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Introduction

*Niamh Nic Shuibhne**

John Usher approached EU legal scholarship in a comprehensive and also distinct way. I first went to Edinburgh University as a PhD student, as a constitutional lawyer planning to examine how the setting and application of language rules intersected with EU law. John, as my supervisor, facilitated that research through first directing me down the expected channels of EU cultural policy and multilingual programmes, as well as the protection of fundamental rights. The next phase of the thesis, on internal market law, also started with relatively predictable research questions about product labelling rules and employment-linked language tests. Then, things took an unplanned turn into the complex matrices of EU administrative law. John suggested that I should also look at the consequences of different language rules for businesses operating within the single market (or, more typically, the instrumental use of language rules by businesses seeking to have substantively unfavourable decisions annulled). Characteristically, his research instinct led to the uncovering of embryonic general principles in very technical case law that most of us ran a mile from ever reading. Those bare constitutional threads became, much later, properly apparent in landmark language rule decisions of the Court of Justice, such as *Kik* and *Skoma-Lux*.¹ But it took a lot of *BASF* to get there.²

John never ignored the detail of the technical, because he saw the constitutional everywhere. He teased out deeper constitutional connections by searching in places that others might never think to look. He mapped the formation and development of EU law in real-time, amassing both breadth and depth through his particular approach to its analysis. He was one of the few to write on the customs union or agriculture; and one of the first to write on the legal implications of monetary union and of flexible integration. The objectives underpinning this collection of essays reflect both the contribution that he made and the way in which he made it.

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¹ Case C-361/01 P *Christina Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2003] ECR I-8283; Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

² See, eg, Case C-137/92P *Commission v BASF* [1994] ECR I-2555; Case C-286/95P *Commission v ICI* [2000] ECR I-2341.

In a formal sense, the collection is structured in a way that reflects the core areas of John's work. We have encouraged our contributors to see the trajectory from single market to economic union as a continuing story, emphasizing questions about the purpose, regulation and structures of economic union within the broader objectives of the EU legal and political order. The free movement provisions remain at the core, but the concept of the transnational market must accommodate other, often competing, interests to which the EU is also committed. An important implication of that broad construction is that the protection of these other interests can distort the basic free trade framework (eg intellectual property rights and the promotion of innovation; free movement of workers and the protection of social policy objectives). Which interests should prevail, and who should decide?

The book is structured around five headings that reflect the scale and complexity of these questions. (1) **Economic and monetary law and policy**: chapters in this Part address the legal, fiscal and institutional dimensions of economic and monetary regulation at EU level—a target moving at dizzying speed at the time of writing, but problems for which more stable, longer-term solutions will have to be worked out. (2) **Internal market: evolution and regulation**: contributors to this Part of the collection explore questions about the present and future regulation of the EU's internal market. Some authors adopt a comparative approach. Others explore how underpinning general principles are engaged in the substantive interpretation and application of internal market law, uncovering tensions between the potentially competing dynamics of public law on the one hand and market integration and/or competition policy on the other. (3) **Common policies**: here, both contributors reimagine 'old' regulatory structures in the context of newer, especially environmental, challenges.

The collection also highlights the significance of questions of a structural and administrative nature that flank, uphold and even challenge the core of internal market law. Part (4), on **expanding horizons**, looks at external aspects of the Union's activities but also at issues of competence, testing the parameters and consequences of the EU's economic objectives and their interaction with broader considerations or ambitions. Finally, in Part (5), **judicial protection and access to justice**, both contributions reflect the fact that the realization of EU economic law in practice has been effected in large part through legal challenges at grassroots level. The authors thus explore the extent to which economic actors are catered for in the EU frameworks of access to justice and judicial protection.

The collected essays offer in-depth reflections on different parts of the transnational economic union. But the ideas developed are linked together through cross-cutting concerns about competence and the nature of regulation, and about where and how the economic law of the EU fits in the continuing integration narrative. They take account too of shifting perceptions of space, priorities and potential by considering regional economic integration in a more global context. The following paragraphs introduce particular themes that can be traced across the essays in this manner, focusing especially on themes that link different policy areas together in somewhat unexpected ways.

