Actors and Roles in EU Law: Asking 'Who Does What?' in the European Union Legal System

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Introduction to the special section – Actors of EU law – Activities of EU actors – Role definition in EU constitutional law – Constitutional theory – Separation of powers –Relationship between public authorities and individuals – Institutional actors – Private actors – Lobbyists – Law and practice – Legal doctrine – Research methods in EU law – Importance of theoretical frameworks in defining the parameters of legal research

Asking – and answering – the question 'who does what?' in the European Union (EU) legal system is a core business of EU institutional and constitutional scholars, as well as a central theme for researchers working in other fields. Based on their observations, legal scholars articulate an understanding of the EU legal system grounded in certain concepts and in accordance with an (often implicit)

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theoretical framework. These concepts and framework contribute to shaping an intellectual 'grammar' which deeply influences the way EU legal developments are identified, defined, assessed and discussed, setting the terms of the message conveyed by legal writing.[1] Defining the 'who' (the 'actor') in the question 'who does what?' is part of shaping such a grammar. This concept can refer to institutions ('the Commission', 'the Council', 'the European Parliament', 'the Court of Justice' . . .) or can be stretched to cover non-institutional actors ('citizens', 'workers', 'lobbyists', 'the doctrine' . . .), the exclusion or inclusion of (some of) whom may be negotiated differently depending on the parameters set for the study. Defining what these actors 'do' (their 'role') can mean looking at their 'competences' or extend to different understandings of their 'activities' or 'practices'. Theoretical frameworks, notably those born from attempts at describing a 'system'[2] structuring the competences held and activities performed by the actors of the European Union, determine how such concepts are chosen, defined and placed in relation to one another. Every step of the way, choices are made which shape the research design of the study. These choices will have consequences for whether legal or non-legal methods will be deemed relevant to describe and analyse the roles of the actors of the EU legal system – notably, but not only, when looking at 'practices' and 'non-institutional' actors. This implies, in turn, that scholars take a stance on what can be known within the legal discipline, and on whether (and how) non-legal research should be included in their analysis of actors and roles in EU law.

However, the parameters chosen to conduct such a study are rarely made explicit. *How then does one (know how to) answer the question 'who does what'?* This Introduction considers the more general context in which such theoretical and methodological questions arise. We recall that there is increasing pressure on legal scholars to make the parameters of their approach more explicit (see the first section below). This does not necessarily require scholars to profoundly change the way they reason; in fact we note that the contributions to this Special Section illustrate that there is much attachment to the doctrinal legal approach under which 'research . . . aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving

[1] *See* W. Twining et al., 'The Role of Academics in the Legal System', in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003) p. 920 at p. 927-929 and 937. On the specificity of EU law *see* N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay', 25 *Oxford Journal of Legal Studies* (2005) p. 581 at p. 582-583.

[2] P. Pescatore, *Le droit de l'intégration. Émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes* (Bruylant 2005) p. 43. *See also* D. Simon, *Le système juridique communautaire*, 2nd edn. (Presses Universitaires de France 1998).

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unclarities and gaps in the existing law'.[3] This, however, imposes more transparency on choices being made, rigour in setting them out and at times making adjustments. Where such choices entail 'analysing materials (such as texts or practices) lying outside the classical pyramid of formal sources', clarity is again required in explaining the distinctiveness, relevance and added value of legal research on such materials vis-à-vis research informed by social sciences, as powerfully argued by Antoine Bailleux in the paper concluding this special section. Yet, the choice to inscribe one's work in (a) specific discipline(s) or to use specific methods is only one important part of the work to set the parameters for one's research. That work also supposes clarity with regard to the kinds of questions one might ask for the purpose of research, which in turn influences the kinds of answers that can be obtained – and the methods and disciplinary inscription which become relevant to reach them. As will be submitted in this Introduction, explicit or implicit theoretical frameworks determine how research questions are asked and, as such, deserve critical attention when engaging in research design (see the second section below). Indeed, a careful reading of the contributions to this Special Section suggests that inherited theoretical frameworks concerning actors and roles in the EU legal system are not always best adapted to the needs of contemporary legal researchers. For instance, unchecked reliance on familiar figures of actors such as the 'individual facing public authority',[4] or the 'institutions taking part in law-making', may sometimes hinder rather than serve the interests of analytical clarity. At the same time, the ambition to design more adequate theoretical frameworks comes with specific methodological challenges, pertaining for example to access to unavailable sources,[5] or the adequacy of doctrinal legal analysis to tackle certain objects of study, as will be further explained.

