argument was that the EEC legal developments were more and more occupying the attention of jurists both inside and outside the Member States.

In his Introductory message for the Review, Lord Denning stated that "the new venture will provide a forum in which experts will expound legal developments inside the common market for the benefit of English readers and … where experts in the law of the United Kingdom will expound subjects which are applicable in Europe as well". For this leading Law Lord at the time, the idea that Britain might be part of the new Europe was absent from his thoughts. Michel Gaudet, the first Director general of the Legal Service to the EEC Commission, had a broader outlook: "The operation of the Common Market … calls for a new legal thinking and provides an opportunity for clarifying the trends of law in the modern world." Irrespective of UK membership, as a result of the creation of the EEC there was an obvious need for a direct dialogue between lawyers of different legal traditions, especially in the field of economic legislation.

One important event in particular demonstrated the novelty of the European Economic Community in legal terms, and was crucial for the decision to go ahead with the Review. The revolutionary judgment in *Van Gend & Loos* (Case 26/62) was rendered on 5 February 1963, less than a month after the first British accession negotiations had failed. In one stroke it established the autonomous position of Community law between international law and the national legal systems of its Member States. At the same time the ruling guaranteed the effective incorporation of Community rules in national law. The ECJ recognized the EEC Treaty to be more than a classic international agreement, limited to creating mutual obligations between the contracting States. It stipulated for the first time, in terms repeated countless times in the

1. The author returned to Leiden from the United States in 1962, and took up the position of Secretary to the Editors for this new journal. He held that position until 1965; he was one of the editors of the Review from 1965 until 1972, and joined the Advisory Board in 1973.

years to come, "that the Community constitutes a new legal order of international law", where authoritative powers had been transferred to common institutions. The judgment gave a boost to the development of a new field of law, the study of European Community law. One should not underestimate the enormous impact of this judgment (together with the *Costa* v. *ENEL* judgment of 1964, a year later). It was nothing less than the birth of a new discipline. It inspired a whole generation of young lawyers. Only later did we understand that the judgment was rendered with the smallest majority possible. It proved to have groundbreaking consequences for all national jurisdictions, as was rapidly recognized by the ECJ's first President, the eminent Dutch law professor André Donner, who – as he himself later revealed – had voted against the majority!

I recall a conversation at the time with Lord Justice Diplock, chairman of the British delegation to the first Leiden-London meeting[2] after the *Van Gend & Loos* ruling. He predicted that the United Kingdom would fundamentally object to the "pooling of sovereignty", the concept underlying the Schuman Plan, on which the ECSC (and subsequently the EEC and Euratom Treaties) were founded. His personal comment was: "The United Kingdom has great difficulties in accepting any authority between God and an Act of Parliament!" How true this proved to be. Rereading this line fifty years later, the current situation has not changed very much compared to those early days! The first sentence of Hugo Young's famous account of the history of British membership of the European Union applies: Britain is still struggling "to reconcile the past she could not forget with the future she could not avoid."[3]

Already at the outset, the different perspectives on the organization of Europe affected the debate about the title for the new journal. Professor Samkalden, the Dutch editor, proposed to name the review the European Community Law Review, emphasizing the novelty of the legal system which was in the process of being construed. The English side on the other hand insisted on Common Market Law Review, the main argument being that the direct objective of the EEC Treaty was to create a common market. And so it would be. Already fifty years ago the Common Market Law Review, in the debate about its title, reflected the still ongoing fight about the ultimate objective of the European integration process: an "ever closer union", or an economic mechanism limited to providing more wealth and welfare for the European citizens.

2. The cooperation between the British Institute of International and Comparative Law, in London, and the Europa Institute, Leiden, which formed the institutional setting for the CML Rev., also initiated a series of conferences on developments in EU law, to be held annually and alternating between London and Leiden.

3. Hugo Young, *This Blessed Plot*, 1998, p.1.

After 50 years there is no reason to change a well-recognized trademark and reputation (never change a winning horse!), even though in the meantime the European Union has far outgrown the original objective of a "common market". Pragmatism should prevail. In practice the contents of the Common Market Law Review have moved far beyond the limits of its name, as the journal's aims correctly describe: "The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere …".