A. From single market to economic union: development and dependency

In choosing the title for this volume, we have portrayed an evolution: *from* single market, *to* economic union. This depiction is obviously descriptive in temporal terms, but what emerges from many of the essays, not least David Edward's foreword, is a parallel construction of *dependency*. As he points out, '[w]ithout [the internal market], the problems of the Eurozone cannot be resolved and the long-term prospects of the Union itself will not be bright'. The global economic climate remains precarious. Questions about optimal financial and fiscal regulation remain critically significant. The challenge of monetary stability is especially pertinent in the transnational context, given the degree of interdependency generated by EU integration. The tenacity of the single currency is tied inexorably, therefore, to the future shape of the internal market, an argument developed in the contribution by Fabian Amtenbrink. Laurence Gormley uncovers the same path-dependency in his evaluation of the customs union, highlighting how 'the functioning and practice of the customs union and the internal market well demonstrate that in the European Union they are intertwined concepts, forming essential elements of the Union's construction'. Gormley's point also exemplifies the existential dependency question about the relationship between economic union and the persistence of the EU *per se*. This is a complex dilemma, which can be framed in both positive and negative ways. Reflecting, first, on the positive, Joseph McMahon charts the past and future of the common agriculture policy (CAP), concluding that '[t]he debate on the future of the CAP... should not be limited to the mechanics of the policy but should also extend to its objectives and how they reflect the ultimate basis of the existence of the Union'. Thus he connects both the mechanics and the substance of sectoral policy reform to more general polity conditions within which the policy objectives sit, and which they shape in reciprocal turn.

Perhaps the dominant mood of crisis portrays the negative side of the dependency bond, however, through its persistent fusion of policy stress to polity security. The momentum driving the EU over all of its decades of existence feels, in general terms, to be forward moving. And yet, the fragility of EU integration is exposed (and often exploited) on an almost daily basis. Would less ambitious policy goals that were more strongly and deeply supported by the governments and peoples of (all of) the Member States actually work better? Would they be more legitimate? As Amtenbrink sharply observes, '[i]n the current political climate, it is hardly conceivable that any new equally ambitious European project would stand a realistic chance'. There is an also existential risk, however, attached to any discussion about now turning, in essence, backwards. Amtenbrink is aware of this too, as evidenced by his remark that 'a return to national currencies would have incalculable consequences for the economies of the Member States and the European integration project as a whole'.

If going backwards is not a credible option, for all kinds of reasons, standstill will not work either. In the context of monetary policy, Andrew Scott predicts an inevitable, if staggered, propulsion towards fiscal union. But more intensive integration of the economic union demands an outing of the existential question. Deeper fiscal integration should not occur without proper insulation from democratic norms and constructs. To underline this point, Scott suggests that ‘the EU as an international economic and political arrangement stands at a crossroads. Perhaps the most important question is not how or when the current sovereign debt crisis might be resolved, but whether the EU has the capacity—individually and collectively—to exercise the type of leadership that is necessary to navigate its way out of this crisis.’ While outlining the choices open to the EU, Scott weaves a legitimacy threshold throughout his chapter. This is also the dominant normative concern in Francis Jacobs’s evaluation of both access to and the functioning of the Court of Justice, which he frames against non-negotiable criteria that emanate from the rule of law.

B. The EU as a (co-)regulator

In different ways, many of the contributions are assessing the performance and capacity of the EU as (co-)regulator of the single market and economic union. Three areas of focus in particular are suggested here—regulatory authority; regulatory reach; and regulatory method. Overlap between these concepts will also be flagged where relevant.

First, there is the ‘distribution of *regulatory authority*’, discussed by Stephen Weatherill through the optic of consumer protection. The Lisbon Treaty’s express delimitation of both EU and Member State competence domains brings reassurance in a symbolic way—and we should not underestimate the value of that on its own terms. But Article 4(2) TFEU’s listing of the policy areas that constitute the necessarily messy idea of ‘shared competences’ will not resolve deeper questions about who should do what, and when. As Weatherill reminds (cautions?) us, ‘there is no sustainable divide between the Union’s interest in market integration and the role of the Member States in matters of market regulation’.

Richard Plender explores the dynamic of Europeanization in his review of applicable law with respect to cross-border transactions. This work demonstrates not only how relevant concepts and principles are applied in complex legal situations, but also how the operation of the EU marketplace has caused us actually to rethink and reconceptualize many of these tools also. Concerns about the distribution of regulatory authority impact on substantive policy development too. We see this most starkly in the chapters addressing the governance of monetary policy against the shadow of the current financial crisis. Bringing an economist’s perspective to that debate, Scott’s diagnosis is uncompromising: ‘the abject failure of the rules that were designed to govern the fiscal policies of Euro area countries has been the major factor that has transformed the financial crisis in Europe to the sovereign debt crisis that is threatening to undermine the EU monetary union’.