Calls to make the parameters of EU legal scholarship explicit

It has long been observed that legal scholars – including EU legal scholars – 'display a surprising lack of interest in legal scholarship, or at least they tend not to make it an object of their writing'.[6] Nevertheless, as aptly shown by Rob Van

[3]J. Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research', in R. Van Gestel et al. (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) p. 207 at p. 210.

[4]*See* J. Mendes in this Special Section.

[5]*See* A. Beckers in this Special Section.

[6]B. De Witte, 'European Union Law: A Unified Academic Discipline?', in A. Vauchez and B. de Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013) p. 101 at p.101-102.

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Gestel and Hans Micklitz, contemporary EU legal scholarship is under pressure to make the parameters of its own work more visible. This results from a conjunction of factors from which two sets – internal and external to EU law – emerge as particularly prominent from the contributions that we have received for this Special Section.[7]

The study of a maturing legal order

Both the perspective of EU law scholars on the object of their analysis, and the object itself have evolved. Scholars have more temporal distance than they have ever had on the study of the EU legal order, while that legal order continues to evolve at considerable speed. These observations are internal to the field of EU law and invite self-reflection, as will now be elaborated on.

The Treaty establishing the European Economic Community was signed in Rome in 1957. The related legal order is thus today in its mid-sixties. This truism has important implications for EU legal scholarship. It means that a mid-career contemporary EU law scholar started studying EU law somewhere between the Treaty of Nice (2001) and that of Lisbon (2007). She herself was taught by a mid-career EU law scholar whose interest for the topic was shaped between the Single European Act (1986) and the Treaty of Maastricht (1992). Or, a senior academic retiring today, will have started in the field in the late 1970s-early 1980s.

In other words, today's average EU lawyer has lost 'personal' contact with the early days of the EU legal order. This may explain contemporary legal researchers' interest in archives on EU law,[8] as well as the quest for personal stories to help us better understand past legal developments and their context.[9] In the meantime, as noted by Neil Walker in 2005, the 'remorseless pace of development of the acquis communautaire' has left 'no subsequent magic moment of doctrinal consolidation to follow the institutional innovations of the foundational phase'. Rather, in his view, 'doctrinal analysis has strained to keep up with the flow of new law' and the related efforts have 'restricted broad-ranging theoretical reflection to modest proportions'.[10]

[7]For a broader overview *see* R. Van Gestel and H. Micklitz, 'Why Methods Matter in European Legal Scholarship', 20(3) *European Law Journal* (2014) p. 292.

[8]*See*, for instance, M. Cremona et al., 'The Court of Justice in the Archives: An Introduction', 6(1) *European Papers* (2021) p. 527 at p. 532.

[9]Illustrating this approach to shedding light on the case law of the Court of Justice of the EU and on related developments in EU law: F. Nicola and B. Davies, *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017). *See also* V. Fritz, 'Activism on and off the Bench: Pierre Pescatore and the Law of Integration', 57(2) *Common Market Law Review* (2020) p. 475.

[10]Walker, *supra* n. 1, p. 581 at p. 582.

Yet, distance in time, as well as providing facilitated access to a broad range of sources, may allow us today to look back more critically at how legal scholars have approached the field, at what have been the strengths and weaknesses of these approaches and at what their impact is on contemporary EU law. This is precisely what Joana Mendes in this Special Section invites us to do. She looks back at the process through which EU administrative law has been constructed by legal doctrine, more specifically by the handbook from Jürgen Schwarze, and critically reflects on the underlying theoretical assumptions and methodological choices made at the time.

