COMMON MARKET LAW REVIEW

CONTENTS Vol. 51 No. 4 August 2014

Editorial comments: After the European elections: Parliamentary games and gambles 1047-1056

Articles
R. Bieber and F. Maiani, Enhancing centralized enforcement of EU law: Pandora’s Toolbox? 1057-1092
E. Drywood, Who’s in and who’s out? The Court’s emerging case law on the definition of a refugee 1093-1124
A. Semertzis, The preclusion of direct effect in the recently concluded EU free trade agreements 1125-1158
C. Volpin, The ball is in your court: Evidential burden of proof and the proof-proximity principle in EU competition law 1159-1186

Case law
A. Court of Justice
Before the law stands a gatekeeper – Or, what is a “regulatory act” in Article 263(4) TFEU? Inuit Tapiriit Kanatami, P.-A. Van Malleghem and N. Baeten 1187-1216
Persecution for reason of sexual orientation: X, Y and Z, M. den Heijer 1217-1234
Secret evidence and due process rights under EU law: ZZ, N. de Boer 1235-1262
Sneak preview of the future application of European competition law on the Internet?: Cisco and Messagenet, I. Graef 1263-1280

Book reviews 1281-1310

Survey of Literature 1311-1332
Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.
COMMON MARKET LAW REVIEW

Editors: Thomas Ackermann, Loïc Azoulay, Michael Dougan, Christophe Hillion, Siofía O’Leary, Wall-Henning Roth, Ben Smulders, Stefan Van den Hout

Advisory Board:
- Ulf Bemhitz, Stockholm
- Kieran Bradley, Luxembourg
- Alan Dashwood, Cambridge
- Jacqueline Dutheil de la Rochère, Paris
- Claus-Dieter Ehlemann, Brussels
- Giorgio Gaja, Florence
- Walter van Gerven, Leuven
- Roger Goebel, New York
- Daniel Halberstam, Ann Arbor
- Gerard Hogan, Dublin
- Laurence Idot, Paris
- Francis Jacobs, London
- Jean-Paul Jacquel, Brussels
- Pieter Jan Kuijper, Amsterdam
- Ole Lands, Copenhagen

Associate Editor: Alison McDonnell
Common Market Law Review
Europa Institut
Steenstraat 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl

Aims
The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy
The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication.

If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts
Manuscripts should be submitted, together with a covering letter, to the Associate Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Authors may be requested to submit a hard copy of their manuscript, in addition to a digital copy, together with a summary of the contents. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotatons should be no longer than 10 pages (approx. 3,000 words). The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All notes should be numbered in sequential order, as cited in the text. *Except for the first note, giving the author’s affiliation the author should submit bibliographical data, including his or her current affiliation.


Further details concerning submission are to be found on the journal’s website http://www.kluwerlawonline.com/productinfo.php?pubcode=COLA

COMMON MARKET LAW REVIEW

Subscription information
Online subscription prices for 2014 (Volume 51, 6 issues) are: EUR 722/USD 1024/GBP 533. Print subscription prices for 2014 (Volume 51, 6 issues): EUR 764/USD 1080/GBP 561
Personal subscription prices at a substantially reduced rate are available upon request. Please contact our sales department for further information at +31 172641562 or at sales@kluwerlaw.com.
Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.
Subscription orders should be sent to:
- All requests for further information and specimen copies should be addressed to:
  Kluwer Law International
  Kluwer Law International
  c/o Turpin Distribution Services Ltd
  PO Box 316
  Stratton Business Park
  2400 AH Alphen aan den Rijn
  The Netherlands
  Tel: +31 172641515
  Fax: +31 172641515
  United Kingdom
  e-mail: sales@kluwerlaw.com
  or to any subscription agent
  For Marketing Opportunities please contact marketing@kluwerlaw.com

Please visit the Common Market Law Review homepage at http://www.kluwerlawonline.com for up-to-date information, tables of contents and to view a FREE online sample copy.

Consent to publish in this journal entails the author’s irrevocable and exclusive authorization of the publisher to collect any sums or considerations for copying or reproduction payable by third parties (as mentioned in Article 17, paragraph 2, of the Dutch Copyright act of 1912 and in the Royal Decree of 20 June 1974 (S.351) pursuant to Article 16b of the Dutch Copyright act of 1912) and/or to act in or out of court in connection herewith.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM: IBZ-Online; IBZ-International Bibliography of Periodical literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social SciSearch.


The reviewed book is an edited collection of thirteen chapters that offers an inspiring journey, allowing the reader to discover Anna Christensen’s theory of law as normative patterns in a normative field. The twelve contributing authors show how this theory may be applied to describe legal developments in the social domain and moreover offer a glimpse at new horizons for future research. They do so by advocating an interdisciplinary approach which should combine especially law, economics and sociology.

The theory of law as normative patterns in a normative field fits well with the intention to follow an interdisciplinary path. Any legal scholar who is searching for ways to connect the legal discipline with other scientific domains, may find this theory to be valuable, as it offers ways to explore a functional relationship between law and the structure of society. It suggests that social structures determine the content of law and thus gives the legal scholar alternative views on the nature of law; turning law perhaps more into an empirical fact than seeing it as an overarching norm or theory. Likewise, the theory on normative patterns provides an excellent opportunity for non-legal scholars to incorporate the legal framework into their research. Apart from giving a good introduction to the theory and its background, the book’s chapters use the theory convincingly to explain developments in a range of social security and labour laws. But we will return to this main road of the book later on, and first explore some exciting alleys which may be discovered in the book’s introductory chapters, written by Numhauser-Henning and Rönnmar.

