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## **The limits of transnational scholarship on EU law A view from Germany**

Daniel Thym



European University Institute  
**Department of Law**

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A VIEW FROM GERMANY**

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## **Abstract**

Scholarship on EU law is well established but arguably lacks sensitivity to the methodological characteristics of transnational discourse. The defining features of the supranational legal order are more fluid than those of domestic legal systems and, moreover, academic debates occur in different languages. This contribution highlights the limits of transnational debates about EU law through a quantitative assessment of both citation practices and the geographical spread of authorship in specialised law journals. Against that background, it uses the example of Germany to designate areas defining national specificities in the methodological approach towards EU law. In doing so, this contribution considers language regimes, publication formats, the role of legal education and practice, the relative weight of theoretical and doctrinal approaches, as well as interaction with international and constitutional law.

## **Keywords**

Academic research, EU law, languages, methodology, legal cultures.

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## Introduction

Scholarship on EU law is well established but arguably lacks sensitivity to the methodological characteristics of transnational discourse. The defining features of the supranational legal order are more fluid than those of domestic legal systems and, moreover, academic debates occur in different languages. This contribution highlights the limits of transnational debates about EU law through a quantitative assessment of both citation practices and the geographical spread of authorship in specialised law journals. Against that background, it uses the example of Germany to designate areas defining national specificities in the methodological approach towards EU law. In doing so, this contribution considers language regimes, publication formats, the role of legal education and practice, the relative weight of theoretical and doctrinal approaches, as well as interaction with international and constitutional law.

### Starting point: European law as a social field

The French sociologist Pierre Bourdieu showed that the law is defined, as a social field, by an extended autonomy from other societal structures and constantly reaffirms its relative independence through routines and procedures. Bourdieu drew our attention to the actors and social practices through which those involved uphold the relative autonomy of the legal system, while at the same time pursuing an internal struggle for dominance.<sup>1</sup> For our purposes, this focus on everyday routines and procedures, whose habitus defines the constant reorganisation of legal debates, is particularly helpful. Such an approach concentrates not only on the epistemological methods of legal knowledge production by scholarly contributions; it also considers the practices of the actors.<sup>2</sup> This contribution follows this pattern: reflection on the argumentative methodology is complemented by thoughts on the everyday social practices concerning legal education, publication formats, multilingualism, career paths, the organisational infrastructure and interaction with practitioners.

One of the basic tenets of modern epistemology is that there is no such thing as a neutral standpoint, since any stance is based on reflexive preconceptions. This contribution is no exception. Our focus on ‘transnational EU law scholarship’ implies a double assumption that, firstly, there is a relatively autonomous area of legal research on EU matters which can be distinguished from constitutional and international law and that, secondly, language regimes and national differences have an impact on academic knowledge production. There are good reasons to base our analysis on these two suppositions. The existence of specialised lectures, textbooks, university chairs, journals and scientific associations dedicated to ‘EU Law’ indicates that such a sub-discipline exists – although the degree of its independence is in flux (see below E.). In assessing these phenomena, this contribution focuses on the academic community at universities and considers both academics with a specialisation in EU affairs and those dealing with EU law occasionally and from specific angles.<sup>3</sup>

Due to the supranational character of EU law, scholarship has to position itself towards the ongoing plurality of domestic legal systems with their diverse legal cultures and academic traditions (a challenge sometimes overlooked by British and American authors dealing with EU law). A survey of authorship and citation practices in leading specialised journals on EU law in French, German and English demonstrates that linguistic (trans-)nationalism is crucial for any evaluation of the state of EU law

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<sup>1</sup> See Pierre Bourdieu, ‘La force du droit. Éléments pour une sociologie du champ juridique’, *Actes de la recherche en sciences sociales* 64 (1986), 3-19; for an English translation see id., ‘The Force of Law: Toward a Sociology of the Juridical Field’, *The Hastings L. J.* 38 (1987), 805-853.

<sup>2</sup> Cf. Bruno Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat* (La Découverte, 2004); published in English as id., *The Making of Law. An Ethnography of the Conseil d'Etat* (OUP, 2010).

<sup>3</sup> This focus implies that other actors participating in the social field of EU law, such as bureaucrats, judges, commercial lawyers, are only considered indirectly; for a broader analysis see Daniel Kelemen, *Eurolegalism* (Harvard UP, 2011).

scholarship (below C.). Academic traditions and the intimate relationship between scholars and practitioners explain the focus on doctrinal output in many contributions from the continent, including Germany. This has recently given way to an increased openness towards theoretical reflection, especially for debates in the English language (below D.). All these findings support the programmatic call for a methodological and discursive reorientation towards transnationalism.

This contribution focuses on the status quo and considers the historic evolution of academic approaches primarily where it informs our understanding of the presence.<sup>4</sup> Different social practices of EU law scholarship (publication formats, legal education, *etc.*) will not be discussed separately but under the umbrella of broader themes. In order to avoid misunderstandings, I should emphasise that this contribution follows a constructive intention. My aim is to foster critical reflection on the state of EU law scholarship, thereby ideally raising awareness of the specificities of transnational debates. I do not claim that EU law scholarship is in crisis, although the example of Germany demonstrates that legal scholarship in general is under pressure to reform.<sup>5</sup> It is in the nature of a generalised treatise on the situation of academic research that certain generalisations are inevitable; to do so facilitates the recognition of underlying patterns and trends.<sup>6</sup>

### **National persistence and transnational linkages**

In most jurisdictions, EU law has traditionally been deemed to represent, together with international law, the ‘external dimension’ of the domestic legal system.<sup>7</sup> Scholars working on EU law could therefore be expected to be more cosmopolitan and multilingual in their outlook and research practices. In comparison to peers with a specialisation in domestic law, this may have been true for a long time. Many EU experts have studied abroad, speak a laudable English and/or French, maintain regular contact with international colleagues and read international legal materials. Nevertheless, this section will demonstrate that their social practices are firmly embedded in the domestic legal and academic systems of home countries, at least in Germany. Debates relate to supranational legal materials, but their discussion and reconstruction often follows distinct national patterns. The supranational object of research resulted in a limited discursive, linguistic or methodological Europeanisation.

### ***Citation practice and authorship***

A quantitative evaluation of citation practices and authorship in selected specialised journals on EU law may help us to identify the degree of transnational linkage. More specifically, the data presented below show the geographical spread of authorship in terms of institutional affiliation (not nationality) and the language of the academic contributions referred to in the footnotes. Both parameters illustrate the degree of transnational connections even if this set of empirical data does not necessarily present a comprehensive picture. Our focus on specialised journals on EU law may yield a higher degree of interconnection than an analysis of domestic law journals.<sup>8</sup> Moreover, the scrutiny of selected volumes

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<sup>4</sup> For a historic approach to the debate in Germany see Anna K. Mangold, *Gemeinschaftsrecht und deutsches Recht* (Mohr Siebeck, 2011) and Bill Davies, *Resisting the European Court of Justice. West Germany’s Confrontation with European Law* (CUP, 2012).

<sup>5</sup> For the programmatic position of the German Academic Research Council see Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland*, doc. 2558-12 of 9 Nov. 2012.

<sup>6</sup> For a similar argument on public international law, see Nico Krisch, ‘The Many Fields of (German) International Law’, in: A. Roberts et al. (eds.), *Comparative International Law* (OUP, 2016), forthcoming.

<sup>7</sup> By way of example, see the separate discussion in the seminal ‘Handbook on the Constitutional Law of the Federal Republic of Germany’ in Volumes X (*Deutschland in der Staatengemeinschaft*) and XI (*Internationale Bezüge*) of Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 3rd edn (C.F. Müller, 2012/13).

<sup>8</sup> Authors contributing to specialised journals are more likely to be familiar with debates abroad than those dealing with EU law as a secondary dimension of domestic law; I also leave aside transnational journals, which publish articles on EU

presents us with snapshots, not multi-year medians,<sup>9</sup> and the number of footnote citations does not necessarily show the actual impact in multilingual debates (even less so than in domestic debates).<sup>10</sup>

Notwithstanding these methodological caveats, our set of empirical data reveals some notable results and trends. The overall degree of transnational linkage is limited in terms of both cross-linguistic fertilisation and transnational authorship; even experts publishing in specialised journals on EU law tend to congregate in national discursive communities (more so in the French language community than in the German equivalent).<sup>11</sup> The overall percentage of ‘foreign’ references in French-language *Cahiers de droit européen*<sup>12</sup> and the Germany-based *Europarecht* was below one third in all volumes under analysis and often accounted for less than twenty percent. At the same time, the international weight of publications in German and French has been in constant decline, while publications in Dutch and Italian, the other two official languages among the original six founding members, have been marginalised from the beginning.<sup>13</sup> French publications are only occasionally referred to in *Europarecht*, while the visibility of German contributions in the *Cahiers de droit européen* remained stable at a low level. The most remarkable outcome of the dataset is the dramatic decline in citations of German and French publications in the *Common Market Law Review*.

Citation Practices in Selected Specialised Journals on EU Law <sup>14</sup>			
Volume	Number of Citations	Language of Related Publications <sup>15</sup>	Page Count (citations per page)
<i>Common Market Law Review</i>			
1965	560	EN 47 % (265); DE 33 % (182); FR 13 % (74); NL 5 % (27); IT 2 % (12).	480 (1.2)
1975	201	EN 53 % (106); FR 21 % (44); DE 19 % (40); NL 3 % (6); IT 2 % (4); ES 0,5 % (1).	517 (0.3)

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affairs, but are broader in their thematic scope, such as the *German Law Journal* or the *International Journal of Constitutional Law*, since a quantitative analysis of authorship and citation practices would not be confined to issues of EU law.

<sup>9</sup> In particular, the visibility of ‘smaller’ languages will depend on whether any author with a background in or knowledge of this jurisdiction was published in the year under analysis.

<sup>10</sup> Arguably, multilingualism supports selective citation practices to the benefit of the language of the journal if authors refer to literature the reader will understand or if they fail to reveal the extent of the ‘foreign’ influences in order not to displease readers, publishers or peer reviewers.

<sup>11</sup> My experience as a participant in EU law debates and discussions with colleagues from Italy and Spain show that the situation there is comparable to the situation in France.

<sup>12</sup> The *Cahiers* have traditionally had strong Belgian connections through the publisher (Bruylant, now part of the French group Larcier) and the editorial team (now headed by Jean-Victor Louis); for the situation of EU law journals based in France, see note 18 below.

<sup>13</sup> The limited weight of French references in the *Common Market Law Review* is particularly surprising given that French remains the working language of the ECJ to this date and that it was also dominant within the other EU institutions until the late 1990s; it should be noted, however, that French publications have traditionally been more visible than English publications in Southern European jurisdictions with Romance languages (plus Greece), i.e. they had an international influence outside Belgium and France.

<sup>14</sup> Greta Baaken, Jonas Müller, Moritz Raiser and Linda Wischrath should be acknowledged for having compiled this list.

<sup>15</sup> Abbreviations in accordance with country-specific internet top-level-domains, i.e. UK for United Kingdom (= references to articles written in English), DE for Germany (= publications in German), etc.

1985	983	<b>EN 43 %</b> (424); <b>DE 24 %</b> (232); <b>FR 16 %</b> (153); NL 13 % (131); IT 2 % (17); RU 1 % (11); PL 1 % (10); NO 0,4 % (4); HR 0,1 % (1).	864 (1.1)
1995	888	<b>EN 68 %</b> (605); <b>FR 12 %</b> (107); <b>DE 11 %</b> (105); IT 3 % (27); NL 3 % (26); ES 2 % (18).	879 (1.01)
2005	1640	<b>EN 69 %</b> (1136); <b>DE 17 %</b> (283); <b>FR 10 %</b> (161); ES 2 % (26); IT 1 % (18); NL 1 % (14); CZ/FI 0,1 % (1 each).	1802 (0.9)
2013	3804	<b>EN 86 %</b> (3288); <b>FR 5 %</b> (192); <b>DE 5 %</b> (173); NL 2 % (81); IT 1 % (44); ES 0,6 % (22); DK 0,1 % (4).	1873 (2.0)
<b><i>Europarecht</i></b>			
1965	357	<b>DE 68 %</b> (243); <b>EN 22 %</b> (81); <b>FR 6 %</b> (23); IT 2 % (9); NL 0,2 % (1).	377 (0.9)
1975	424	<b>DE 69 %</b> (294); <b>FR 16 %</b> (67); <b>EN 12 %</b> (51); NL 2 % (9); IT 0,7 % (3).	398 (1.1)
1985	400	<b>DE 80 %</b> (319); <b>EN 10 %</b> (38); <b>FR 8 %</b> (33); GR 1 % (3); DK 1 % (5); NL 1 % (2).	440 (0.9)
1995	705	<b>DE 83 %</b> (587); <b>EN 13 %</b> (93); <b>FR 3 %</b> (23); ES 0,3 % (2).	455 (1.5)
2005	1466	<b>DE 82 %</b> (1199); <b>EN 16 %</b> (228); <b>FR 2 %</b> (25); ES 1 % (9); IT 0,2 % (3); PL/DK 0,1 % (1 each).	823 (1.8)
2013	1331	<b>DE 69 %</b> (925); <b>EN 28 %</b> (376); <b>FR 2 %</b> (25); IT 0,2 % (2); PL/CZ/NO 0,1 % (1 each).	722 (1.8)
<b><i>Cahiers de droit européen</i></b>			
1965	132	<b>FR 83 %</b> (109); <b>DE 6 %</b> (8); <b>EN 5 %</b> (6); NL 5 % (7); IT 2 % (2).	291 (0.5)
1975	420	<b>FR 56 %</b> (238); <b>IT 22 %</b> (93); <b>DE 15 %</b> (63); EN 5 % (24); NL 0,4 % (2).	768 (0.5)
1985	452	<b>FR 92 %</b> (418); <b>EN 4 %</b> (18); <b>DE 2 %</b> (10); NL 0,7 % (3); ES 0,4 % (2); IT 0,2 % (1).	765 (0.6)
1995	294	<b>FR 59 %</b> (175); <b>EN 17 %</b> (50); <b>IT 10 %</b> (30); DE 11 % (35); NL 1 % (3); SP 0,3 % (1).	807 (0.4)
2005	514	<b>FR 69 %</b> (357); <b>EN 22 %</b> (113); ES 4 % (19); <b>DE 3 %</b> (13); IT/NLGR 1 % (3 each); PT/NO/SE 0,2 % (1 each).	752 (0.7)
2013	608	<b>FR 81 %</b> (494); <b>EN 8 %</b> (47); <b>DE 5 %</b> (33); SE 3 % (17); ES 1 % (6); NL 1 % (5); GR/IT 0,4 % (3).	880 (0.7)