Second, we can detect considerable concern about the *reach of regulation*. Weatherill addresses this through his profiling of minimum harmonization as a regulatory method that generates space for the virtue of diversity. The counter-tension is, however, ‘a persistently fragmented regulatory landscape’. In a single market welded together from distinct State pieces, does uniformity or diversity merit greater normative weight? And who should decide? Weatherill’s preference is clear: ‘[i]t is neither politically feasible nor economically desirable to expect all 27 Member States to advance as a single bloc in all the sectors of economic activity now affected by EU policy.’ Adjusting the macro template of single market law further away from the sacrificial tenor of uniformity would be an enormous challenge. Moreover there has to be some protected core of sameness, the contours of which would need to be carefully worked out. After all, as Gormley rightly reminds us, ‘[b]oth the Union legislature and the Court of Justice have sought to develop and maintain the unity of the marketplace and the effectiveness of the economic law which has been established in these areas, and the pursuit of those aims has indeed been very successful.’ But if longer-term EU viability is the gain, then a revised appreciation of the *positive* contribution of non-uniformity is not a challenge that can be eschewed. The primary legislative framework for regulating the single market was designed for a union of six States more than fifty years ago. It is naïve to presume that the same framework can be equally effective in the contemporary Union.

Dimitry Kochenov presents a nuanced study of regulatory reach through his discussion of the ‘mutation’ of Member State nationality laws. Bringing together the technicalities of nationality law and the constitutional impact of EU citizenship, he argues that ‘the move from a single market to an economic union has been accompanied by some fundamental mutations at the Member State level which would not necessarily be connected to economic regulation at the first glance, showing how far beyond the objectives stated in the Treaties the deeper consequences of economic integration actually stretch, discovering constitutional questions raised by the internal market on a plane far removed from economic regulation *sensu stricto*.’ Interestingly, Kochenov finds both formal and *informal* EU regulatory influence through his case study, both aspects of which ‘affect the essence of the State in Europe in ways not necessarily envisaged by the drafters of the Treaties’. This notion of context-integration supports the point expressed above about the limitations of formal competence division in seeking to control the distribution of regulatory authority: ‘the indirect influence of the internal market is only likely to grow, presenting the division of competences between the Member States and the Union in a somewhat different light compared with what can be read in the Treaties’. Here, then, we see the impulse of regulatory *reach* displacing formal regulatory *distribution*.

In her contribution on the concept of distinctiveness in EU trade mark case law, Rosa Greaves presents a regulatory picture reflecting partial fragmentation in substantive and also institutional terms. The substantive regulation of trade mark law leads her to critique the ongoing saga of patent regulation. That analysis brings her ideas about the reach of EU intellectual property regulation right up to the

boundaries of its institutional design, showing again the unexpected consequences of EU regulatory influence and stressing the value and significance of regulatory *enforcement*. Specifically, Greaves argues that ‘it is difficult to refute the need to establish a specialist EU intellectual property law court (or tribunal) as a constituent part of the ECJ’. Moreover, her depiction of an overall ‘conservative’ approach to copyright regulation jars with the relevance of that rule-book for predominantly ‘fast moving industries’—not to mention highly lucrative ones. Jacqueline Dutheil de la Rochère presents a similar picture of the regulation of online gambling. Taken together, these chapters conceive questions about regulatory reach in an especially vital contemporary context: how can regulation best—and effectively—reach into the *virtual* market?

Exploring the reach of EU regulation through substantive market case studies, both Dutheil de la Rochère and Amandine Gardé also identify protected spaces for the Member States. These authors explore gambling regulation and advertising restrictions respectively, against varying demands of public interest protection at national level. Dutheil de la Rochère demonstrates how Member States *can* carve space for specific national regulatory preferences, so long as they can show that those policy choices are coherent and genuine and that they respect fundamental principles of EU law such as non-discrimination and proportionality. Importantly, she emphasizes that ‘genuine acceptable interests justifying obstacles to the freedoms of the internal market will have to be made out, rather than merely asserted’. This finding links her work even more closely with Gardé’s contribution, which focuses on precisely these questions at the justification and proportionality stages of the EU free movement paradigm. In the context of regulatory authority, she advocates a limited judicial role in the determination of proportionality, arguing that the Court ‘should neither substitute its assessment for that of legislative authorities nor instrumentalize the principle of proportionality to suit its own policy preferences.’ But she also argues for a more rigorous approach to questions about the burden of proof, drawing comparative lessons from US Supreme Court case law.