The journal's ambition continues to be to have a comprehensive outreach extending to all fields of EU activities, internal and external. It is interesting to note that the cumulative index of the Review[4] lists 43 different subjects, from Accession to Transport policy, including such items as Greenland and Education, not forgetting more obvious topics like commercial policy, or free movement of services. Reflecting its early history of concentration on the internal market, over the whole time period of the Review the topic attracting the largest number of articles on subjects devoted to substantive law has remained competition law, including intellectual property law. In the institutional field issues of judicial protection and, closely related, of judicial cooperation between the European and national courts, continue to figure prominently. Moreover the Review has always devoted much attention to annotations of the case law of the Court of Justice.

Over the years the contents of the various contributions have faithfully followed and commented upon the ups and downs of the European Union. From a functional organization, limited to the regulation of the economy, the European Union has grown into a mature and relatively cohesive political system with worldwide responsibilities. As a consequence it is only natural that the matter contained in the great variety of contributions has developed as well. In the early days the need to explain the contents of the new legislation and case law was of primordial importance. For instance, the directly binding nature of Community law for private citizens soon led to a discussion of the concepts of direct effect and direct applicability. An early famous article by Professor Jan Winter made an important contribution to a better understanding of these concepts.[5]

Although English was not an official language of the EEC at the time, it was clear that to reach as wide a readership as possible, the English language had to be used as the practical vehicle for communication, as was indicated in the first Editorial. It proved to be wise decision. Of course, when the journal was

4. Covering all volumes up to vol. 49, and available on the website: www.kluwerlawonline.com/toc.php?pubcode=cola.

5. Winter, "Direct applicability and direct effect: Two distinct and different concepts in Community law", 9 CML Rev. (1972), 425–438.

founded this choice also supported the desire to serve as a legal bridge between the Anglo-Saxon and continental legal traditions. After fifty years, it remains the oldest specialized journal of Community/European Union law, established before its sister journals in Germany (*Europarecht*), in France (*Revue Trimestrielle de Droit Européen*) or Belgium (*Cahiers de Droit Européen*). Its ambition to be international in outlook was reflected in the composition of its first Advisory Board, consisting of British, French, German, Italian and Dutch lawyers. They were soon to be complemented by American, Irish and Danish members. Fifty years after the first issue appeared, the Editorial Board has been extended from two to eight members, with the Associate Editor occupying a pivotal place. Similarly the number of members of the Advisory Board has increased to 23 persons, representing a wide variety of expertise and covering many legal systems. This wide network forms the basic strength of the Review and it guarantees stability for the future, attracting contributions from all over the world.

The subject matter of the articles published has evolved over the years, reflecting changes in the nature of the Union itself. It should be recalled that after the defeat of the European Defence Community in 1954 for a long time the emphasis had been on the economic nature of the European integration process, in particular the creation of the internal market. Then, in the 1970s, three important political events, although very different in nature, had a major impact on re-emphasizing the political nature of the European integration process. These were respectively the creation of the European Council in 1974, the direct elections for the European Parliament in 1979, followed a few years later by the accession of Greece, Spain and Portugal, a new group of southern Member States. For most member countries, these events confirmed that the Community was more than a common market, more than an economic venture, that it was also a political system based on common values of democracy, human rights and the rule of law. This latter element played an even more significant role after the fall of the Berlin Wall and the subsequent demise of the Soviet Union which enabled the extension of the EU to Central and Eastern Europe. The need to give suitable prominence to fundamental rights became evident, and the adoption of a common charter of fundamental rights as a precondition of future membership became an important objective. The discussion of the role of fundamental rights in the EU was reflected in a series of important articles in the Review, one of the earliest being Weiler and Lockhart, "'Taking rights seriously' seriously: The European Court and its fundamental rights jurisprudence".[6]

6. Part 1, 32 CML Rev. (1995), 51 –94 and part 2, 32 CML Rev. (1995), 579 –627. That article was a reaction to Coppel and O'Neill, "The European Court of Justice: Taking rights seriously?", 29 CML Rev. (1992), 669–692. There had also been a much earlier article by

At approximately the same time a critical dialogue started about the future constitutional nature of the European Union. Significant contributions in the Review were written by Mancini, "The making of a Constitution for Europe"[7] and Curtin, "The constitutional structure of the Union: A Europe of bits and pieces".[8] Apart from efficiency and output results, credibility and legitimacy as input tests have come to dominate increasingly the debate in Member States about the stability of European structures built up over the last decades.