The *Common Market Law Review* directs our attention to a specificity of English language journals, which have never been written exclusively for the British (and Irish) academic market: they are fora for

transnational debates.<sup>16</sup> This function of specialised journals on EU law becomes apparent upon analysis of the geographical spread of authors. Bruno de Witte showed that corresponding data for the *Europarecht*, the *Cahiers de droit européen*, the Italian *Diritto dell'Unione Europea*, the French *Revue trimestrielle de droit européen* and the Spanish *Revista Española de Derecho Europeo* demonstrate the predominance of authors from within the language area.<sup>17</sup> While data prepared by de Witte and Francis Snyder show that French journals have some international reach with roughly one fifth of the authors coming from outside France and Belgium, the German, Italian and Spanish periodicals mentioned above are essentially confined to their respective language area.<sup>18</sup> In the latter journals, authorship is less transnationalised than references in the footnotes.

The picture looks different in specialised English language journals. The *European Law Review* is the only periodical with a certain orientation towards the British market (although the EU law faculty at many British universities is a microcosm of European diversity with researchers from across the continent). With regard to the *Common Market Law Review*, the *European Law Review*, the *European Law Journal* and the *European Constitutional Law Review*, the geographic spread of authorship in terms of institutional affiliation over the past four years (2010-2013) supports a clear outcome.<sup>19</sup> While contributors from the United Kingdom constituted the largest group, authors from other Member States collectively accounted for almost 70 % of all articles – and corresponding data for earlier periods demonstrate that this appears not to be a novel phenomenon.<sup>20</sup> Against this background, the increasing predominance of English references in the citation practices of the *Common Market Law Review* appears in a different light. It may constitute an exercise of linguistic closure, but conceals nevertheless an extended discursive transnationalisation with academics from different Member States communicating with each other via English language publications.

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<sup>16</sup> In the case of the *Common Market Law Review*, the transnational character is underlined by the editorial responsibility of the Europa Institute at the University of Leiden.

<sup>17</sup> See the data for 1995/96 and 2005/06 published by Bruno de Witte, *European Union Law: A Unified Academic Discipline?*, EUI Working Paper RSCAS 2008/34, 8-10 and annexes.

<sup>18</sup> 80 % of authors in the *Cahiers de droit européen* come from France or Belgium, incl. those working for the EU institutions; for German, Italian and Spanish journals the percentage of domestic authors stands at 100 % for some volumes, or marginally less than that in other years (*id.*, annexes for 1995/96 and 2005/06); for 1998-2004, similar results were revealed for the *Cahiers de droit européen*, the *Revue du marché commun et de L'Union européenne*, the *Revue trimestrielle de droit européen* and the *Revue des affaires européennes* by Francis Snyder, 'Creusets de la communauté doctrinale de l'Union européenne', in: F. Picod (ed), *Doctrine et droit de l'Union européenne* (Bruylant, 2005), 35 (50-62, 82): almost 80 % French and Belgians.

<sup>19</sup> I focus on these four specialised journals, which I consider to be the most visible and influential; an analysis of sectoral publications (such as the *European Journal of Migration and Law*, the *European Competition Law Review* or the *Review of European Administrative Law*) would probably yield similar results.

<sup>20</sup> See the analysis of the volumes 1995/96 and 2005/06 by de Witte (note 17) for the *Common Market Law Review* (UK: 24 %, EU institutions/EUI: 18 %; NL: 14 %; BE (without EU institutions): 14 %; DE: 11 %; IT: 5 %; *etc.*) and the *European Law Review* (UK: 49 %, EU institutions /EUI: 11 %; NL: 8 %; BE: 4 %; DE: 4 %; IE: 3 %; *etc.*); data accumulated by the author on the basis of de Witte's statistics.

<i>Institutional Affiliation of Authors in Specialised English Language Journals on EU law during 2010-2013<sup>21</sup></i>		
Number of Articles	Member State of Institutional Affiliation <sup>22</sup>	
<i>Common Market Law Review</i>		
260	<b>United Kingdom 25 %</b> (66)	Poland, Luxembourg 3 % (7)
	<b>Netherlands 16 %</b> (42)	Denmark 2 % (5)
	<b>Germany 13 %</b> (33)	Greece, United States 2 % (4)
	Belgium/EU institutions 11 % (28)	Ireland, Austria, Finland, Norway 1 % (3)
	<b>France, EUI 4 %</b> (10)	Various 0-2
	<b>Italy, Spain 3 %</b> (8)	
<i>European Law Review</i>		
196	<b>United Kingdom 51 %</b> (99)	Österreich 3 % (6)
	<b>Netherlands 11 %</b> (22)	<b>Italy 3 %</b> (5)
	<b>Belgium/EU institutions 10 %</b> (19)	Luxembourg 2 % (3)
	<b>Germany 4 %</b> (8)	Various 0-2
	Denmark, Greece, Norway 4 % (7)	<b>France, Spain etc. 0 %</b> (0)
<i>European Law Journal</i>		
158	<b>United Kingdom 29 %</b> (46)	Finland 4 % (6)
	<b>Netherlands 14 %</b> (22)	<b>Spain 3 %</b> (5)
	<b>Germany 8 %</b> (13)	Belgium/EU institutions, Norway 3 % (4)
	United States 8 % (12)	Denmark, Poland, Sweden, China 2 % (3)
	<b>Italy, France, EUI 4 %</b> (7)	Various 0-2
<i>European Constitutional Law Review</i>		
95	<b>Netherlands 27 %</b> (26)	<b>Italy 6 %</b> (6)
	<b>United Kingdom 14 %</b> (13)	EUI 5 % (5)
	<b>Germany 11 %</b> (10)	<b>France, Spain, Luxembourg, United States 3 %</b> (3)
	Belgium/EU institutions 8 % (8)	Various 0-2
<i>Accumulated Data for the Above-Mentioned Journals</i>		
709	<b>United Kingdom 32 %</b> (224)	Denmark 2 % (17)
	<b>Netherlands 16 %</b> (112)	<b>Spain 2 %</b> (16)
	<b>Germany 9 %</b> (64)	Luxembourg, Norway 2 % (14)

<sup>21</sup> My assistant Carolin Beverungen Arévalo deserves credit for having compiled the list.

<sup>22</sup> Accumulated data for each volume on the basis of institutional affiliation (not: nationality); abbreviations according to country-specific internet top-level domains (cf. note 15); staff working for the EU institutions are counted according to their state of residence; dual authorship was counted 50 % and figures were rounded up for each year; the top 3 for each journal and bigger Member States are marked in bold.

	Belgium/EU institutions 8 % (59)	Poland, Greece 1.7 % (12)
	<b>Italy 4 % (26)</b>	Finland 1.4 % (10)
	EUI 3 % (24)	Various 0-2
	<b>France, United States 3 % (20)</b>	

### *Multilingualism in the past and in the present*

Times change and so does the social context. Academic discourse on EU law is a case in point, since publications in English have not always been as dominant as the data presented above showed. At the time of the first FIDE congress, the natural choice was the French acronym FIDE for the newly founded *Fédération Internationale pour le Droit Européen*.<sup>23</sup> In the years following World War II, French was the lingua franca of international diplomacy and became the main working language of both the European Commission and the Court of Justice, which holds its *délibéré* in French to this date.<sup>24</sup> Indeed, the original European Economic Community was much more a pluri- than a multinational club. In the beginning, it had four official languages (French, German, Italian and Dutch). English joined that group more than twenty years after the Schuman declaration – and it was not until the 1995 enlargement that the number rose above ten. Today, there are 24 official languages.

In short, one could reasonably expect EU experts to participate in transnational debates in the main languages and the citation practice in the *Common Market Law Review* suggests that multilingual debates were, at least to some extent, a reality until a generation ago. Multilingualism was sustained by a comparatively small number of persons playing a crucial role in early debates about Community law: various prominent individuals published regularly in several of the official languages.<sup>25</sup> In recent years, the European University Institute (EUI) in Florence arguably acquired similar significance for transnational debates. Researchers working in Florence at the time of publication accounted for more articles in our survey than authors from France, Spain, Poland or Greece.<sup>26</sup> Furthermore, the EUI sustains lasting transnational debates through their alumni, who often obtain academic positions at universities across Europe, especially in the Netherlands and the UK.<sup>27</sup> Florence serves as a breeding ground for transnational EU law scholarship.

The example of the EUI illustrates why I designate the discourse on EU law in the English language to be ‘transnational’. PhD researchers in Florence obtained their law degrees at domestic universities and hold the nationalities of various Member States; nationals of the United Kingdom and Ireland are in the minority.<sup>28</sup> In Florence, we can observe in the real-life what happens virtually in English language

<sup>23</sup> The *Association française des juristes européens* initiated the foundation of FIDE in 1961 in close cooperation with the Commission’s legal service; see Morten Rasmussen, ‘Constructing and Deconstructing ‘Constitutional’ European Law’, in: H. Koch *et al.* (eds), *Europe. The New Legal Realism* (DJØF, 2010), 643 (645).

<sup>24</sup> On the ECJ’s internal language politics, see Karen McAuliffe, ‘Enlargement at the European Court of Justice: Law, Language and Translation’, *ELJ* 14 (2008), 806-818.

<sup>25</sup> On these repeat players, see Harm Schepel and Rein Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’, *ELJ* 3 (1997), 165 (183).

<sup>26</sup> This outcome is remarkable, not least since the EUI is not focused on EU studies; among the 13 professors of the Law Department, only three have a specialisation in general EU law (according to the official designation of their post on the website of the EUI Law Department in spring 2015); four more professors deal with subjects with a weighty EU component, such as competition law.

<sup>27</sup> I am unaware of empirical data, but I regularly meet (younger) colleagues from British or Dutch universities (and now increasingly from Northern Europe), who obtained their PhD in Florence; this trend is facilitated by the openness of the academic career path for foreigners in these countries.

<sup>28</sup> In September 2014, the EUI admitted 44 new researchers as PhD students with the nationality of 15 different Member States and 5 third states; 6 were nationals of either UK or Ireland, 6 were German and Italian, 4 French and 3 each Polish and Spanish; cf. <http://www.eui.eu/DepartmentsAndCentres/Law/People/Researchers> (last accessed: 1 Jun. 2015); I have been

journals on EU law: specialists engage in transnational debates on EU law in English, but only a minority of the participants in these debates are speaking or writing in their mother tongue (similar to the situation in Brussels and Luxembourg). Of course, those with a better knowledge of the English language hold an advantage, but a robust majority of those partaking in transnational debates use foreign languages. The quality of the English in specialised journals on EU law may occasionally be lower than the standard in the *Modern Law Review*, but that is inevitable if we do not wish the transnational debate to be a monopoly controlled by the British.

Anecdotal evidence indicates that there are at least three structural reasons supporting this trend: Firstly, the English language is generally on the rise, also in other academic disciplines and society at large. Secondly, Europe's new found linguistic diversity with 24 official languages implies less overlap: most experts on EU law speak one or more foreign languages, but these will not necessarily coincide with those spoken by scholars in other countries.<sup>29</sup> At most events, a number of participants do *not* speak French, German, Spanish, Polish or Italian—while English is the common denominator. This trend becomes more entrenched over time with more and more people reorienting their language skills towards the English language.<sup>30</sup> Thirdly, the rise of the English language has a social substratum. Arguably, a transnational elite of young academics on EU law is emerging (not only at the EU) and is setting itself apart through the use of the English language and active recourse to transnational publication formats.<sup>31</sup> Like the original lingua franca, English has become the language of choice in international communication for very pragmatic reasons.