One of these alleys is the tale of how scholars find inspiration for developing a theory, and how looking at a painting can trigger one’s imagination to start seeing law in a different way. For Christensen – who was also inspired by other scholars, such as Hofstadter – the work of the painter Escher formed such a source of inspiration. To her, Escher’s paintings captured certain patterns in complex realities. And such patterns in complex realities was something she began to uncover in legal developments, defining law as “…a medium where different moral and legal
patterns appear and dissolve, float, clash and form new patterns” (Quote of Christensen’s work taken from Numhauser-Henning’s chapter, p. 28). Basically, she distinguishes three such patterns in the social dimension, these being the Market-Functional Pattern, the Protection of Established Rights and Just distribution.

Most chapters in the book use these three basic patterns to explain the developments in a range of social security and labour laws, predominantly legal issues related to important demographic changes, such as new family structures and the ageing society. These studies mostly find a dominance of the Market-Functional Pattern in more recent decades, yet, they also demonstrate that the other normative patterns still matter. Although these exercises are fruitful, they tend to focus on EU law combined with Swedish case studies. It would have been interesting to add studies of other countries as well to the collection of chapters.

Exercises of putting the theory to practice, are combined with chapters that argue for developing the theory further. For instance, Votinius uses the theory’s heuristic qualities to uncover additional normative patterns and suggests adding a Gender Difference pattern. Yet, the greatest contribution of the collection of chapters is that it places the theory, developed largely to fit national level patterns in legal development, in a European context. From this clash between the national and the international context, new ideas emerge on how to further develop the theory. It thereby goes beyond the question posed in the introduction of the book concerning which normative patterns may be found after the implementation of the Lisbon Treaty. It also touches upon more fundamental work to-be-done. One example is the chapter of Sciarra, who mentions that in current times of EU integration, labour lawyers are challenged to transfer their discourse into a transnational scheme (p. 69), while advocating a strong position for the national legislature to safeguard the security of workers and citizens.

Deakin calls for a new theoretical synthesis of both economics and law, going beyond the view that these are two separate domains. He rather argues for the need to understand labour law as a mode of market governance, that as such provides the basis for sustainable economic development (p. 159). Bruun struggles to fit the recent EU-level developments into the theory of Christensen, and questions whether the normative patterns of Just Distribution and Protection of Established Rights are still relevant in an EU-setting where labour increasingly tends to be seen as a commodity. He ends his chapter with the suggestion that the blurring borders between social security law and labour law could actually lead to the construction of a new normative pattern in the labour law field: the Basic Subsistence pattern.

The preface of the book mentions that its aim is not to be merely a collection of conference proceedings. It has succeeded in offering a coherent volume, as most of the authors refer back to Christensen’s theory and relate their research findings to the main building blocks or ideas of this theory. It would have been even better if a concluding chapter had been added, with a research map or compass for exploring and theorizing the future of the social model in a European setting. But perhaps the authors, while writing their chapter, have succeeded in inspiring each other to proceed along the lines set out by the book, and will construct such a compass in future publications. This would give us something to look forward to, while, perhaps luckily, leaving us room to explore the new frontiers of social Europe ourselves.

Sonja Bekker
Tilburg
COMMON MARKET LAW REVIEW

Editors: Thomas Ackermann, Loïc Azoulay, Michael Dougan, Christophe Hillion, Siofra O’Leary, Wall-Hemming Roth, Ben Smulders, Stefan Van den Bogaert

Advisory Board:
Ulf Benitz, Stockholm
Eliana Chiorali, Rome
Jacqueline Dutheil de la Rochère, Paris
Gil Carlos Rodriguez Iglesias, Madrid
Allan Ross, Luxembourg
Eleanor Sharpston, Luxembourg
Piet Jan Slot, Amsterdam
John Spencer, Cambridge
Christian W.A. Timmermans, Brussels
Emri Vamiy, Debrecen
Joachim Vogel, München
Armin von Bogdandy, Heidelberg
Joseph H.H. Weiler, Florence
Jan A. Winter, Bloemendaal
Miroslaw Wyrzykowski, Warsaw
Odd Haavardso, Copenhagen

Associate Editor: Alison McDonnell
Common Market Law Review
Europa Institut
Steenstraat 25
2311 ES Leiden
The Netherlands
tel. + 31 71 5277549
e-mail: a.m.mcdonnell@law.leidenuniv.nl

Aims
The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy
The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts
Manuscripts should be submitted, together with a covering letter, to the Associate Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Authors may be requested to submit a hard copy of their manuscript, in addition to a digital copy, together with a summary of the contents. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotatons should be no longer than 10 pages (approx. 3,000 words). The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All notes should be numbered in sequential order, as cited in the text. *Exception for the first note, giving the author’s affiliation. The author should submit biographical data, including his or her current affiliation.


Further details concerning submission are to be found on the journal’s website http://www.kluwerlawonline.com/productinfo.php?pubcode=COLA