



Re-Imagining the European Union

ACELG's Annual Conference 2017

10 November 2017, University of Amsterdam
REC A, Nieuwe Achtergracht 166, Moot Court Room

Organized by the [Amsterdam Centre for European Law and Governance](#)



UNIVERSITY OF AMSTERDAM

Background

Has European integration gone too far? Can it be contained without unravelling the whole Union? Can the EU back off without becoming dysfunctional or irrelevant?

The Union's 60th birthday is overshadowed by Brexit negotiations and instead of grand celebrations fundamental questions of the EU's added value and sustainability loom large in the debate. Disenchantment with European integration is omnipresent. Across Europe, euro-critical parties, such as Wilders' PVV, Le Pen's Front National and the AfD, have gained a prominent voice in political debates and tap into the dissatisfaction of large parts of the population with the state of affairs in the EU. The Commission White Paper on the Future of Europe acknowledged in March 2017 that "many Europeans consider the Union as either too distant or too interfering in their day-to-day lives." Two of the five scenarios for Europe's future propose that the EU will do less rather than more in order to respond to Europe's challenges. At 60, the EU's primary task may therefore not be to continue its path towards "an ever closer union", but rather to ask whether the extent of integration has become too intrusive and to see where the EU can and should do less.

This conference aims at providing pointers towards addressing this challenge. It focuses on the questions of whether the EU's powers should and could be contained and how existing discontent with the European project should and could be addressed – both without triggering disintegration of the European *acquis*. To answer this question, the conference includes three sessions focusing each on a distinct European policy area that has given rise to particularly prominent concerns, EU Trade Policies, Monetary Union and EU Internal Market and Social Concerns.

Programme

09.00 – 09.10 **Opening**

09.10 – 10.00 **Keynote presentation: The EU - a Case of Overconstitutionalization?**

Dieter Grimm, former Justice of the German Federal Constitutional Court, Professor emeritus Humboldt University Berlin, Wissenschaftskolleg zu Berlin

10.00 – 11.30: **Session 1 – Making the New Generation Trade Agreements Work For Rather Than Against the EU**

Large trade agreements such as CETA and TTIP are widely criticised for promoting unfettered free trade at the expense of the environment, social issues and democracy. Rather than seeing free trade as a tide that lifts all boats, critics associate free trade with rising inequality and increased economic insecurity for the many losers of globalisation. It raises the question of how unwanted collateral effects of large trade agreements can be tackled and whether that would require any changes to current EU law.

Chair: Pieter Jan Kuijper, Professor of the Law of International (Economic) Organizations, ACELG

- **Normative Trade Power Europe**
Panos Delimatsis, Professor EU and International Trade Law, Tilburg University
- **Hollowed Out from Without: The Short and Tragic Career of the EU's External Competence in Matters Relating to Foreign Direct Investment**
Harm Schepel, Professor in Economic Law, University of Kent

Discussant: Christina Eckes, Professor of European Law, ACELG

11.30 – 11.50 Coffee break

11.50 – 13.20 **Session 2 – How Social Should the Internal Market Be?**

Tying in with the negative discourse about trade and globalisation, many argue that Europe's internal market has been very beneficial for Europe's mobile and successful citizens, but has done too little for those less mobile and less successful. For the latter, the internal market is perceived more as a threat to their job and security than as an opportunity. Dissatisfaction with free movement of workers also played an important role in the Brexit referendum. Critics have argued that Europe's openness too often subordinates social concerns to free market considerations. The third session of the conference concentrates on the EU's internal market and its social dimension. It examines whether the EU's internal market law should be changed to better accommodate its social and redistributive impact in the Member States.

Chair: Annik de Ruijter, Assistant Professor European Law, ACELG

- **The Human Costs of Market Freedom**
Gareth Davies, Professor in European Law, VU University Amsterdam Amsterdam
- **Of Cabbages and Goats. Social Europe and the Free Movement of Persons and Services**
Aukje van Hoek, Professor of Private Law, University of Amsterdam

Discussant: Annette Schrauwen, Professor of European Integration, ACELG

13.20 – 14.30 Lunch break

14.30 – 16:00 **Session 3 –The Future of EMU: Towards a Fiscal and Democratic Union**

Faced with a simmering sovereign debt crisis ever since 2010, the EU has taken significant steps to strengthen the monetary union. The EU has set up a permanent mechanism for financial assistance, adopted several legislative measures to strengthen budgetary discipline and economic coordination, and set up a full-fledged Banking Union. Yet, according to several economists, political scientists and legal scholars, these measures still fail to make the monetary union economically viable, socially just or democratically legitimate. Several politicians favour a break-up of the euro-zone, a call supported more recently by Nobel Prize laureate Joseph Stiglitz. This session deals with the future of the Euro and addresses pressing concerns about Europe's currency and possible ways to improve its current set-up.