### ***United in diversity – separated in unity***

It would be wrong to presume a monopoly of the English language in transnational debates on EU law. To confine one's research primarily to monolingual sources means that one would be drawing an incomplete picture of the landscape of EU law research. A reminder of the citation practices in both *Cahiers de droit européen* and *Europarecht* presented above shows that there are relevant debates about important EU law developments in which English language contributions are ancillary sources – and vice versa. When it comes to journals with a focus on domestic law, cross-linkages between debates in different languages seem to be even more peripheral.<sup>32</sup> Practitioners within Member States are even less likely to read international publications.<sup>33</sup> At the transnational *and* the domestic level, there are semi-

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told that origin is based on nationality—not legal education, i.e. there may be more researchers with a law degree from a British university.

<sup>29</sup> Among the general population, a Eurobarometer inquiry shows that German is the most widely spoken mother tongue, but that far more people can communicate in English as a foreign language (35 % excl. native speakers) than in French or German (11-12 % respectively); see Commission, *Europeans and Their Languages*, Special Eurobarometer No. 386, June 2012, 12, 22.

<sup>30</sup> 79 % of Union citizens want their children to focus on English, while 20 % want them to concentrate on French or German alternatively *or* additionally; *cf. id.*, 91.

<sup>31</sup> *Cf.* on the emergence of a transnational business elites, based, among others, on the use of the English language Leslie Sklair, *The Transnational Capitalist Class* (Wiley, 2001); moreover, some academics with a non-British background working in the UK may tend to accentuate their loyalty to the system through overtly “British” behaviour by citing primarily English language sources in order to receive the recognition of peers (and those deciding upon contract renewal), see de Witte (note 17), 10.

<sup>32</sup> Many authors writing predominantly in English may be unaware of the existence of prominent domestic journals where influential pieces on EU law are published, such as the German periodicals *Der Staat* and *Juristenzeitung*, the French *L'actualité juridique droit administratif* (AJDA) or the Spanish *Revista Española de Derecho Administrativo*; at the same time, articles on EU law in these journals do not consult foreign literature extensively; continental Europeans publishing in English will have learned, moreover, that some domestic colleagues working on similar topics had not even seen their piece in a prominent English language journal.

<sup>33</sup> Entering *Common Market Law Review* (and various abbreviations) into the ‘Beck Online’ database with thousands of German judgments, gives you single-digit results for decisions of domestic courts (excl. the ECJ), while the *Juristenzeitung* (and the abbreviation JZ) produces more than 10,000 hits.

autonomous debates,<sup>34</sup> which bibliometric research assessments are structurally bound to ignore.<sup>35</sup> We live in a world of concentric discursive circles on EU law both transnationally and within Member States and the overlap is much smaller than many may be aware of.

Within this broader context, we should be careful not to associate the supranational EU institutions single-handedly with the sphere of English language publications. It is true that they are widely read in Brussels and Luxembourg, where a survey has recently identified the *Common Market Law Review* as the single most influential publication.<sup>36</sup> This does not imply, however, that the supranational institutions are monolingual in their outlook. On the contrary, members of staff working on legal topics received their training at universities across Europe; they will often continue to consult publications from their home jurisdiction and are regularly confronted with domestic viewpoints in discussion with Member State representatives.<sup>37</sup> Opinions of many Advocates General are an excellent example to demonstrate that the sources on which they base their arguments are much more multilingual than the footnotes of specialised journals in the English language.<sup>38</sup> The same seems to apply to the everyday working practices of ECJ Judges, who usually held prominent offices within domestic judiciaries, universities or politics before their appointment;<sup>39</sup> as a result, we can expect them to consult not only English language journals.<sup>40</sup> In Brussels and Luxembourg, the semi-autonomous discussion circles are partly connected, although the English language and Anglo-Saxon approaches may be on the rise, including at the Court.<sup>41</sup>

I understand that language is much more than a means of communication in legal debates (as it often is in the case of the natural sciences). National legal cultures are intricately linked to languages, which define not only the choice of terminology but have direct bearing upon the patterns of legal argumentation and the construction of doctrinal figures that often cannot be translated into foreign

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<sup>34</sup> Similarly, Armin von Bogdandy, 'A Bird's Eye View on the Science of European Law', *ELJ* 6 (2000), 208 (211-212), de Witte (note 17), 10 and Snyder (note 18), 72-73.

<sup>35</sup> Bibliometric inquiries are usually based on international databases (such as Westlaw), where many domestic and non-English publications are absent; for corresponding weaknesses of bibliometry in law, see the Wissenschaftsrat (note 5), 51 and Hughes Bouthinon-Dumas and Antoine Masson, 'Quelles sont les revues juridiques qui comptent à la Cour de justice de l'Union européenne?', *Revue trimestrielle de droit européen* 49 (2013), 781 (799).

<sup>36</sup> This was the result of the survey conducted on those working at the Court (Judges, Advocates General, *référéndaires*) by Bouthinon-Dumas and Masson (note 35), 794-795.

<sup>37</sup> Members of the Legal Service of the EU Commission are a case in point, since they are confronted with, among others, the German, French, Greek or Danish perspectives on EU law both in person (via legal counsels of the Member States) and in terms of arguments (through written and oral contributions) during infringement proceedings and other Court cases, in which they participate.

<sup>38</sup> See the cursory assessment by de Witte (note 17), 10.

<sup>39</sup> On comparative reasoning, also via the consultation of non-English publications, as an everyday practice of the ECJ, see Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', *ICLQ* 52 (2003), 873-906 and Vassilios Skouris, 'L'influence du droit national et de la jurisprudence des juridictions des États membres sur l'interprétation du droit communautaire', in: G. Müller *et al.* (eds), *Festschrift für Günter Hirsch* (C.H. Beck, 2008), 175-184.

<sup>40</sup> The survey of the most influential journals at the ECJ, mentioned above, identified seven (!) French language publications plus the *Common Market Law Review* (No 1), the *European Law Review* (No 9) and the *Europarecht* (No 10); Bouthinon-Dumas and Masson (note 35), 799 explained this outcome by the status of French as the working language, but it seems to be that an *additional* factor may be the design of the survey, since the questionnaire was sent out in French only and came from a French university, which could have implied a higher percentage of returns from Francophile recipients (the authors did not give information about the nationality and/or education background of the 14 % of the recipients that replied to the survey).

<sup>41</sup> Frederico Mancini and David Keeling, Language, 'Culture and Politics in the Life of the European Court of Justice', *Colum. J. Eur. L.* 1 (1995), 397 (398-403) identify three phases of influence on the working of the Court: first the French, then the German, later the British.

languages without modifying their meaning.<sup>42</sup> For that reason, the increasing weight of the English language has cultural costs, since it entails the continuous regression of continental legal cultures (quite similar to the dominance of “German” monetary doctrine within the monetary union<sup>43</sup>). This conclusion applies primarily to the transnational debate in the English language, while national cultural idiosyncrasies will prevail in domestic debates about EU law which often follow domestic traditions.<sup>44</sup> It is telling that the continental academic project of developing a common legal space based on shared traditions and common values, which allegedly underlie European legal cultures, has hardly been taken up in the English debates about EU law.<sup>45</sup>

The recognition of disparities in legal approaches to EU law has implications beyond the realm of academic debate. Distinct national outlooks can entail an “alienation” effect of supranational legal norms if their reception is adopted to the domestic legal context, thereby potentially thwarting their meaning.<sup>46</sup> If we want to uphold the observance of the law in the application and interpretation of the Treaties, we must reach beyond transnational debates in the English language, since the latter are structurally disconnected, for linguistic reasons, from national debates about EU law in many Member States. Conversely, the increasing influence of supranational legal norms implies that the effectiveness of attempts to modify or defend national legal cultures in the age of Europeanisation depends, among other factors, on the ability of domestic actors to engage in transnational debates.<sup>47</sup> The fate of domestic and transnational debates is intricately connected and interdependent.

### ***The potential of deliberate multilingualism***

I would contend that it is in the collective self-interest of scholars working on EU law to reconnect discussion circles in the different languages. To do so may improve our understanding of EU law and it may, moreover, enhance the standing of a discipline at a time of scarce research resources, also considering that other legal fields with a legitimate claim to being international, such as comparative law or public international law, are on the rise.<sup>48</sup> The example of Germany shows increasing calls for openness among legal scholars in general (not only among EU experts) with the objective of enhancing the transnational visibility of academics from German universities and research institutions,<sup>49</sup> including

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<sup>42</sup> For the experience of comparative law, see Karl-Peter Sommermann, ‘Funktionen und Methoden der Grundrechtsvergleichung’, in: D. Merten and H.-J. Papier (eds), *Handbuch der Grundrechte*, Vol. I (C.F. Müller, 2003), § 16 margin numbers 71-74 and Marie-Claire Ponthoreau, ‘Europeanization of Minds. Imagining a Transnational European Legal Community’, in: M. Claes and M. de Visser (eds), *Constructing European Constitutional Law* (Bloomsbury/Hart), section 1.1 (forthcoming).

<sup>43</sup> This example has been borrowed from von Bogdandy (note 34), 238.

<sup>44</sup> On different approaches to EU law within the Member States, see Armin Hatje and Peter Mankowski, ‘Nationale Unionsrechte’, *Europarecht* 2014, 155-169 and Ponthoreau (note 42), section 1.2, who both tend to underestimate the weight of the discourse in the English language.

<sup>45</sup> Prominent authors propagating this approach are Peter Häberle, *Europäische Verfassungslehre*, 7th end (Nomos, 2011), Constance Grewe and Hélène Ruiz Fabri, *Droits constitutionnels européens* (Presses universitaires de France, 1995) and Alessandro Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino, 2002).

<sup>46</sup> See Ingolf Pernice, ‘Europarechtswissenschaft oder Staatsrechtslehre?’, DV Beiheft 7/2007, 225 (233-234); as well as Hatje and Mankowski (note 44), 157-167.

<sup>47</sup> For pleas for supranational openness from Germany, see Rainer Wahl, ‘Die Rechtsfortbildung in Europa als Entwicklungslabor’, *Juristenzeitung* 2012, 861 (863-866) and Matthias Jestaedt, ‘Die deutsche Staatsrechtslehre im europäisierten Rechtswissenschaftsdiskurs’, *Juristenzeitung* 2012, 1 (9-10).

<sup>48</sup> There can be a conflict between the *collective* interest of EU law scholarship to augment its reach and credibility and the *individual* interest of researchers, who may want to ‘protect’ their discursive area of influence against competitors from other countries and language areas.

<sup>49</sup> By way of example, see Armin von Bogdandy, ‘National Legal Scholarship in the European Legal Area—A Manifesto’, *ICON* 10 (2012), 614 (621-625) and Wahl (note 47), 866-877.

through publications in the English language.<sup>50</sup> I share this viewpoint. EU experts from continental Europe should make an effort to bridge the gap between domestic and transnational discourses, thereby also reminding those reading and citing only in English that theirs is a limited outlook on EU law that is structurally bound to ignore important perspectives.

It should be noted that this is *not* an appeal for a general switch towards English publications across the continent, but an argument for deliberate multilingualism that would have to be built around English as today's lingua franca.<sup>51</sup> Other languages should retain their relevance, not least in order to sustain channels of communication with practitioners and to connect academia to wider social and political debates. However, to claim that all European languages should have the same weight as English in a universe of multilingualism will not deliver effective transnationalism.<sup>52</sup> In today's European Union with 24 official languages, the use of multiple languages can optimise transnational debates, which a Babylonian confusion, however, would not bring about. Even a stable bilingual Franco-German discourse did not develop under the favourable conditions of the 1970s and 1980s.<sup>53</sup> Those who reject the use of the English language as a matter of conviction or defiance will ultimately support, arguably, the further weakening of continental legal cultures.

There are positive signals illustrating the potential of transnational engagement. Our quantitative survey of the authorship of leading specialised EU law journals showed that the Netherlands and Germany are in second and third place behind the United Kingdom.<sup>54</sup> More representative is the comparison of the relative weight of different jurisdictions in terms of publications per 1 million inhabitants: it reveals a clear-cut picture with smaller countries in Central and Northern Europe dominating the top-15, while the more populous Member States and countries from the Southern or Eastern parts of the continent play second fiddle to them.<sup>55</sup> The lesser visibility of the larger Member States is no coincidence: there is a sufficiently big domestic "market" for publications on EU law with an audience of legal practitioners and fellow academics. Other contextual factors can explain the lesser weight of some countries where scarce institutional resources, low salaries for academics<sup>56</sup> and uncompetitive academic career paths<sup>57</sup> hinder international openness. In the case of France, ignorance towards other languages is occasionally portrayed as a sign of superiority, which may arguably be rationalised as frustration over the loss of former glory:

‘La doctrine étrangère nous est peu familière... Ajoutons de surcroît, sans faire de chauvinisme mal placé, que la doctrine française et francophone a longtemps tenu le haut du pavé en droit

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<sup>50</sup> See the official recommendations of the Wissenschaftsrat (note 5), 70-72.