This is not to say that serious theoretical and critical work has not been done in the past.[11] Nor is it suggested that any early work was necessarily ill-conceived. As Joana Mendes herself notes in her reflection on the foundations of EU administrative law, one ought to be cautious when judging past work with new lenses. In her case study focused on EU administrative law, for instance, she acknowledges that initial comparative law analysis on which the field developed not only 'was *not*' but also actually 'did not purport to be', 'a "scientific" enterprise, bound by rigorous methodology'.[12] The point being made here is thus both nuanced and modest: certain features of legal reasoning, and their related strengths and weaknesses, are more easily identified with the benefit of hindsight; these may in turn help us to better understand the present.[13]

Meanwhile, EU institutional and 'constitutional' law continues to develop. The EU is indeed 'a polity in the making' and scholars ought to seek to 'make sense of its ever-emerging, evolving dimensions'.[14] Illustrations of this process abound in this Special Section. In his contribution, Bruno de Witte refers to the rise and consolidation of institutional practices, such as the growing importance of trilogues alongside the increased recourse to the ordinary legislative

[11]Surveying and exploring the strengths and weaknesses of existing EU law scholarship: *see* J. Komárek, 'Whose Ideas Matter? Studying the Origins of European Constitutional Imaginaries' (forthcoming); A. von Bogdandy, 'A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective', 6 *European Law Journal* (2000) p. 208; J. Shaw, 'The European Union: Discipline Building Meets Polity Building', in Cane and Tushnet (eds.), *supra* n. 1, p. 325; C. Harlow, 'The EU and Law in Context: The Context', 1(1) *European Law Open* (2022) p. 209.

[12]*See* J. Mendes in this Special Section.

[13]*See*, for instance, M.P. Maduro and L. Azoulai, 'Introduction', in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) p. xiii at p. xiv.

[14]J. Hunt and J. 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 Studies in European Union Politics* (Palgrave Macmillan 2009) p. 93 at p. 96.

(formerly codecision) procedure. On a different note, Anna Beckers convincingly shows how private actors have become part of the process of developing, implementing and enforcing EU law in the past two decades. Such developments in the EU law-making process invite scholars to re-think their theoretical assumptions and methodological choices.

In other words, legal scholarship is challenged in its ability to 'see' and fit both new and old developments of EU law into analytic categories; such changes indeed often 'confound our previously accepted ways of thinking'.[15] Legal scholarship may thereby be called to re-assess pre-existing methods and theoretical frameworks – a theme further developed in the second part of this Introduction. As Emilia Korkea-aho notes in her reflections on the lack of an overall legal approach to lobbying, the inability of legal scholarship to grasp a given development may result in a 'curious mismatch' between political and scientific attention; this may even raise questions of constitutional importance for instance because 'the contribution of lobbying to democratic processes is underestimated and poorly understood'.

Several authors, such as Jo Shaw, have reflected on the evolution of paradigms, approaches and meta-theories enabling the building of the discipline of EU law.[16] Yet, what characterises most contributions to this Special Section is of a slightly different nature. Aware that their academic work contributes to structuring EU law,[17] as well as of the fact that law plays an important role in shaping the EU,[18] several of our contributors reflect on what is 'relevant' for the purpose of developing a better understanding of EU law. This is a question to which we will return below; it suffices here to stress that the process of justifying choices through rigorous systematic reasoning requires from lawyers that they 'self-reflect on [their] own role as just that, namely as a legal scholar rather than a poor (wo)man's version of a social scientist'.[19] What forcefully emerges from this Special Section, and for which we are most grateful to our contributors, is that EU legal scholars, although (perhaps) not often explicit (enough) on the matter, are willing to engage in deep and solid reflection on the limits of what they can know and explore, and the related underlying theoretical and methodological choices.

[15]F. Snyder, 'Editorial', 1 *European Law Journal* (1995) p. 2.

[16]Shaw, *supra* n. 11, p. 325 at p. 339.

[17]As noted by J. Smits, 'It would be a grave misunderstanding to regard legal doctrine as a mere description of existing legislation and case law': Smits, *supra* n. 3, p. 211.

[18]*See* for instance P. Pescatore, 'Rôle et chance du droit et des juges dans la construction de l'Europe', 26 *Revue Internationale de Droit Comparé* (1974) p. 5 at p. 7-8.

[19]Ibid.

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Choosing a lens among many

Several elements external to the narrow confines of EU law add to both the necessity for, and the ability of, EU legal scholars to make the parameters and characteristics of their work ever more explicit, as further elaborated upon by Antoine Bailleux in the conclusion of this Special Section. EU law is informed by an ever-growing interest from other disciplines in the EU, which impacts the institutional landscape in which EU law scholars operate. This results in both methodological insights and pressures on EU legal scholarship, as will now be explained.