Chair: Rein Wesseling, Professor of Competition Law and Regulation, ACELG

- **The Future of EMU: An Assessment of Past and Current Plans**
Amy Verdun, Professor of Political Science, University of Victoria, Canada
- **Form Follows Function: Addressing the Substantive Shortcomings of EMU**
René Repasi, European Research Centre for Economic and Financial Governance (EURO-CEFG) & Erasmus University Rotterdam

Discussant: Nik de Boer, Postdoctoral Researcher, ACELG/CSECL & ACCESS EUROPE

16:00 – 16.15 **Wrap up**

16.15 Drinks

Abstracts

- **Dieter Grimm - The EU: A Case of Overconstitutionalization?**

There is little doubt that the European Union suffers from a democratic deficit that affects its legitimacy and acceptance with EU citizens. However, it is rarely noticed that this deficit finds its source in the state of European constitutionalism. The EU is over-constitutionalized, and the effect is a power shift from the democratically legitimized and accountable institutions to the executive and judicial bodies of the EU. In his book, Dieter Grimm analyzes the origins and consequences of this situation, and develops proposals for a reform of the institutional structure and the decision making process within the EU.

- **Panos Delimatsis - Normative Trade Power Europe**

The EU trade policy has reached its apogee in recent times. Never was the EU's competence so broad, as confirmed by the recent Singapore Opinion (Opinion 2/15); and never were concerns about unbridled globalization more appealing and widespread, as the rise of populism and anti-liberalization sentiment in Europe and elsewhere demonstrates. The Brexit and the inability of WTO Members to reach a meaningful deal after over fifteen years of negotiations rather contributes to the general pessimism. Just like in previous crises of this type, we are currently in a turning moment. Whereas the fundamentals of the EU (the EU is the world's biggest trader in goods and services with a strong basis of intra-EU trade while also reigning inbound and outbound international investment) and signs of recovery are strong (the EU economy has been growing for four years straight) the EU is yet to sufficiently address unemployment (currently way above pre-crisis levels, particularly among youth) and equality. Whereas prosperity from increased openness and reduced protectionism is created, the reach of such prosperity is not sufficiently broad. In this respect, the European Commission has correctly turned towards the conclusion of trade agreements that can have a significant economic impact on EU trade. The Comprehensive Economic and Trade Agreement (CETA) with Canada and the Trans-Atlantic Trade and Investment Partnership (TTIP) with the US form integral part of this turn and a renewed engagement with EU's most important partners. A trade deal with Japan and an investment deal with China also serve this very economic purpose. Against this backdrop, this Note offers a critical account of the EU trade policy and advances four arguments: first, with all its imperfections and internal struggles, the EU currently implements an offensive trade strategy which however is contained by internal conflicts and disagreements regarding certain still sensitive areas; second, Brexit and all adjustments surrounding it will rather undermine the EU's efforts to lead the shaping of global trade rules in the short run; third, the conclusion of megaregion als will most likely accelerate domestic regulatory reform and openness, allowing to further integrate certain economic sectors internally; and fourth, the US isolationism is a unique opportunity for the EU to establish itself as a normative trade power globally . This will largely depend on EU's stance to multilateralism and its adherence to the rules-oriented system of the WTO; the successful conclusion of the Economic Partnership Agreements (EPAs) succeeding the Lomé framework; more boldness in offering further liberalization to rectify EU's WTO schedules after the EU - UK divorce ; and showing leadership in collecting the low-hanging fruit at the WTO, including rules on fisheries, agriculture, industrial market access and domestic regulations in services. Finally, its ability to export successful concepts of mutual recognition, equivalence, proportionality and its approach to technical standardization with a view to promoting regulatory cooperation with its partners in preferential trade agreements (PTAs) will by far be the most challenging part of its mission. How these agreements initiatives and endeavours will fare in the global arena will be viewed as a bellwether for the future of the EU trade policy. As the relevant TFEU provisions (notably Articles 3:2 and 207) have been interpreted consistently broadly by the CJEU in the aftermath of the entry into force of the Lisbon Treaty, it would appear that the necessary legal instruments are in place for the EU to assertively exert its normative role. At the same time, cases like Efler only show that such assertiveness should also be accompanied by increased transparency and citizens' participation in the EU's normative activity in trade matters from the outset. More, not less, participation of citizens