<sup>51</sup> See the petition for English as an *additional* language besides German for the communication of research results by the German conference of university presidents Hochschulrektorenkonferenz, Sprachenpolitik an deutschen Hochschulen, Recommendation of the 11<sup>th</sup> Assembly on 20 November 2011.

<sup>52</sup> Contra Hatje and Mankowski (note 44), 167 and Ponthoreau (note 42), section 2.

<sup>53</sup> Notwithstanding positive examples, see Claus Dieter Classen, ‘Die deutsche Europarechtswissenschaft und Frankreich: Die Geschichte einer punktuellen Wahrnehmung’, in: O. Beaud and E. Heyen (eds), *Eine deutsch-französische Rechtswissenschaft? Une science juridique franco-allemande?* (Nomos, 1999), 351-367.

<sup>54</sup> In qualitative terms, the influence of German authors on topics such as constitutionalisation or administrative law is particularly pronounced, see Matthias Ruffert, ‘Was kann die Europarechtslehre von der Europarechtswissenschaft im europäischen Ausland lernen?’, *Die Verwaltung Beiheft* 7/2007, 253 (253).

<sup>55</sup> In the case of France, the limited number of English language publications is compensated, at least in part, by the visibility of French journals in both Southern Member States and the EU institutions.

<sup>56</sup> Notwithstanding the brilliance of many monographs from Italy and Spain, less pay can mean that professors may work as legal counsels in parallel; doing so consumes times and directs the academic output towards practice-oriented formats, rendering it less likely that transnationally visible publications will be produced.

<sup>57</sup> Academic positions in France and Germany may not be open for outsiders (see below), but are assigned on the basis of highly competitive procedures, while chairs at Italian and Spanish universities are occasionally handed out on the basis of intra-institutional patronage.

communautaire. Les anglo-saxons ne sont venus que plus tard. La consultation des ouvrages en langue anglaise laisse d'ailleurs parfois assez perplexe, non seulement parce que les thèmes abordés sont rarement les mêmes qu'en France. La jurisprudence, le case law y occupent une place déterminante, mais souvent le degré d'approfondissement conceptuel est beaucoup moins poussé.' [We are rarely familiar with foreign writings ... and should add, without misplaced chauvinism, that French and Francophone literature has traditionally been in the pole-position in terms of Community law. The Anglo-Saxons only joined at a later stage. To read their publications leaves you behind in a state of perplexity, not only because they rarely deal with the same themes as in France. Case law occupies a central place, but the degree of conceptual depth is less developed.]<sup>58</sup>

<b>Number of Publications in Leading Specialised English-Language Journals on EU Law during 2010-2013 per 1 Million Inhabitants</b>			
<b>Luxembourg/ECJ</b>	<b>25.5</b>	Greece, Austria	1.1
<b>Netherlands</b>	<b>6.7</b>	<b>Germany</b>	<b>0.8</b>
<b>Belgium/EU institutions</b>	<b>5.3</b>	Sweden	0.6
<b>United Kingdom</b>	<b>3.5</b>	Italy (without EU), Hungary, Czech Republic, Switzerland, Austria	<b>0.4</b>
Denmark	3.2		
Norway	2.8	<b>France, Spain, Poland</b>	<b>0.3</b>
Slovenia, Finland	1.9	Various	0.001-0.3
Ireland	1.7	Malta, Slovakia, Portugal, Latvia, Lithuania, Cyprus, Bulgaria, Croatia	0
Estonia	1.5		

By contrast, the greater success of smaller jurisdictions in Central and Northern Europe can be explained by the traditional orientation towards the English language (while Southern Europe has habitually been leaning linguistically towards France) and contextual factors, such as better pay, research conditions and competitive recruitment procedures<sup>59</sup> that are open towards appointments from other Member States.<sup>60</sup> Such openness for international talent, both in terms of university employees and students enrolling in master courses,<sup>61</sup> can be perceived as a means to foster economic competitiveness of the economy at

<sup>58</sup> Surprisingly direct Claude Blumann, *Querelles internes*, in: Picod (note 18), 93-94.

<sup>59</sup> The increasing relevance of peer-reviewed publications for research funding and the recruitment of personnel in the UK since the late 1980s, the Netherlands during the 1990s and, more recently, Northern Europe are important factors for the high number of English language publications; see Snyder (note 18), 68-69.

<sup>60</sup> In contrast to Germany, France, Italy and Spain, most smaller countries in Central and Northern Europe have recently been active in hiring postdoc researchers and lecturers from other Member States (although it seems to me that nationals are still dominant among full-time professors).

<sup>61</sup> International master courses in the English language are an important factor explaining the spread of international recruitment practices; see Jo Shaw, 'The European Union. Discipline Building Meets Policy Building', in: P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP, 2005), 325, 324-335.

large.<sup>62</sup> Moreover, smaller states lack a sufficiently large community of scholars to sustain meaningful domestic debates about specialised areas of EU law, although they will often retain discursive communities with practitioners in the national language, which – similar to corresponding debates in France, Italy, Spain or Germany – are largely disconnected from the transnational discussion.<sup>63</sup> On the whole, the status of EU law scholarship in Germany appears decent, not least since there are additional fora for transnational visibility, such as the *German Law Journal*<sup>64</sup> and the *Verfassungsblog*<sup>65</sup> that serve as bridges between domestic and transnational debates (not only on EU law). Nevertheless, the example of Germany shows that even a considerable number of international publications should not disguise a persistent disconnect between from transnational debates about EU law.

Resources are limited, also among academics. Time and energy invested in English language publications cannot be used for other purposes – and vice versa. In order to evaluate the status of EU law scholarship, it is crucial, therefore, to consider not only the degree of transnational visibility but to direct our attention to domestic debates as well. In this respect, even a cursory inspection of the German publication market illustrates the pertinence of internal discussions. This is demonstrated by the example of the doctrinal commentaries that are emblematic of German legal scholarship. Commentaries restate the law through a systemic presentation of both case law and legal writing and contribute to its doctrinal reconstruction through new argumentative patterns put forward by the author.<sup>66</sup> They have traditionally been used extensively by courts and legal practitioners, thereby supporting an intimate relationship between academia and legal practice, which will be discussed below.

Readers from outside Germany will probably not be aware that there will soon be no less than nine (!) doctrinal commentaries in the German language on the single issue of the EU Treaties.<sup>67</sup> Some of these commentaries are high quality and are held in high regard by practitioners in Germany, Brussels or Luxembourg. However, the various commentary projects bind resources that cannot be employed elsewhere: more than 100 full-time professors contribute to regular updates.<sup>68</sup> An even greater number of full-time professors has contributed to the *Enzyklopädie Europarecht*, a ten-volume handbook on

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<sup>62</sup> Cf. on the economic perspective, which partly underlies the ‘Bologna Process’ on the comparability of tertiary education in Europe, OECD, *Untapped Skills. Realising the Potential of Immigrant Students*, July 2012.

<sup>63</sup> For Finland, see Päivi Leino and Janne Salminen, *Languages and EU Law Discourse: A view from a bilingual periphery*, *Verfassungsblog.de* of 2 June 2014.

<sup>64</sup> It is telling that the *German Law Journal* was founded by two academics with a German law degree (Peer Zumbansen and Russell Miller), who migrated to the US, where they work as law professors.

<sup>65</sup> The online blog at [www.verfassungsblog.de](http://www.verfassungsblog.de) is loosely connected to the Institute of Advanced Studies in Berlin (Berliner Wissenschaftskolleg; project ‘law in context’) and the Humboldt-University in Berlin (within the framework of the initiative of academic excellence), but continues to be managed by its free-lance founder and columnist Maximilian Steinbeis.

<sup>66</sup> For their role, see Christian Djeffal, *A Commentary on Commentaries: The Wissenschaftsrat on Legal Commentaries and Beyond*, *Verfassungsblog.de* of 30 June 2014.

<sup>67</sup> In alphabetic order of the editors see: Christian Calliess and Matthias Ruffert (eds), *EUV – AEUV. Kommentar*, 4th edn (C.H. Beck, 2011), Rudolf Geiger, Daniel Kahn and Markus Kotzur (eds), *EUV/AEUV*, 5th edn (C.H. Beck, 2010), Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Vol. I-III (C.H. Beck, loose-leaf), Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht*, Vol. 1–4, 7th edn (Nomos, 2014), Rudolf Streinz (ed), *EUV/AEUV*, 2nd edn (C.H. Beck, 2011), Jürgen Schwarze (ed), *EU-Kommentar*, 3rd edn (Nomos, 2012) and Christoph Vedder and Wolff Heintschel von Heinegg (eds), *Europäisches Unionsrecht* (Nomos, 2011); in the near future two more projects will be finalised: Matthias Pechstein *et al.* (eds), *Frankfurter Kommentar zum EUV/AEUV* (Mohr Siebeck, 2016) as well as Kay Hailbronner and Georg Jochum (eds), *Recht der Europäischen Union. Kommentar* (Kohlhammer, loose-leaf); moreover, there is an “Austrian” commentary, which is rarely consulted even by most German academics (although they would do well to do so), by Hans Mayer and Karl Stöger (eds), *Kommentar zu EUV und AEUV unter Berücksichtigung der österreichischen Judikatur und Literatur* (Manz, loose-leaf).

<sup>68</sup> This number is based on the list of contributors in the commentaries which are already on the market (i.e. not including the forthcoming multi-volume *Frankfurter Kommentar*) for full-time professors at German universities; the numbers would be higher if we were to include assistant professors and postdocs.

different fields of Union law.<sup>69</sup> Moreover, no less than 123 articles were written on EU law in the most prominent domestic public law journals in the year 2007 alone.<sup>70</sup> All this contrasts with the 63 publications from Germany over a 4-year period in the above-mentioned specialised English-language journals on EU law which, moreover, were often written by postdocs. A collective policy of deliberate multilingualism would look different: it would strive for a greater balance between the discursive circles at the domestic and transnational levels. German academia could become more active transnationally without bringing domestic debates to the brink of extinction (as has happened recently in the field of international relations<sup>71</sup>). The situation in France, Spain or Italy appears to resemble that of Germany.

Closer inspection of citation practices in English language periodicals reveals that international publications by German, French or Spanish authors can serve a crucial bridging function between domestic and transnational debates. Among the 33 German publications cited in the footnotes of the 2013 *Common Market Law Review*, no less than 24 references (73 %) came from three contributions written by German authors,<sup>72</sup> which lent international visibility to opinions of domestic peers (accordingly, the small number of references to French publications can be explained by the limited number of French authors). The same applies to the bilingual treatise on the *Principles of European Constitutional Law*,<sup>73</sup> which raised the eyebrows of non-German observers not least because of the “German obsession with the legitimate genesis and status of legal doctrine.”<sup>74</sup> Those partaking in domestic and transnational debates serve as discursive bridges and argumentative meditators between the semi-autonomous debates persisting in the Member States and transnationally.

### ***Legal education and career paths***

Distinct national legal cultures are not a genetic characteristic, but are handed over from generation to generation through social practices and shared experiences, among which both legal education and the career paths of younger academics assume a prominent role. Through these practices, the course is set for national perseverance and/or transnational openness of domestic legal cultures. In this section, I will use the example of Germany to highlight certain features complicating further interconnections and designating potential areas for reform. At least four different aspects deserve our attention.

Firstly, European law nowadays is firmly embedded into legal education at German law departments, which, generally speaking, have little leeway in the organisation of their courses as the basic course outline is regulated by the state through the infamous state exam at the end of university training. Most universities offer a mandatory 2-hour lecture on EU law over one semester,<sup>75</sup> which students usually follow after having already attended 12 hours of lectures and tutorials on German constitutional law (EU law is therefore allocated 1/6 of the time assigned to constitutional law).<sup>76</sup> Some textbooks retain the traditional notion of “complementary interactions” (*Bezüge*) treating EU law as an add-on to

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<sup>69</sup> According to the list of contributors to the eight volumes available (Nos 1-5, 8-10) 120 chapters were written by full-time professors at German universities or research institutions.

<sup>70</sup> See Mangold (note 4), 182-184 for ten periodicals, *excluding* the contributions to the *Europarecht* and the *Europäischen Zeitschrift für Wirtschaftsrecht*.

<sup>71</sup> See the plea for publications *also* in German by Mathias Albert and Michael Zürn, ‘Über doppelte Identitäten’, *Zeitschrift für Internationale Beziehungen* 20 (2013), 141–154.

<sup>72</sup> Count by the author on the basis of the data presented above (the fourth ‘German’ contribution cited only case law and English language articles).

<sup>73</sup> Cf. Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht*, 2nd edn (Springer, 2009) and von Bogdandy and Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Hart, 2009).

<sup>74</sup> Michelle Everson, ‘Is it just me, or is there an Elephant in the Room?’, *ELJ* 13 (2007), 136 (136).

<sup>75</sup> Mangold (note 4), 276-297 describes the status quo and traces the historic evolution.