Through his case study on the scope of obstacles to capital movements, however, Thomas Horsley detects a slight but growing preference in the case law of the Court of Justice that requires Member States to justify rules regulating market behaviour *within* State boundaries. More specifically, through the engagement of tests grounded in deterrent or dissuasive effects on free movement, he argues that the Court is ‘[applying] the Treaty freedoms to review of non-discriminatory national rules that simply define the regulatory environment within a Member State’. This approach is consistent with the increasingly dominant market access philosophy that is evident across the Court’s free movement case law. A market access approach undoubtedly dissolves national market protectionism, intended or otherwise. But Horsley flags a point of caution, arguing that the Court is essentially reviewing ‘the existence of (certain) non-discriminatory national policies that simply restrict commercial or personal freedom within Member States.’ Reflecting the theme of regulatory reach, he characterizes this case law as marking ‘a definite shift in the balance of power between the Member States and the Court of Justice. The dangers

of judicial overreach into Member State autonomy are well known and the Court has been forced to backtrack already once before', recalling the case law in the 1980s and 1990s which led to the market access clampdown in *Keck*.³ But for now, at least, no *Keck II* is appearing (yet) on the horizon.

Regulatory reach finds *spatial* reflection in two further chapters in particular. Marc Maresceau looks outwards, reflecting comprehensively on the evolution of EU policy concerning the proposed accession to the Union by Turkey. His analysis deftly exhibits the complex tangling of the legal, political and economic facets of the contemporary EU. The starkness of the following question, for example, illustrates the resulting complexity: 'is Turkey welcome in the EU if it satisfies the Copenhagen criteria in the way other candidates have complied with them and contributes to finding an acceptable solution for the Cyprus question?' Francesco de Cecco, in contrast, engages the TFEU's State aid rules to look inwards—through the glass floor of internal Member State structures. Using the lens of the financial crisis, de Cecco constructs parallels between inter- and intra-State EU constitutionalism: 'EU institutions are often perceived to be at odds with national democracies, as they exert a strong influence over domestic economic policy decisions, particularly in the Eurozone. Moreover, indirect transfers from countries with stronger finances towards countries with weaker finances are a cause of great concern for public opinion in the former countries. Similar tensions are mirrored within individual Member States, as governments attempt to rein in public spending by exercising closer control over financial decisions taken at decentralized level.' While affirming respect for the internal constitutional structures of the Member States in general terms, de Cecco grasps one of the most problematic spatial nettles of the State aid rules, suggesting that 'a more open and explicit articulation of the role played by national constitutional identities in the Court's reasoning would help to justify an otherwise problematic jurisprudential stance'. Arguably, the revised expression of subsidiarity in Article 5(3) TEU opens a constitutional door in this regard that might yet be opened.

Finally, third, there is discussion in several of the chapters about the *method of regulation*. On this theme, Jan Jans's exploration of a common frame of reference for public law provides a useful companion analysis to Kochenov's exposition of indirect regulatory reach. Jans traces the consequences of *non*-harmonization yet notes similarly the reality of less systematic 'piecemeal' harmonization of public and administrative law nonetheless. He also discusses some of the drawbacks generated by this organic approach. Drawing from the ongoing development of a common frame of reference for private law, Jans asks whether comparable work in the field of public law is needed, possible, or even wise. Cairtriona Carter's empirical study of the embedding of sustainable development in the regulation of sea fisheries and aquaculture reminds us that a whole range of actors participate in market regulation; her own work outlines the particular contribution of producers, businesses and NGOs. Stakeholder contributions to regulatory methods are one thing; but

³ Joined Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.

Carter's preliminary finding that 'there was no immediate evidence of "leadership" by EU public actors over sectoral integration' is another. However, she reaches a less ominous conclusion overall, noting that 'the power of the concept of sustainable development is revealed more as a resource for private actors to bring about change within the economic logic of their industry as part of a competitive strategy, than as a new regulatory device for Commission officials to "govern" industry. This coincides also with a changing regulatory approach to economic union with its current emphasis on self-regulation, voluntary agreements and incentive-based market mechanisms'.