may be the key in addressing the existing discontent with the European project, at least with regard to trade matters.

- **Harm Schepel - Hollowed Out from Without: The Short and Tragic Career of the EU's External Competence in Matters Relating to Foreign Direct Investment**

The EU's engagement with international investment law and arbitration is based on a strict distinction between the internal and external dimensions of EU law. The Commission has maintained for a long time that Investment Treaties as between Member States are incompatible with the internal market, and are as such inapplicable. It defends this stance both in the European legal order - by bringing infringement proceedings against Member States for their failure to terminate intra-EU BITs, and in international law by intervening in arbitration proceedings urging Tribunals to decline jurisdiction, in vain. On the external front, however, the inclusion of foreign direct investment in the common commercial policy has led the Commission to pursue an ambitious program of including investment chapters in its new generation trade agreements, belatedly under the banner of institutional reform of international investment law.

The presentation will focus on two points. First, the distinction between the internal and external dimensions of investment law is untenable in light of the vast personal scope of investment treaties: any EU investment agreement with third countries will inevitably import investment law into the internal market, and indeed would likely be leveraged by the principle of non-discrimination as to be available to (nearly) all European companies. Second, in both its internal and external dimensions, the EU's engagement with investment law sits awkwardly in the agenda of harnessing globalization: setting up a parallel legal system for the hyper-protection of property rights in relative isolation of considerations of collective decision-making and diffuse public interests will inexorably undermine any efforts towards a more equitable distribution of wealth and a more sustainable model of economic growth.

- **Gareth Davies - The human costs of market freedom**

Any level of government has to balance the desire of economic actors for freedom of contract with other societal interests. There is accordingly an intense academic and policy discussion about the redistributive consequences of free movement law, and its capacity for wealth-generation. Yet there are other consequences which are at least as important, about which there is a resounding silence: what about the harm to individual consumers caused by imposing endless choice, the alienation and insecurity – and their political consequences - resulting from the embrace of de-localisation and individualism, and the cultural price of insisting that a certain narrow and outdated model of efficiency trumps traditions and the pleasures of continuity? The actors in free movement law display no awareness of what it is actually about – whether this comes from a materialist bias, an unconsidered acceptance of simplistic economic ideas, or merely a functional need to reduce policy to measurable interests - and the consequence of that blindness will be either that the internal market collapses under the weight of political resistance, or that it prevails, but ceases to be a tool for improving the lives of Europeans.

- **Aukje van Hoek - Of Cabbages and Goats. Social Europe and the Free Movement of Persons and Services**

Aukje van Hoek addresses the paradoxes of 'social Europe' - with specific reference to the free movement of services/the posting of workers. While during the pre-Brexit negotiations the UK pleaded for an exception to the rule of equal treatment of migrant workers, the Netherlands presidency declared equal treatment of posted workers to be key to their plans for Europe. These opposing responses can be understood as reactions to opposing uses made of the freedom of movement offered by the EU treaties. Are the freedoms used to opt-in or opt-out of the national social system? After disentangling this first paradox the speaker turns to a second one – whereas the

UK has claimed that EU labour law is overly restricting their labour markets (see e.g. the saga of the working time directive), the European trade unions claim EU (internal market) law has disrupted the national and/or local embedding of labour. So when it comes to creating a social Europe, the EU is deemed to be doing too much, too little, or simply the wrong things.

Just last month agreements were reached in Parliament and Council on the revision of the posting of workers directive and further changes to the coordination systems of private law and social security are in the making – will the new rules be able to save both the cabbage of social Europe and the goat of free movement?