<sup>76</sup> In most universities, both fundamental rights and the constitutional law of state organisation (*Staatsorganisationsrecht*) are taught in 4-hour lectures plus 2-hour tutorials; see Mangold (note 4), 291-299.

domestic law. Throughout Germany, universities are obliged to offer additional non-compulsory courses for students that have traditionally embraced an optional module on EU law and public international law at most law faculties.<sup>77</sup> The recent expansion of these modules has resulted in a diversification of specialised lectures where EU law is often taught in close interaction with domestic issues, such as consumer protection, competition or criminal law.<sup>78</sup>

Secondly, the straightjacket of state regulations for legal training supports the canonisation of subject areas that every lecture on EU law is expected to deal with, since they can feature in the state exam (although EU law rarely plays a central role in exam questions and is usually dealt with as a secondary aspect of domestic legal problems). Topics of canonised EU law knowledge include: “sources of Union law; legal effects, institutions and legal instruments of the European Union; economic freedoms and their enforcement.”<sup>79</sup> These questions dominate the 14 textbooks on EU law written by German law professors.<sup>80</sup> The list of canonised problems appears as reasonable, but has structural repercussions nevertheless, since it allows students and academics little flexibility (it should be self-evident that the constitutional caveats established by the German Federal Constitutional Court play a prominent role in legal education<sup>81</sup>). German professors rarely have the opportunity to teach questions that define their research – unless they concentrate their research outlook on the topics that dominate the official curriculum but may lack prominence in transnational debates. The absence of synergies with teaching obligations hampers innovative research; the same applies to the English language, which plays a marginal role in lectures.

Thirdly, most professors with an expertise in EU law cannot concentrate their teaching portfolio on supranational law, since they are obliged to teach mandatory classes on constitutional law, administrative procedure or public international law.<sup>82</sup> This broader thematic outlook has advantages, since it fosters awareness for similarities between different branches of the law and also prevents hyper-specialisation, which is widespread in the UK where EU experts rarely teach public international or constitutional law. Yet, this benefit is also a curse if wide areas of the law have to be monitored on an ongoing basis. The most pronounced expression of the German orientation towards the “full jurist” (*Volljurist*) is the career path. German law professors are usually expected to have undergone two years

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<sup>77</sup> See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Vol. 4 (C.H. Beck, 2012), 614-626.

<sup>78</sup> See the survey of these specialisations (*Wahlfachgruppen*) by Mangold (note 4), 291-299.

<sup>79</sup> Section 8(2)(11) of the Regulation of Legal Education in the State of Baden-Württemberg (*Juristenausbildungs- und Prüfungsordnung*); own translation replacing ‘Community’ with ‘Union’.

<sup>80</sup> In alphabetical order (without collections of mock exam questions): Hans-Wolfgang Arndt et al., *Europarecht. Start ins Rechtsgebiet*, 11th edn (C.F. Müller, 2015), forthcoming, Rudolf Bieber, Astrid Epiney and Marcel Haag, *Die Europäische Union*, 11th edn (Nomos, 2015), Ulrich Fastenrath and Maike Müller-Gerbes, *Europarecht*, 3rd edn (Boorberg, 2012), Walter Frenz, *Europarecht* (Springer, 2011), Ulrich Haltern, *Europarecht. Dogmatik im Kontext*, 2nd edn (UTB, 2007), Andreas Haratsch, *Europarecht*, 9th edn (Mohr Siebeck, 2014), Matthias Herdegen, *Europarecht*, 16th edn (C.H. Beck, 2014), Stefan Heselhaus, *Europarecht. Examinatorium* (Nomos, 2015), forthcoming, Stefan Hobe, *Europarecht*, 7th edn (C.H. Beck, 2012), Georg Jochum, *Europarecht*, 2nd edn (Kohlhammer, 2012), Helmuth Lecheler and Jörg Gundel, *Europarecht*, 3rd edn (C.H. Beck, 2015), forthcoming, Thomas Oppermann, Claus Dieter Classen and Martin Nettesheim, *Europarecht*, 6th edn (C.H. Beck, 2014), Werner Schroeder, *Grundkurs Europarecht*, 3rd edn (C.H. Beck, 2013) and Rudolf Streinz, *Europarecht*, 9th edn (C.F. Müller, 2012), 258-259.

<sup>81</sup> Although the *Bundesverfassungsgericht* has not activated the caveats a single time ever since the *Solange I* judgment of 1974 (leaving aside the ultra vires and constitutional identity warnings in response to *Åkerberg Fransson* and *Melloni* as well as the ongoing challenges to the *OMT Programme*), I regularly come across students whose first idea about any question on EU law concerns the potential of non-applicability; the FCC’s controversial case law has repercussions far beyond inter-judicial relations with the ECJ.

<sup>82</sup> Regional laws regulate the teaching load of all full professors at 240-270 hours per annum (8 or 9 hours per week for two 15-week semesters).

of practical training for the second state exam.<sup>83</sup> Moreover, the PhD must be followed by a second book (*Habilitation*) which experts on EU law often write on domestic issues. Without the second book and a series of German-language articles, postdocs are unlikely to receive a permanent position by means of appointment to a university chair.<sup>84</sup> The career path firmly binds German legal academics to the domestic legal order and corresponding debates.

Fourthly, all of the above implies that German universities are intricately linked to the domestic legal system. In addition, most German law departments have – in contrast to their peers in the Benelux countries, on the British isles or Northern Europe – neither the manpower nor the resources to offer English language programmes for Erasmus or Master’s students.<sup>85</sup> One reason for this is that they do not depend on overseas students financially, since the state provides basic funding for the regular syllabus that universities have to offer free of charge to all students.<sup>86</sup> English language courses for domestic students are also a rarity – and a survey of further reading recommendations in EU law textbooks shows only a modest level of openness towards non-German sources (note that also *Craig* and *de Búrca* remain decidedly monolingual).<sup>87</sup> Likewise, the focus of legal education on the state exam prevents an enhanced level of *inward* mobility of non-German teaching staff, who cannot participate in all aspects of the tightly regulated syllabus,<sup>88</sup> while academics with a law degree from a German university can be successful in the Anglo-Saxon world<sup>89</sup> – mirroring the success of many Italians and Greeks within the British academic system.<sup>90</sup> Not even German postdocs would necessarily benefit from international visibility, since not all search and select committees would appreciate the value of peer-reviewed publications in transnational journals, whereas contributions to doctrinal commentaries are likely to be acknowledged.<sup>91</sup> It will be discussed below in how far EU law becomes increasingly fragmented within the German academic system, thereby producing less academics with a focus on EU studies.

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<sup>83</sup> The second state exam (2 years) follows the first state exam at the end of university education (4-5 years); after successful completion of both exams, the “full jurists” can settle as self-employed lawyers or become judges without the need for further training.

<sup>84</sup> State regulations forbid contracts for researchers or postdocs for more than six years each in regular circumstances (i.e. 12 years altogether); there are, on the whole, no tenured employment opportunities for academics below the level of chair holder at most universities.

<sup>85</sup> See also de Witte (note 17), 7.

<sup>86</sup> Attempts to introduce (modest) fees of 500 EUR per semester a decade ago have failed; by now, most regions have re-enacted statutory rules on free university access.

<sup>87</sup> In the section on the ECJ, Streinz (note 80), 258-259 mentions one English reference among 46 recommendations and Classen, in: Oppermann, *id.* and Nettesheim (note 80), § 13 lists 15 German, 3 English and 1 French sources; by contrast, Albert Bleckmann, *Europarecht*, 1st edn (Carl Heymanns, 1976), 15 was more transnational: 14 German, 7 English, 11 French and 4 Italian contributions, while Paul Craig and Grainne de Búrca, *EU Law. Text, Cases and Materials*, 5th edn (OUP, 2011), 440-441, 483-484 mention English texts only.

<sup>88</sup> In addition to the reasons listed by Russell Miller, Poor Prospects for Internationalization: Germans and Americans in Law Faculties Jenseits des Atlantiks, *Verfassungsblog.de* of 26 February 2014, it is important to understand that the limited number of full-time positions at German law faculties in practice prevents the appointment of someone without expertise in domestic law, since doing so would burden the remaining colleagues with a greater share of time-consuming mandatory lectures, exam preparatory classes as well as written and oral examinations in the context of the state exam.

<sup>89</sup> Some examples of the younger generation with German law degrees that have been successful at British universities are Robert Schütze (Durham) and Tobias Locke (Edinburgh); for the US, see the list by Miller, *id.*

<sup>90</sup> By way of example, consider Filippo Fontanelli (Edinburgh), Eleanor Spaventa (Durham), Francesco de Cecco (Newcastle), Dora Kostakopoulou (Warwick) and Panos Koutrakos (City, London) all of whom obtained their first law degrees in Italy or Greece.

<sup>91</sup> Appointments to chairs with an important EU law component will usually be done by the remaining staff, i.e. experts on constitutional law or administrative procedure, thereby giving an advantage to those who deal with EU law as an add-on to domestic legal issues.

## **Methodology between doctrine and theory**

Linguistic diversity and the disconnect between discursive communities are not the only characteristics of EU law scholarship. In addition, the methods of production of legal knowledge change over time and vary between domestic legal cultures: neither is there now nor has there ever been a uniformly recognised pan-European methodology for EU law. Considering the methodological specificities of traditional and recent scholarship, we may nevertheless observe certain common features, such as interaction with legal practice, the relative weight of theoretical and doctrinal approaches, political support for the integration project, as well as relations with public international and constitutional law. Along these parameters, each generation has to define its methodological standards.

### ***The “sui-generis-trap” and “euro-enthusiasm”***

It is well known that the ECJ assumed that the Treaty of Rome ‘created its own legal system.’<sup>92</sup> On this basis, EU law scholarship defended not only the doctrinal autonomy of the supranational legal order, it also fortified its conceptual autonomy by separating – in contrast to initial debates during the 1950s<sup>93</sup> – the analysis of Community law from comparisons with public international law and/or domestic constitutional law. In the words of Hans-Peter Ipsen, the founding father of Community law in post-war Germany: “I understand autonomy in a heuristic and functional way: [the EEC] brings about novel legal constructions and relationships, which neither public international law nor constitutional law had generated hitherto.”<sup>94</sup> While it may always have been necessary to highlight the peculiarities of the supranational legal system, the widespread insistence upon the conceptual *sui generis* nature can arguably mask ‘classificatory impotence’ if comparisons with domestic and international experiences are rejected as a matter of principle.<sup>95</sup> It would certainly be superficial to randomly project domestic constitutional concepts onto the supranational sphere without critical reflection,<sup>96</sup> but the *sui generis* hypothesis may hamper the understanding of Union law if it prevents recourse to the historical experience and theoretical complexities of constitutional or international legal scholarship.

The divorce between the scholarly communities working on EU law and on public international law, in particular, was no foregone conclusion. Many academic pioneers working on Community law had been socialised as public international law experts<sup>97</sup> and it would have been possible to rationalise most specificities of the new supranational legal order as an advanced form of international organisation.<sup>98</sup> Having said that, it might be precisely the proximity to international legal arguments that explains the

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<sup>92</sup> ECJ, Case 6/64, *Costa/E.N.E.L.*, EU:C:1964:66; more cautious ECJ, Case 26/62, *van Gend en Loos*, 26/62, EU:C:1963:1: ‘a new legal order of international law’ (emphasis added).

<sup>93</sup> For the initial focus on public international law or constitutional and administrative law in Italy and France, see Giulio Itzcovich, ‘Legal Order, Legal Pluralism, Fundamental Principles’, *ELJ* 18 (2012), 358 (361-364); and for Germany, see Davies (note 4), 53-63 and Mangold (note 4), 432-448.

<sup>94</sup> Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck, 1972), 7 (own translation); see also Joseph Kaiser, ‘Modi der Integration’, in: E. von Caemmerer *et al.* (eds), *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein* (Vittorio Klostermann, 1966), 266-274.

<sup>95</sup> For the citation see von Bogdandy (note 34), 214; similarly, Neil Walker, ‘Legal Theory and the European Union’, *OJLS* 25 (2005), 581 (585).

<sup>96</sup> See Neil Walker, ‘Postnational Constitutionalism and the Problem of Translation’, in: J. Weiler and M. Wind (Hrsg): *European Constitutionalism Beyond the State* (CUP, 2003), 27–54 and Rainer Wahl, ‘Erklären staatstheoretische Grundbegriffe die Europäische Union?’, *Juristenzeitung* 2005, 916–925.

<sup>97</sup> For France, see Blumann (note 58), 98-100; for Germany, see Mangold (note 4), 248-249; and for Italy, see Itzcovich (note 93), 361-364.