In recent years, the discussion about the future of the EU took on a new urgency after the European Constitution failed to be adopted, as a result of negative referendums in France and in the Netherlands in 2005. This event led the Member States to go back to the drawing board and to draft a new document in the form of a more traditional international agreement, which became the Lisbon Treaty of 2007. The Review published an important and critical commentary by Dougan, "The Treaty of Lisbon 2007: Winning minds, not hearts"[9] in which the issue of political legitimacy of the institutions figured prominently. These examples make abundantly clear that, over the years, the Review has contributed significantly to the debate about the future shape of Europe, apart from its manifold articles on the practical functioning of the EU in day to day life.

The European Union is struggling to find a new course for its future. The recent June Editorial Comments[10] gave an important account of the variety of possibilities for flexibility inside and outside the existing Treaties framework. Over the years, the EU in legal terms has become an "Emmental cheese", where Member States seem free to engage in a pick-and-choose policy. Unity of purpose is no longer a common source of inspiration to drive the EU forward. Some of the existing Member States, old and new, declare openly that they disassociate themselves from the key concept of "an ever closer union", a concrete objective laid down in Article 1 TEU. The current UK Government even intends to free itself from some of its essential existing commitments under the Lisbon Treaty and to renegotiate its overall position *vis-à-vis* the European Union. Such a situation cannot last much longer. The danger of unravelling the common tissue woven over the last decades has become a serious threat to the survival of the European Union in its current shape. Nationalist tendencies are undermining the mutual trust on which the European Union is built. The failure in October 2013 by the ministerial

Scheuner, "Fundamental Rights in European Community law and in National Constitutional law", 12 CML Rev. (1975), 171–191.

7. 26 CML Rev. (1989), 595–614.
8. 30 CML Rev. (1993), 17–69.
9. 45 CML Rev. (2008), 617–703.
10. Editorial comments: "What do we want? 'Flexibility! Sort-of …' When do we want it? 'Now! Maybe …'", 50 CML Rev. (2013), 673 –682.

Council of Justice and Internal Affairs to demonstrate real solidarity after the shipwreck tragedies in the Mediterranean, where hundreds of asylum seekers were killed, is a case in point.

We are faced with a curious paradox. On many fronts the need for countries in Europe to give common responses to common problems is obvious: in the economic and political fields alike. Ageing European nations separately have become too small to act alone in meeting the challenges of a new world. New powers with different social and political cultures are claiming a place in the sun. They no longer accept the premises of our Western value system and reject our centuries-long dominance. Much is at stake. German Chancellor Angela Merkel stated a few years ago at the Davos World Economic Forum: "The future of the euro, is the future of Europe". But the leadership of the EU as a whole, as well as that of the euro area separately, seems curiously unable to create new sustainable structures. We are often faced with patchwork decisions arrived at to avoid imminent disaster at the last moment. It is too early to say whether this will change after the recent German elections, but we may enter a new phase of more determination.

Let me therefore end my comments with some personal views about our future as a European value system, a kind of "farewell to arms". In a sense we are in a similar situation to that of sixty years ago when the original ECSC Treaty was signed. Within the Council of Europe and the OEEC (the predecessor of the current OECD) some believed that the existing structures built up in the direct post war period were not adequate to meet the challenges of the future. Others were not able or willing to follow a new course of action. It was the beginning of a temporary split between the so-called Inner Six and the Outer Seven.

Underlying the Schuman Plan was the determination by the French and German governments to support a common approach. In the middle of the Cold War the outcome was uncertain, but the result in political and economic terms was spectacular. It was the beginning of an unprecedented period of peace and prosperity on a continent ravaged by two world wars.

We now live in a different world, and a Union with 28 rather than 6 Member States. But the stakes are equally high: in Europe we face a stark choice between increasing global irrelevance or a new spirit of cooperation, based on common interests and values. A joint Franco-German approach is as necessary as 60 years ago, although no longer sufficient to guarantee success. However, other Member States both old and new, such as Poland, are interested to join. At the end of the day Britain will not leave the European Union if new leadership is demonstrated on the continent. Britain needs the continent as much as the continent needs Britain. Benjamin Franklin famously

said: "we will hang together, or we will hang separately". This is as true now as it was 200 years ago.

The creation of the Common Market Law Review inspired me at the beginning of my career to follow a European path. Fifty years later I trust it will continue for another half century to provide informed legal knowledge about Europe to present and future generations!

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