- **Amy Verdun - The Future of EMU: An Assessment of Past and Current Plans**

This paper offers an assessment of the so-called “Five Presidents’ Report” (5PR) (of June 2015) and the “Reflection paper on the Deepening of the Economic and Monetary Union” (May 2017), both of which attempts to complete Europe’s Economic and Monetary Union (EMU). How do these two reports aim at offsetting the asymmetries in the institutional architecture that have plagued EMU over the past years? How well do these proposals address the challenges of making EMU economically viable, socially just, or democratically legitimate? Furthermore, what might be some obstacles that the EU faces in getting these plans implemented?

- **René Repasi - Form Follows Function: Addressing the Substantive Shortcomings of EMU**

Recent discussions about the next steps in reforming EMU turn around proposals such as the establishment of a European Finance Minister, a Eurozone Parliament or a Eurozone Budget. These discussions beg the question whether new forms such as a finance minister make sense if there is no fiscal capacity and no power to raise taxes and redistribute income from it. As important as these proposals are, they can only be discussed in a meaningful manner once there is a consensus found as to which function a reformed EMU has to fulfil. It is submitted that the main function of a further developed EMU is to generate economic and social convergence of the participating economies and societies under the conditions of a centralised monetary union and a decentralised economic and social union. Instruments will be discussed with a view to achieve economic and social convergence within EMU in terms of triggering investments, enhancing the overall fiscal capacity and reinsuring stabilising mechanisms such as unemployment insurances. Once the function of a reformed EMU and its instruments are defined, the form in which this function can be fulfilled the most effectively can be properly designed.

The speakers

Nik de Boer is a postdoctoral researcher at the Amsterdam Centre for Contemporary European Studies (ACCESS EUROPE) at the Faculty of Law at the University of Amsterdam. He is affiliated with both the Centre for the Study of European Contract Law (CSECL) as well as the Amsterdam Centre for European Law and Governance (ACELG).

Gareth Davies is Professor in European Law at VU University Amsterdam Amsterdam. Gareth was a barrister in London before being a University Lecturer at the University of Groningen (2000-2007) and then moving to VU University Amsterdam Amsterdam (2007 to the present). In 2006 he was an Emile Noël Fellow at New York University Law School, and in 2014 a Fernand Braudel Senior Fellow at the EUI. Gareth Davies also teaches at Amsterdam University College. He is the co-author, with Damian Chalmers and Giorgio Monti of *EU Law* (3rd edn, Cambridge University Press, 2014).

Panos Delimatsis is Professor of EU and International Trade Law and Director of the Tilburg Law and Economics Center (TILEC) at Tilburg University, the Netherlands. He has held visiting professorships at the universities of Lausanne, Neuchâtel and Saarbrücken. In the academic year 2015-16, Panos was a Fellow with the Program on International Financial Systems and a visiting scholar at Harvard Law School. His work on the regulation of services industries, issues of transnational governance and the regulation of EU and international trade has been extensively published in top refereed international journals. More recently, he edited a comprehensive book on *The Law, Economics and Politics of International Standardization*, published by Cambridge University Press in 2015 and a *Research Handbook on Climate Change and Trade Law*, published by Edward Elgar in 2016. In the same year, Panos Delimatsis was awarded an ERC Consolidator Grant (2 million Euros), the most prestigious mid-level personal grant at the EU level, for his research project on the resilience of non-State regulatory bodies and the role of the law.

Christina Eckes is Professor of European law at the University of Amsterdam and the director of the Amsterdam Centre for European Law and Governance (ACELG). Her research focusses on the EU external relations and fundamental rights, and in particular their consequences for power relations.

Aukje van Hoek is Professor of private international law and civil procedure at the University of Amsterdam and honorary justice in the court of appeals in Den Bosch. Before being appointed at the UvA, she held a Jean Monnet Chair in transnational social justice at Tilburg University where she worked as associate professor in European law. She specializes in transnational labour relations and has written extensively on the issue of posted workers in EU law. See inter alia Van Hoek, A. A. H. (2016). Re-Embedding the Transnational Employment Relationship – Can the Commission Proposal Deliver? ([Centre for the Study of European Contract Law Working Paper Series; Vol. 2016, No. 16](#)). Other recent research projects deal with regulatory competition in private law, cross-border insolvency, cross-border litigation, social dialogue as a source of EU legal acts and transnational company agreements. See also [personal profile](#).