<sup>98</sup> Cf. Bruno de Witte, ‘Retour à « Costa » – La primauté de droit communautaire à la lumière du droit international’, *Revue trimestrielle de droit européen* 20 (1984), 425–454, Alain Pellet, ‘Le fondements juridiques internationaux du droit communautaire’, in: *Collected Courses of the Academy of European Law*, Vol. V-2 (Kluwer, 1997), 193–271 and Trevor Hartley, ‘International Law and the Law of the European Union – A Reassessment’, *B.Y.I.L.* 72 (2001), 1–35.

early insistence upon the sui generis character of Community law. To some, supranationalism may have appeared as the promised land international lawyers had always dreamt of,<sup>99</sup> while those with a socialisation in domestic law were unfamiliar with the international template in the first place. Indeed, administrative and commercial legal practices were prominent in the early practice of the institutions, including the ECJ,<sup>100</sup> reflecting the administrative structure of the initial Coal and Steel Community and the commercial dimension of central policy fields.<sup>101</sup> When it comes to international law, Pierre Pescatore, who had a decisive influence on the evolution of Community law as a civil servant, academic and judge, justified his reservations as follows:

‘Diese Zurückhaltung hat mancherlei Gründe, von denen der eindeutigste wohl in der Sorge besteht, das Gemeinschaftsrecht durch Einführung völkerrechtlicher Wertmaßstäbe nicht desintegrieren zu lassen... [Wenn im Völkerrecht eine] formlose Änderung..., Außerkraftsetzung ... durch widersprechende staatliche Gesetze und, in ‚gravierenden Konfliktsituationen‘, der Vorrang der staatlichen Macht vor dem Recht im Völkerrecht immerhin erwägenswerte Fragen sind, ... muss man verstehen, dass der Gerichtshof es vermeidet, ein mit solchen Ideen befrachtetes trojanisches Pferd in das Gemeinschaftsrecht einzuführen.’ [There are various reasons for this restraint among which the foremost relates to the concern that Community law might disintegrate through the introduction of international law-style argument... (If in international law) informal amendments and the disapplication of the law on the basis of conflicting national laws and—in ‘serious situations of conflict’—the supremacy of national strength over the law may at least be contemplated..., one understands why the Court avoided bringing a Trojan horse loaded with such thoughts into the Community legal order.]<sup>102</sup>

Indeed, early generations of Community law experts seems to have been united by ‘une certaine idée de l’Europe’<sup>103</sup> – an essentially pro-European impetus, which was committed to upholding and promoting the vision of an ever closer union in the realms of politics, academia and education,<sup>104</sup> an idea that could also be found in the United Kingdom after accession.<sup>105</sup> Although ‘europhilia’ may have been particularly pervasive among EU experts,<sup>106</sup> it should be noted that it was not limited to them in the early

<sup>99</sup> See, with regard to Eric Stein, Anne Boerger and Morten Rasmussen, ‘Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993’, *EuConst* 10 (2014), 199 (215-220) and, more generally, Joseph H.H. Weiler, ‘Journey to an Unknown Destination’, *JCMSt.* 31 (1993), 417 (432-433).

<sup>100</sup> Most initial ECJ judges came from a domestic context (unlike their colleagues at the ECtHR); see Antonin Cohen, ‘Ten Majestic Figures in Long Amaranth Robes’, in: A. Vauchez and B. de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Hart, 2013), 21, 28-32.

<sup>101</sup> There were quite some administrative and commercial law experts among the first generation of EU scholars; see the references *supra* in note 97, Jean Rivero, ‘Le problème de l’Influence des droits internes sur la Cour de Justice de la C.E.C.A.’, *Annuaire Français de Droit International* 4 (1958), 298 (300-308) and the account by the first German judge (from 1952 until 1963) Otto Riese, ‘Erfahrungen aus der Praxis des Gerichtshof der Europäischen Gemeinschaft für Kohle und Stahl’, *Deutsche Richterzeitung* (1958), 270, 273-274 (1958).

<sup>102</sup> Pierre Pescatore, ‘Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen’, in: R. Bernhardt *et al.* (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrecht. Festschrift für Hermann Mosler* (Springer, 1983), 661 (663).

<sup>103</sup> Mancini and Keeling (note 41), 403-405.

<sup>104</sup> For legal education in Germany, see Thomas Oppermann, ‘Europarecht in der deutschen Juristenausbildung’, *Europarecht* 1980, 173 (173); and for academia, see Hans-Peter Ipsen, ‘Die europäische Integration in der deutschen Staatsrechtslehre’, in: J. Baur *et al.* (Hrsg.), *Festschrift für Bodo Börner* (Carl Heymanns, 1992), 163-177.

<sup>105</sup> British EU law experts had often worked for the institutions, were immigrants (or their children) or enjoyed personal relations to other Member States, *cf.* Francis Snyder, ‘New Directions in European Community Law’, *J. of Law & Society* 14 (1987), 167 (168) and in Shaw (note 61), 331-333.

<sup>106</sup> It should be noted that support for the ECJ, more specifically, could be perceived as an indirect tactic trying to increase the visibility and relevance of legal academics with a focus on EU law; see Anthony Arnall, ‘The Americanisation of EU Law Scholarship’, in: *id. et al.* (eds.), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (Hart, 2008), 415 (429); and, more generally, on widespread ‘europhilia’ among expert circles, Boerger and Rasmussen (note 99) and,

decades of the integration project when pro-integrationist convictions were shared by wide segments of the political elite, especially on the continent.<sup>107</sup> However, the euro-enthusiasm of many EU experts became a structural challenge when the number of critical domestic voices became more prominent in the early 1990s – exemplarily during the debates about the ratification of the Treaty of Maastricht that were fought on political grounds in France, the United Kingdom and Denmark, whereas the Maastricht judgment of the Federal Constitutional Court assumed that function within Germany.<sup>108</sup> At the time, scholarship on EU law began to be viewed as being structurally biased in comparison to a broader cross-section of society.<sup>109</sup>

My experience as a participant observer in scholarly debates on EU law shows that the phenomenon has not disappeared, although EU scholarship has certainly become more diverse in terms of political and methodological outlook in most Member States. I have witnessed situations in which EU experts have rejected criticism at the integration project (or the Court of Justice) by likening the disapproval to a return to the follies of nationalism. This attitude can backfire if the participants in domestic debates delegitimise substantive arguments put forward by EU experts by censuring an alleged pro-integrationist naivety.<sup>110</sup> This contribution cannot resolve the problem, but greater scholarly sensitivity towards the methodological characteristics might alleviate the relevance of basic political convictions.

### ***Relations with legal practitioners***

Close cooperation with legal practitioners has been a defining feature of important segments of EU law scholarship from the outset. During the early decades of the integration project, roughly 20 % of all authors in specialised journals on EU law were employed by one of the supranational institutions.<sup>111</sup> In addition, there have always been extensive personal exchanges between the world of academia and judges from Luxembourg, with the latter group producing many influential articles for law journals. Pierre Pescatore and Koen Lenaerts are among the most prolific and visible judges,<sup>112</sup> comparable to the German practitioners Ulrich Everling, Claus Dieter Ehlermann and Walter Hallstein.<sup>113</sup> Conversely, prominent German university professors with a specialisation in EU law had worked as civil servants

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on Eberhard Grabitz, a leading German EU expert of the second-generation during the 1970s and 1980s, Anna K. Mangold, 'Zwischen Vision und Pragmatismus', *Jahrbuch des Öffentlichen Rechts neue Folge* 63 (2015), 429–454.

<sup>107</sup> See Weiler (note 99), 430–431 and the prominent thesis of a 'permissive consensus' among the elite and the wider electorate in support of EU integration on the basis of Stuart Scheingold and Leon Lindberg, *Europe's Would-Be Polity* (Prentice-Hall, 1970); for Germany, see Davies (note 4), chapters 2, 3.

<sup>108</sup> In France a referendum produced a 51 %-majority for the yes-vote, while Denmark undertook two referenda and the conservative 'Maastricht Rebels' almost brought down the British Tory government of John Major; the German Maastricht judgment was perceived as a proxy for political criticism (which was largely absent) by Matthias Herdegen, 'Maastricht and the German Constitutional Court', *CML Rev.* 31 (1994), 235 (239).

<sup>109</sup> See the argument by Jo Shaw, 'European Union Legal Studies in Crisis?', *Oxford J. Leg. St.* 16 (1996), 231 (234–235), Walker (note 95), 585–586 and Mangold (note 4), 490–491.

<sup>110</sup> Debates in Germany about the legality of the rescue programmes during the euro crisis are a case in point; I have come across many colleagues who conceive the ECJ's *Pringle* judgment and corresponding legal arguments as being essentially pro-European – and thus 'useless' as legal positions.

<sup>111</sup> See the evaluation for 1965–1995 of the *Common Market Law Review*, *Europarecht* and the *Cahiers de droit européen* by Schepel and Wesseling (note 25), 171–176 who identified the high-point of practitioners' involvement towards the end of the single market programme; a similar result in terms of 'practitioners' quotas' was reached for French EU law periodicals of the 1998–2004 period by Snyder (note 18), 50–62.

<sup>112</sup> Pescatore was a member of the Luxembourg delegation in the negotiations on the Treaty of Rome; he also worked as a professor and served as a judge from 1967 until 1985; over the past twenty years, Lenaerts has held similar posts as a professor and judge; for further details, see Schepel and Wesseling (note 25), 183 and von Bogdandy (note 34), 213.

<sup>113</sup> Everling held prominent functions in German ministries and the Commission; Ehlermann was, among others, the head of the Commission's Legal Service and a professor at the EUI; Hallstein was a full-time professor (of private law), a politician and the first President of the Commission; for further CVs, see Mangold (note 4), 243–250.

for a number of years.<sup>114</sup> The percentage of those belonging to both the realm of practice and academia seems to have diminished only recently, at least in Germany.

Although collaboration with legal practice presents itself as a pan-European phenomenon, German scholarship on EU law is defined by particularly close cooperation with legal practice reflecting the traditionally intimate relations between worlds of academia and practice. The most pronounced expression of this interaction are the doctrinal commentaries restating the law through a systemic presentation of both case law and legal writing.<sup>115</sup> As mentioned previously, there will soon be no less than nine commentaries on EU primary law in the German language with contributions of more than 100 full-time professors,<sup>116</sup> who often serve as authors side by side with practitioners from Germany or the EU institutions (it should be noted that these commentaries are, like handbooks, popular among English language publishers at the moment<sup>117</sup>). Reasons for this success include the prestige that German academia has traditionally ascribed to doctrinal work and the financial interest of both publishers and authors, who can earn substantial amounts of money with publications that will be bought not only by university libraries but also by courts, state institutions and private practitioners.<sup>118</sup> Both considerations are legitimate and can become a problem, nonetheless, if the multiplication of similar formats takes up too many resources.

Readers from outside Germany should be aware that the proximity of scholarship and legal practice is a two-way street which has traditionally endowed law professors with influence on the course of legal practice through a discursive community of academia, courts and other practitioners.<sup>119</sup> In contrast to the United Kingdom, legal practice is more attentive to the views of academics in Germany.<sup>120</sup> Moreover, law has traditionally been the professional training of choice of those pursuing a career in public administration or politics in Germany (unlike in France).<sup>121</sup> Correspondingly, Germany has sent comparatively more lawyers to the Commission than other large Member States.<sup>122</sup> The traditional German focus on practice-oriented publication formats can be explained, therefore, by the desire to influence the outcome of (domestic) legal practice in matters related to EU law.<sup>123</sup> Against this background, calls for greater international visibility can become a zero-sum game.<sup>124</sup> Energy flowing into transnational debates may increase the distance from domestic practice unless legal scholars manage

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<sup>114</sup> Meinhard Hilf and Ingolf Pernice worked for the Legal Service of the Commission and Thomas Oppermann, 'Meine sechs Jahrzehnte Öffentliches Recht', *Jahrbuch des Öffentliches Rechts neue Folge* 62 (2014), 511-527 reports enthusiastically about his time in the EU department of the German Ministry of Economy.

<sup>115</sup> Cf. Oliver Lepsius, 'The Quest for Middle-Range Theories in German Public Law', *ICON* 12 (2014), 692 (693-698).

<sup>116</sup> See above notes 67 and 68 and accompanying text.

<sup>117</sup> See the catalogues of *Oxford University Press*, *Elgar Publishing* and *Hart Publishing*, whose commentaries are published in collaboration with the English language programme of the German publisher *C.H. Beck*; in addition, *Springer* has increased its output in English; English language commentaries on EU primary law by German authors include Hermann-Josef Blanke and Stelio Mangiameli (eds), *Commentary on the Treaty on European Union* (Springer, 2013) and Rudolf Geiger, Daniel Kahn and Markus Kotzur (eds), *European Union Treaties* (C.H. Beck, 2014).

<sup>118</sup> On the financial side, see Bouthinon-Dumas and Masson (note 35), 786-787 and Snyder (note 18), 68.

<sup>119</sup> See Matthias Jestaedt, 'Rechtsdogmatik im Wissenschaftsvergleich', *Juristenzeitung* 2014, 1 (3-5) and Alexander Somek, 'The Indelible Science of Law', *ICON* 7 (2009), 424 (435).

<sup>120</sup> See William Twining *et al.*, 'The Role of Academics in the Legal System', in: Cane and Tushnet (note 61), 920.

<sup>121</sup> Franz Mayer, 'Europa als Rechtsgemeinschaft', in: F. Schuppert *et al.* (eds), *Europawissenschaft* (Nomos, 2005), 429 (480) notes that in France *Sciences Po* and the *Ecole nationale d'administration* assume that function of law studies in Germany.

<sup>122</sup> See the statistical survey by Didier Georgakakis and Marine de Lasalle, 'Where Have all the Lawyers Gone?', in: Vauchez and de Witte (note 100), 137 (140-141, 148).