Coupled with this evolution of regulatory method, Carter finds the persistence of another regulatory truism: 'the current character of economic union, with its focus on better regulation tools and impact assessments, serves to further the dominance of experts'. Exploring a policy field in which the expertise of agencies plays a critical part, Takis Tridimas reviews the structure and powers of the European Financial Markets Authority (ESMA) in order to sketch the kind of 'regulatory experimentation of which we need more not less'. He emphasizes in particular the 'heavy hand of soft law' and the often binding-in-fact nature of such instruments. The depiction of ESMA's capacity to generate 'peer pressure to an asphyxiating degree', for example, notwithstanding the limits to its power in a legal sense, brings that analysis strikingly to life. But the pursuit of regulatory effectiveness beyond law will need somehow to reconcile the benefits uncovered by Tridimas with the concerns about legitimacy and competence boundaries identified by, among others, Scott and Weatherill.

McMahon's work on the CAP and Robin White's analysis of EU competence in the field of fundamental rights are thematically discrete but they share two key things. First, they locate the scrutiny of their subject areas in contemporary regulatory methodology and the increasingly complex balancing of interests that regulation, whether legislative or court-led, must hope to achieve. McMahon traces the way in which a burgeoning range of flanking interests and sociological drivers, notably globalization, have bled into the EU regulatory process over time. This finding is mirrored in Carter's conclusions on the 'political usages of sustainable development [which] have brought about a changing logic of economic union in sea fisheries and aquaculture'. White focuses on the way in which the Lisbon reforms sought to entrench a growing set of value criteria in primary EU law. The second shared quality in both chapters is a sense of optimism. McMahon describes the fast-paced changes in the agriculture sector as a 'moving target' while observing that 'at least the thick fog has dissipated'. White presents the expansion of Union competence as a trajectory of regulatory maturity, on which the inherent significance of fundamental rights is now—finally—more aptly reflected through the achievements of the Lisbon Treaty, thinking especially but not exclusively of the legal effect conferred on the EU Charter of Fundamental Rights. It is worth recalling, however, that Dutheil de la Rochère, in her exploration of case law on the regulation of gambling activities, cautioned that even in the established services' sector of free movement law, 'the balancing of factors makes considerable demands of the judiciary, both at European and national levels'. When more law exists, and

more requirements are built into it, regulators face even tougher challenges when trying to deal with the complicated balancing of interests that results.

Bringing together the three themes of authority, reach and method, Noreen Burrows and Muriel Robison's analysis of the 'motherhood penalty' and the gender pay gap is perhaps more pessimistic, or at best realistic, but that pessimism is shaped by observation of years of poor progress in this field. Interestingly, from the perspective of regulatory reach, they characterize this policy field as a protected space for Member State regulatory responsibility, remarking that '[t]he absence of a political commitment to renegotiating the Pregnant Workers Directive is also indicative of the continuing wariness of several Member States to having EU level market correcting mechanisms replace domestic welfare policies both on grounds of costs and on grounds of the internal logic of national solidarity principles'.⁴ This position is shown empirically to have the support of the Court of Justice, a strategy that has manifested itself through the 'drawing [of] a boundary between equality policies operating at EU level and welfare policies operating at the national level'. In terms of the distribution of regulatory authority, however, Burrows and Robison are highly critical of the outcome, since there are 'wide divergences in benefits available to women and a wide divergence in costs to the Member States and to employers'. Here, then, as we saw also in the contributions on monetary union, we face something of an impasse. We are forced once again to compare the ambition-gap between the objectives of economic union and the structures created for its delivery.

Amttenbrink addresses this conundrum as an inherent design flaw in the EU's polity make-up. He treats the problem as a systemic hangover that still affects the design of EU regulation, in the sense of 'creating a supranational monetary policy authority from scratch in the face of a constitutional system that does not have all the characteristics of a state'. In his exploration of the deepening of EU competence for the protection of fundamental rights, White reminds us, however, that '[t]here is nothing contradictory about an economic constitution that also respects human rights. But it would be wrong to categorize the European Union as offering little more than an economic constitution when it offers much more.'

Whether we go so far as to agree or disagree with the Court of Justice's claim that the EU Treaties constitute an actual constitutional charter, it is difficult to dispel a related claim that constitutional *questions*, at least, underpin both the evolution and interdependency of the single market and the economic union. Moreover, that claim will always be associated with John Usher's remarkable imprint on EU scholarship.

⁴ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L 348/1.

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