Prof. **Dieter Grimm** teaches constitutional law at Humboldt University Berlin and at the Yale Law School. From 1987 to 1999 he served as Justice of the Federal Constitutional Court of Germany. He holds a law degree and a doctoral from the University of Frankfurt and an LL.M. degree from Harvard Law School. He has been a visiting professor in many universities such as Harvard, New York University, the University of Toronto, the University La Sapienza in Rome, the Indian National Law School in Kolkatta, Seoul National University, Beijing University, Renmin University Beijing etc. Dieter Grimm holds honorary doctoral degrees from the universities of Toronto, Göttingen, Porto Alegre and Bucharest. He is a member of the Berlin-Brandenburgische Akademie der Wissenschaften, the Academia Europaea and the American Academy of Arts and Sciences.

In 2016 his book *Europa ja – aber welches?* appeared with C.H. Beck (English: *The Constitution of European Democracy*, Oxford University Press, 2017) and his book *Constitutionalism - Past, Present and Future* with Oxford University Press.

Pieter Jan Kuijper has been Professor of the Law of International (Economic) Organizations at the Faculty of Law of the University of Amsterdam (UvA), the Netherlands, since 2007. Prior to his appointment at the UvA, he was principal Legal Advisor and Director of the 'External Relations and International Trade' team of the Legal Service of the European Commission (2002-2007) and Director of the Legal Affairs Division of the Secretariat of the World Trade Organization (1999-2002).

René Repasi is scientific coordinator of the European Research Centre for Economic and Financial Governance (EURO-CEFG) of the Universities of Delft, Leiden and Rotterdam and teaches EU law at the Erasmus University Rotterdam. He studied law at the Universities of Heidelberg and Montpellier and was assistant professor at the University of Heidelberg. Repasi acted as legal expert for the European Parliament in the context of the Banking Union and the reforms of EU's economic governance framework. He recently worked on the legal feasibility of a European Unemployment Benefits Scheme and on the implications of Brexit on economic governance.

Anniek de Ruijter is Assistant Professor in European Law and researcher at the Amsterdam Centre for European Law and Governance. Her research interests lie at the intersection of European Union law and health law and policy. In this respect she focuses on constitutional questions regarding the EU role in human health and risk regulation.

Harm Schepel is Professor of Economic Law at Kent Law School and the Director of Law Programmes at the University of Kent's Brussels School of International Studies. He holds a first degree from the University of Amsterdam and a PhD from the EUI Florence. He is a member of the Peer Review College of the ESRC, and an Editor of the *European Law Journal*. He has published widely in the fields

of EU Internal Market Law, international trade and investment law, and private transnational regulation.

Annette Schrauwen is Professor of European integration at the University of Amsterdam and member of the Amsterdam Centre for European Law and Governance. Her research focuses on European citizenship and free movement of persons within the EU. She recently published '(Not) losing out from Brexit' (2017, *Europe and the World: A Law Review*, 1(1)). Annette Schrauwen is editor of *Legal Issues of Economic Integration*.

Amy Verdun is Professor of Political Science, Lansdowne Distinguished Fellow in European Integration and Jean Monnet Chair Ad Personam at the Department of Political Science of the University of Victoria, Canada. She has written extensively on issues related to European integration, governance, integration theory, policy-making in particular economic and monetary integration as well as comparisons and relations of the EU and the rest of the world. She has published 18 books, more than 120 peer-reviewed articles and chapters. Her articles have come out in journals such as, *Acta Politica; British Journal of Politics and International Relations, Canadian Public Administration, Comparative European Politics, European Political Science, European Union Politics, German Law Journal, International Studies Quarterly, JCMS: Journal of Common Market Studies, Journal of European Integration, Journal of European Public Policy, Journal of Public Policy, Politique Européenne, Regulation and Governance, Review of International Political Economy, West European Politics, and World Politics*.

Rein Wesseling is Professor of Competition Law and Regulation at the Law Faculty of the University of Amsterdam. He holds first degrees from the University of Amsterdam and a PhD from the EUI (Florence). Rein is a private practitioner specializing in EU and national competition law and regulation. He has published widely in this area and is a member of the editorial board of *Markt & Mededinging*.