<sup>123</sup> Note that legal practice on EU-related issues can be influenced at the domestic level, if national legislatures, administrations or courts decide on issues with an EU law dimension.

<sup>124</sup> See also Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship', *ELJ* 20 (2014), 292 (300).

to allocate their resources more efficiently in addressing different audiences for different interventions.<sup>125</sup>

### ***Practice-oriented and doctrinal output***

One consequence of the close collaboration between EU law scholarship and legal practice in Germany and beyond relates to the weight of practice-oriented output, which has traditionally played a central role in continental jurisdictions, but can also be found in the United Kingdom in the form of analytical descriptions of key legal developments.<sup>126</sup> That such contributions dominated EU law scholarship throughout the 1970s, 1980s and 1990s to the detriment of theoretically oriented publications was not only the result of scholarly proximity to legal practice. At the same time, EU law experts may have unknowingly pursued a strategy of segregation by erecting hurdles on entry for academics without a specialisation in EU law through a focus on practice-oriented and technical knowledge.<sup>127</sup> Moreover, doctrinal contributions supported the recognition of Union law as an ‘equal’ discipline by students and academic peers alike who encountered EU law through its domestic effects.<sup>128</sup> Attention to practice-oriented questions was a means to integrate the new discipline of EU law scholarship into the canon of established areas of legal research.<sup>129</sup>

Arguably, another factor was at play. In a multicultural setting, emphasis on practice-oriented issues, such as ECJ judgments, established a common denominator for transnational discourse irrespective of the diversity of national legal cultures.<sup>130</sup> Orientation at legal practice did not necessarily require prior agreement upon the underlying methodological and theoretical presuppositions, which the first generation of Community lawyers would have had to develop in painstaking and potentially divisive debates. Practice-oriented debates evaded these pitfalls by establishing a ‘rather crude version of ECJ positivism.’<sup>131</sup> Distinct national legal cultures and methodological perspectives were united in the common object of study and did not amalgamate into a sophisticated doctrinal approach towards Union law and corresponding domestic legal issues which would have replaced the distinct approaches of the French *doctrine*, the German *Dogmatik* or the British *case law* which are methodologically often more ambitious than corresponding treatises on EU law suggest.<sup>132</sup>

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<sup>125</sup> According to the economic ‘law of diminishing returns’ the German-language commentaries, in particular, may take up an increasing amount of resources without resulting in a comparable increase in influence; arguably, the overall visibility of nine commentaries may even be less than the fierce ‘competition’ of one or two high-profile commentaries; if that is correct, resources for international visibility could be ‘freed’ without necessarily diminishing the domestic legal impact of German EU scholarship.

<sup>126</sup> All traditional EU law journals, with the exception of the *European Law Journal*, include case notes or French-style *chronique de jurisprudence* on a sequence of judgments.

<sup>127</sup> See Shaw (note 109), 235, Arnulf (note 106), 428-429 and Ulrich Haltern, ‘Europarechtswissenschaft und ihre politisch-kulturellen Voraussetzungen’, *Zeitschrift für Staats- & Europawissenschaften* 2006, 364 (369).

<sup>128</sup> See Shaw (note 109), 235 and, for textbooks, de Witte (note 17), 4-5 and Snyder (note 105), 167; after World War II, public international law in Germany also focused on practice-oriented contributions, cf. Felix Lange, ‘Die ‘International Society of Public Law’’, *Völkerrechtsblog.de* of 9 July 2014.

<sup>129</sup> When I was applying for university chairs an experienced emeritus gave me the fatherly advice to teach both EU law and public international law in a similar doctrinal fashion as domestic administrative or constitutional law in order to convince my colleagues and my students that our topics belonged to the ‘regular’ branches of the law.

<sup>130</sup> Cf. von Bogdandy (note 34), 209.

<sup>131</sup> Matthias Jestaedt, “‘Öffentliches Recht’ als wissenschaftliche Disziplin”, in: C. Engel and N. Schön (eds), *Das Proprium der Rechtswissenschaft* (Mohr Siebeck, 2007), 241 (250) (own translation).

<sup>132</sup> The French *doctrine* (often: analytical summary of core developments) should be distinguished from German *Dogmatik* (ideally: systemic restatement of the law with original proposals by academics) and the rather pragmatic British focus on *case law*, incl. the factual background of the case (also in situations without strict *stare decisis* rules); see Jürgen Kühling and Oliver Lieth, ‘Dogmatik und Pragmatik als leitende Parameter der Rechtsgewinnung im Gemeinschaftsrecht’, *Europarecht* 2003, 371 (377-385) and Raoul Charles Van Caenegem, *Judges, Legislators and Professors* (CUP, 1987).

What is more, the focus on practice-oriented contributions responded to a real demand among domestic academics and practitioners. There was (and still is) a broader audience for work explaining complex developments in Brussels and Luxembourg.<sup>133</sup> Ever more Treaty changes, legislative proposals and (vaguely formulated) ECJ judgments provided EU law experts with a constantly fresh supply in need of explanatory contributions and practice-oriented exegeses. Doing so was a rational choice, not least in legal education,<sup>134</sup> but came with a price tag attached: scholarship on EU law ‘responded to data overload by trimming its theoretical ambitions.’<sup>135</sup> Scholarship on EU law dealt with supranational legal questions, but managed only to a limited extent to become the lead discipline for the internationalisation of legal scholarship, since it focused too often on practical questions instead of emphasising broader methodological and theoretical implications of Europeanisation.<sup>136</sup>

### *Theoretical and contextual openness*

In retrospect, the quarter century between the Single European Act and the entry into force of the Treaty of Lisbon appears as a period of almost continuous treaty changes, mirroring the traditional approach of integration-through-law that employed legal rules as instruments for transformative change.<sup>137</sup> The belief in the effectiveness of the legally instructed modification of social and economic realities was boosted in the 1990s through the success of the single market programme and the increasing institutional responsibilities of a generation of bureaucrats and politicians trained in the wider context of the 1968 movement, which generally expected public authorities to take an active role in steering social and economic developments.<sup>138</sup> This integration-through-law movement reached its climax, arguably, in the endeavour to foster political union by means of transformative treaty changes through direct elections to the European Parliament, the introduction of Union citizenship, a legally binding Charter of Fundamental Rights and the Constitutional Treaty.<sup>139</sup> The inherent limits of this endeavour have become obvious in the meantime: scholars working on EU law have realised that concepts such ‘constitution’, ‘democracy’ or ‘legitimacy’ are not self-fulfilling prophecies and should be discussed with methodological and theoretical sensitivities towards the underlying prerequisites.

It seems to me that greater methodological openness towards the theoretical underpinnings and contextual dimensions of EU law presents the single most important evolution in EU law scholarship in recent years. This conclusion is not invalidated by the occasionally unsatisfactory performance of EU law scholarship during debates on recent Treaty changes, in particular with regard to the Constitutional

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<sup>133</sup> See Hans Christian Röhl, ‘Öffnung der öffentlich-rechtlichen Methode durch Internationalität und Interdisziplinarität. Erscheinungsformen, Chancen, Grenzen’, *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 74 (2015), 7 (25-26) and Walker (note 95), 582.

<sup>134</sup> Thomas Oppermann, ‘Reform der öffentlich-rechtlichen Wahlfachgruppen?’, *Die Öffentliche Verwaltung* 1979, 632 (635) complained about the (former) mistake of integrating the theory of the state (legal philosophy) into specialised courses (*Wahlfachgruppe*) on public international law and EU law, not least because students were not interested in pursuing all of these issues on a parallel basis.

<sup>135</sup> Walker (note 95), 585.

<sup>136</sup> For Germany, see Röhl (note 133), 25-27 and Christoph Schönberger, ‘Verfassungsvergleichung heute’, *Verfassung und Recht in Übersee* 2010, 6 (8-9).

<sup>137</sup> See the classic account by Mauro Cappelletti *et al.* (eds), *Integration Through Law. Europe and the American Federal Experience*, Vol. I-1 (de Gruyter, 1986); and the more recent, critical assessment by Joseph H.H. Weiler, ‘Deciphering the Political and Legal DNA of European Integration’, in: J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP, 2012), 137 (149-156).

<sup>138</sup> On the role of the ‘generation 1968’, see Rob van Gestel and Hans-W. Micklitz, ‘Revitalizing Doctrinal Legal Research in Europe: What about Methodology?’, *EUI Working Paper LAW* 2011/05, 11-12.

<sup>139</sup> Cf. Walker (note 95), 595, Haltern (note 127), 374 and Jo Hunt and Jo Shaw, ‘Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration’, in: D. Phinnemore and A. Warleigh-Lack (eds), *Reflections on European Integration. 50 Years of the Treaty of Rome* (Palgrave, 2009), 93 (94).

Treaty.<sup>140</sup> Negative experiences have arguably triggered methodological transformations which are enhanced by the increasing dominance of English language contributions to EU law, the success of which does not rest on the English language only. Rather, it reflects a methodological openness towards the US-style contextualism and theoretical arguments that entered the English language discourse on EU law during the 1990s.<sup>141</sup> The work of Joseph Weiler, the influence of the European University Institute and the foundation of the *European Law Journal* as a ‘Review of European Law in Context’<sup>142</sup> are signs of a methodological re-orientation which has by now embraced most segments of the transnational discourse.<sup>143</sup> Even contributions to the practice-oriented *Common Market Law Review* increasingly include a theoretical dimension. This does not imply that doctrinal and output-oriented research is dying out.<sup>144</sup> A methodologically enriched approach towards Union law along the continental tradition that one might call ‘contextually embedded doctrinal constructivism’ may continue to cooperate with legal practice.<sup>145</sup>

Given the greater transnational openness of many smaller jurisdictions, it does not come as a surprise that they were quicker to implement the methodological transformation than scholarly communities in Germany, France or Italy.<sup>146</sup> In the case of Germany, moreover, a parallel debate emerged on the theoretical foundations of Union law after the Maastricht judgment of the Federal Constitutional Court; crucially, this discussion followed the traditional categories and established argumentative patterns of German constitutional law<sup>147</sup> instead of joining the contextual drive of the transnational debate.<sup>148</sup> It seems to me that this asymmetry is one reason why the FCC’s judgments on EU law are widely read and commented upon throughout Europe, whereas corresponding scholarly treatises from Germany are rarely read internationally.<sup>149</sup> Armin von Bogdandy is one of the few scholars actively trying to bridge the gap between German scholarship and the transnational debate.<sup>150</sup> If more energy were invested into such projects across Europe, sustainable bridges between domestic and transnational debates could be

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<sup>140</sup> Cf. the sharp criticism by Ulrich Haltern, ‘Pathos and Patina. The Failure and Promise of Constitutionalism in the European Imagination’, *ELJ* 9 (2003), 14–44.

<sup>141</sup> See the prominent critique by Snyder (note 105) and Shaw (note 109); see also Martin Shapiro, ‘Comparative Law and Comparative Politics’, *South. Calif. L. Rev.* 53 (1979), 537-542, Arnulf (note 106), 415-431; Snyder’s and Shaw’s ideas were taken up in Germany by Ulrich Haltern, ‘Rechtswissenschaft als Europawissenschaft’, in: Schuppert, Pernice and *id.* (note 121), 37 (49-69).

<sup>142</sup> Until a generational change in 2013, Francis Snyder served as editor-in-chief and the editorial board comprised many (former) EUI professors.

<sup>143</sup> The crucial steps and actors in this process of ‘Americanisation’ are traced by Arnulf (note 106), 417-420 and Boerger and Rasmussen (note 99), 215-222; on the more recent ‘critical turn’ in response to the financial crisis, see Editorial Comments, ‘The Critical Turn in EU Legal Studies’, *CML Rev.* 52 (2015), 881-888 and Loïc Azoulay, ‘Solitude, désœuvrement et conscience critique’, *Politiques européennes* 2015, 82-86.

<sup>144</sup> See van Gestel and Micklitz (note 124), 294-297; the continued relevance of doctrinal output in the continental European tradition, may distinguish Europe from the opposite trend in the US, criticised by Richard A. Posner, ‘Response: The State of Legal Scholarship Today: A Comment on Schlag’, *Georgetown Law Journal* 97 (2008), 845, 850-854.

<sup>145</sup> See Armin von Bogdandy, ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’, *ELJ* 16 (2010), 95-111, who employs the formula of ‘doctrinal constructivism’, which one might supplement with the addition ‘contextually embedded’ in order to emphasise the openness towards non-legal and theoretical points of view in the assessment of specific doctrinal rules; see also Christoph Möllers and Hannah Birkenkötter, ‘Towards a New Conceptualism in Comparative Constitutional Law, or Reviving the German Tradition of the Lehrbuch’, *ICON* 12 (2014), 603.

<sup>146</sup> See above section C.IV.

<sup>147</sup> This concerns both the substantive focus on the Federal Constitutional Court and the argumentative orientation at domestic debates about constitutional issues; see von Bogdandy (note 34), 213-220.

<sup>148</sup> Cf. Robert Cryer et al., *Research Methodologies in EU and International Law* (Hart, 2011).

<sup>149</sup> In the early stages of EU integration, the situation was different; at the time, theoretical ideas from Germany were very visible, not only ordoliberalism; cf. Ruffert (note 54), 254 and von Bogdandy (note 34), 213.

<sup>150</sup> See von Bogdandy (note 145), 96-97 and the contributions to von Bogdandy and Bast (note 73); see also van Gestel and Micklitz (note 138), 20-31.

built. Arguably, continental legal cultures embody a rich pedigree of doctrinal research to which a US-style contextualism cannot respond that scholarship on EU law will always retain a practice-oriented dimension.<sup>151</sup>

### **Autonomy vs. fragmentation**

As a starting point, this contribution assumed that legal scholarship might benefit from a sociological perspective in which the law and the corresponding academic debates are studied as social fields in a Bourdieuan sense reaffirming their relative independence through practices such as the language regime, publication formats, legal education or academic career paths. Against this background, we shall finally consider a central question that so far has been discussed only indirectly: the relative autonomy of scholarship on Union law vis-à-vis domestic public law. In this respect, one may observe a double thematic and discursive fragmentation of scholarly debate, which may always have always existed to a certain degree, but which has arguably become more pronounced in recent years. EU law scholarship is becoming increasingly fragmented along substantive policy issues.

### **Plurality of legal themes**

It is widely recognised today that the EU Treaties established their ‘own legal system.’<sup>152</sup> This doctrinal autonomy of the EU legal order does not, however, imply the necessary existence of an independent and internally homogeneous area of legal research called ‘EU law.’ On the contrary, it appears that the formation, evolution and disappearance of research fields depend primarily on the social practices of scholars and practitioners which, by way of example, uphold the principled distinction between public and civil law in continental Europe.<sup>153</sup> For that reason, autonomy will usually be relative. For instance, environmental law, administrative procedure and constitutional law are intricately interlinked but nevertheless constitute relatively autonomous (sub-)systems of legal scholarship.<sup>154</sup> This implies for our purposes that scholarly research on European law need not be either fully independent of or completely integrated into domestic legal research; intermediate positions are possible. Arguably, there are different strands of development coexisting at domestic and transnational level where we may observe in parallel both an increase in the autonomy of transnational discursive communities on EU law and an enhanced domestic assimilation of debates on EU law into pre-existing areas of research.

A generation ago, there was still a canon of substantive legal issues with which most EU experts could reasonably be expected to be familiar: the economic freedoms, competition law incl. state aid and, possibly, international trade or agriculture.<sup>155</sup> Today, this common denominator has been lost. Most EU experts will not be familiar with even the most important *substantive* legal developments in diverse areas of EU activity such as environmental protection, foreign and security policy, criminal law, data

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<sup>151</sup> See Ruffert (note 54), 260, van Gestel and Micklitz (note 124), 294-297 and Haltern (note 127), 377.

<sup>152</sup> Cf. ECJ, *Costa vs. E.N.E.L.* (note 92) as well as Federal Constitutional Court (*Bundesverfassungsgericht*), Decision of 18 October 1967, *EWG-Verordnung*, BVerfGE 22, 293

<sup>153</sup> The theoretical *unity* of domestic legal orders does not prevent the practical differentiation, in most continental European jurisdictions, between public and civil law in the organisation of the judiciary, discursive communities (publication formats, methodology, conferences) and education (lectures, academic career paths).

<sup>154</sup> Doctrinal research in the German tradition with its focus on internal systematisation will often try to align centripetal forces; cf., for administrative law, Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd edn (Springer, 2004).

<sup>155</sup> Apart from institutional questions and the relationship with national law, these *substantive* issues dominated the FIDE congresses until the early 1990s, cf. <http://fide2014.eu/fide/previouscongresses> (last accessed: 20 June 2015); similarly, cf. the early German-language textbook by Bleckmann (note 87) in contrast to the epic breadth of today’s Oppermann *et al.* (note 80) and Bieber *et al.* (note 80).

protection, media law or migration and asylum.<sup>156</sup> Rather, differentiated areas of specialisation are on the rise for which separate discursive communities materialise at domestic and/or transnational level.<sup>157</sup> Horizontal themes are often discussed, in Germany and beyond, under the essentially heuristic rubric of ‘European Constitutional Law’; they serve as the focal point of general debates on EU integration at domestic and transnational level.<sup>158</sup> These debates will nowadays embrace issues such as Union citizenship, the Charter of Fundamental Rights, democracy and the rule of law, or the constitutional consequences of the euro crisis.

### ***Integrative multi-level research***

In contrast to public international law, substantive fragmentation affects scholarship on EU law not only in terms of *internal* differentiation.<sup>159</sup> Instead, the complex interaction between domestic and supranational norms requires specific legal questions to be treated as multi-level issues binding together rules of diverse origins. This need for integrative multi-level research defines specialised debates on environmental protection or migration in the same way as it affects arguments about democracy or human rights protection<sup>160</sup> – and the degree of national autonomy and/or transnational openness will often vary for different policy areas and between Member States.<sup>161</sup> To a certain extent, the autonomy of the scholarly discourse on EU law can be considered the victim of its own success if the domestic relevance of Union law implies that supranational legal issues are increasingly discussed alongside domestic developments.<sup>162</sup> It seems to me that the year 1992 should be regarded as a turning point when the realisation of the internal market programme brought a growing number of substantive areas of law within the reach of supranational rules.<sup>163</sup> This led to an unprecedented increase in interest in Union law among domestic academics.

Scholarship on EU law might thus be defined by enhanced internal diversification in the future if questions of EU law are being discussed in the context of specialised or constitutional legal discourses, at both domestic and transnational levels. The degree of thematic fragmentation or discursive unity will be defined by the community of scholars through their daily practices which constantly redefine the relative autonomy of EU law scholarship.<sup>164</sup> Research policy may try to steer this process with

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<sup>156</sup> An empirical survey of French journals on EU law during 1998-2004 by Snyder (note 18), 70-75 did not reveal any dominant themes; similarly, de Witte (note 17), 11.

<sup>157</sup> The degree of national separation or transnational embeddedness varies between policy fields.

<sup>158</sup> By way of example, see von Bogdandy and Bast (note 73), Allan Rosas and Lorna Armati, *An Introduction to EU Constitutional Law* (Hart, 2010) and Robert Schütze, *European Constitutional Law* (CUP, 2012).

<sup>159</sup> For public international law, see the International Law Commission, Report of the Study Group on the Fragmentation of International Law, UN doc. A/CN.4/L.682 of 13 June 2006 and Martti Koskenniemi, *The Fate of Public International Law*, *Mod. L. Rev.* 70 (2007), 1 (4-8).

<sup>160</sup> See Pernice (note 46), 237-238 and, more far-reaching, von Bogdandy (note 49), 617-618.

<sup>161</sup> National and transnational debates on specialised areas, such as migration or the environment, are – like debates on horizontal themes – only connected to a limited extent.

<sup>162</sup> Common debates on domestic and supranational constitutionalism are promoted, among others, by the *European Constitutional Law Review* with its emphasis on comparative analysis, the *ius commune* series with both *Intersentia* and *Hart Publishing*, and the *European Constitutional Law Network* founded by Ingolf Pernice; cf. <http://www.ecln.net>, last accessed on 20 June 2015.

<sup>163</sup> Analysing public law journals from Germany, Mangold (note 4), 171-186 noted a significant increase of articles dealing with supranational legal issues since the late 1980s; similarly, Antonio Tizzano, ‘Les communautaristes et les autres’, in: Picod (note 18), 115 (119-125).

<sup>164</sup> Armin von Bogdandy, ‘Common Principles for a Plurality of Orders’, *ICON* 12 (2014), 980 pleads for the enhanced thematic and discursive convergence of debates on domestic, European and international law.

incentives,<sup>165</sup> but it cannot instruct any re-orientation on an authoritative basis. For as long as legal education, academic career paths and teaching obligations are focused on the model of the ‘full jurist’ in Germany, it is to be expected that scholarship on EU law in the biggest Member States will retain its current proximity to domestic debates.<sup>166</sup> There is nothing like a Langdellian reform in sight for Europe, replicating the experience of legal education in the US at the end of the 19<sup>th</sup> century when Christopher Langdell, the dean of Harvard Law School, initiated the case method and replaced the previous focus on diverse state laws by a curriculum of standardised treatises on US law.<sup>167</sup>

The dependence of scholarship on EU law from domestic scholarly cultures is enhanced, in the case of Germany, by the absence of specialised institutions that may serve as focal points for autonomous debates on EU law, mirroring the corresponding function for German public international law by the *Deutsche Gesellschaft für Internationales Recht DGIR* (German Society for International Law) or the expansive activities of the *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* (Max Planck Institute for Comparative Public Law and International Law) in Heidelberg.<sup>168</sup> The annual meetings of the *Vereinigung Deutscher Staatsrechtslehrer* (Association of German Public Law Professors) are emblematic of the state of German scholarship on EU law, as representatives meet for debates on European issues in a sort of antechamber before the plenary proceedings, thereby reaffirming the intimate symbiosis with domestic public law scholarship.<sup>169</sup>

## Outlook

From a sociological perspective, scholarship on EU law can be perceived as a social field in a Bourdieuan sense the evolution of which is defined, among other things, by the collective practices of scholars in diverse areas such as publication formats, legal education, career paths or research funding. Against this background, the Europeanisation of scholarship has often remained – not only in Germany – an essentially thematic undertaking discussing implications of supranational legal rules within the domestic context. This thematic Europeanisation has been accompanied to a limited extent only by linguistic, discursive and methodological transnationalisation. An empirical survey of citation practices and authorship of leading and specialised journals on EU law revealed that semi-autonomous discursive communities persist at domestic and supranational level: they overlap only to a limited extent. Although we can observe the emergence of transnational debates which are increasingly held through the medium of the English language with an active input by academics on the British isles and from smaller states in Central and Northern Europe, domestic discourses on EU law persist, in particular in the larger

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<sup>165</sup> Transnational linkages are supported by the *EU Framework Programmes* and the *European Research Council*; in addition, the domestic allocation of research funding on the basis of peer reviewed publications, such as the British *Research Assessment Exercise*, may support the reorientation of legal research; cf. Snyder (note 18), 76-77 and Shaw (note 61), 334-335; similar developments could be observed in countries in Central and Northern Europe in recent years, which partly explains their increased transnational visibility; cf. section C.IV.

<sup>166</sup> See above section C.V.

<sup>167</sup> I owe this idea to Federico Fabbrini; for the Langdellian reform after the traumatic experience of the Civil War and at a time of enhanced economic modernisation, see Anthony Chase, ‘The Birth of the Modern Law School’, *The American Journal of Legal History* 23 (1979) 329 (346-348).

<sup>168</sup> The *Arbeitskreis Europäischer Integration* (Study Group on European Integration) never gained much visibility, although it serves as the domestic section of the *European Community Studies Association* (ECSA); the more autonomous *Wissenschaftliche Vereinigung für Europarecht* (Academic Association for European Law) suffers from being an integral part of the *Gesellschaft für Rechtsvergleichung* (Association for Comparative Legal Research), whose framework programme at the bi-annual meetings has little to do with EU law; moreover, said association had been presided over by a single person for more than twenty years (in contrast to the collegiate and rotating presidency of the *DGIR* or the *VDSiRL*) and therefore did not represent, arguably, the internal plurality of discourse on EU law in Germany.

<sup>169</sup> The *Gesprächskreis Europäisches Verfassungsrecht* (Discussion Circle European Constitutional Law) has existed since the early 2000s and is chaired by two persons for two years, who are replaced through co-optation.

Member States and Southern Europe. The example of Germany highlights various social practices fostering the perseverance of domestic discourses and hampering transnational openness.

Linguistic and discourses cleavages are complemented by continued methodological specificities characterising different approaches to Union law. For many years, practice-oriented contributions and publication formats dominated domestic and transnational debates and impeded, together with the 'sui generis-hypothesis' and widespread political support for the integration process, theoretical curiosity about how to conceptualise EU integration in relation to domestic and international experiences. Over three past two decades, however, transnational debates have embarked upon more theoretical and contextual work even if the ingrained continental tradition of doctrinal research will continue to distinguish pan-European scholarship on EU law from approaches on the other side of the Atlantic. One factor nourishing the significance of doctrinal work is the traditionally close collaboration and continued cross-fertilisation between academia and legal practice, both at EU level and in many Member States. At the same time, the spread of EU law into new domains entails a continued fragmentation of legal research, both horizontally among subject areas and vertically regarding the overlap of domestic, European and international law.

Neither of developments described in this article was or is inevitable. It is inherent in the view of legal scholarship as a social field that daily practices can change research patterns in the long run. If that is correct, the findings of this article can be turned into a programmatic call for a deliberate strategy for transnationalisation that attempts to connect the diverse publication formats, separate discussion circles and different methodologies through a policy of deliberate multilingualism and greater methodological sensitivity. Ideally, such a process may buttress the function of EU law scholarship as a lead discipline for the internationalisation of scholarly debates on the law in a multi-level setting.