EU law represents, 'more evidently perhaps than most other subjects an intricate web of politics, economics and law'. As Francis Snyder put it as early as the 1980s, EU law thus calls out to be understood 'by means of a political economy of law or an interdisciplinary, contextual or critical approach'.[20] Legal scholars are indeed nowadays visibly studying the EU alongside other scientists. To the established tradition of doctrinal analysis have now been added insights from theoretical, contextual and interdisciplinary work.[21] Several authors have observed and sought to survey the dense disciplinary environment in which legal scholars operate, as well as the influence of American scholarship.[22] Political science features prominently among the disciplines that inform our understanding of the law and its limits.[23] Bruno de Witte as well as Antoine Bailleux recall the contribution of this discipline to indeed shed light on the institutional functioning of the EU, such as the dynamics of decision-making within the Council or the Parliament. In her plea for more attention by scholars for lobbyists as non-institutional actors, Emilia Korkea-aho also stresses that political science has long pioneered and dominated the evolution of the field.

Other disciplines thus shed light on some of the 'blind spots'[24] of EU law. This diversity of approaches to the EU legal system by other disciplines, often within a strong methodological identity, is made particularly visible and ever more accessible owing to the multiplication of open access sources, be they intended to give

[20]F. Snyder, 'New Directions in European Community Law', 14(1) *Journal of Law and Society* (1987) p. 167.

[21]A. Arnull, 'The Americanization of EU Law Scholarship', in A. Arnull et al. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008) p. 415 at p. 431.

[22]Ibid. *See also* the overviews provided by: Shaw, *supra* n. 11, p. 325; M. Kumm, 'On the Past and Future of European Constitutional Scholarship', 7(3) *International Journal of Constitutional Law* (2009) p. 401; Van Gestel et al., *supra* n. 3.

[23]*See* for instance: Arnull, *supra* n. 21, p. 415 at p. 419-421; *see also* A. Bailleux et al. (eds.), *Les récits judiciaires de l'Europe (I) and (II)* (Bruylant, 2019 and 2021).

[24]J. Klabbers, 'Whatever Happened to Gramsci? Some Reflections on New Legal Realism', 28(3) *Leiden Journal of International Law* (2015) p. 469.

access to advanced pieces of work or to condensed summaries of finding for dissemination (for instance in the form of blogs). The design of educational programmes and research centres also enable (future) academics in certain education systems to be trained with the appropriate skills to engage in fruitful inter-disciplinary work.

Furthermore, common criteria, including clarity on methodological choices, are used to assess the quality of research across disciplines. Research funding indeed relies on selective procedures requiring researchers to submit proposals which are evaluated through common forms and by multi-disciplinary panels. Also, academic institutions themselves are subject to 'institutionalised research assessment'. These trends place (at times bluntly) legal scholarship in a multi-disciplinary environment.[25] The ability of researchers to attract such funding in turn impacts on career and promotion; similarly, research assessments have an impact on the reputation and sometimes the funding of the institution targeted. This results in legal scholars having to both make explicit and sharpen the parameters of their own research. Legal scholars are not only encouraged to engage with other disciplines, but may also be incentivised to mould their approaches to – if not to have their approaches 'colonized'[26] by – the theories and methods of other disciplines.

The role of scholarly law journals in this context is particularly crucial. Journals are created, or their editorial lines adjusted, to open up for critical reflections on the parameters of EU law scholarships in dialogue and interaction with other disciplines.[27] This was, for instance, the 'raison d'être' of the creation of the *European Law Journal* (1995) and it remains the rationale for the establishment of European Law Open (2022). Scientific journals play an important role in helping, and requiring, legal scholars to precisely identify the theoretical and methodological tools that ought to be mobilised for these scholars to be able to answer their research questions.[28] This may precisely be the rationale for the Editorial Board of the present journal to publish this Special Section.

As recently noted by Bartl, Cebulak and Lawrence, these external elements not only set the stage, they also 'possibly accelerate, a renewed struggle for voice and influence in the construction of the legal world' and enable legal scholars 'to make more informed choices about the questions they ask, the tools they use and the

[25]This is further elaborated upon in Van Gestel and Micklitz, *supra* n. 7, p. 292 at p. 295; and Van Gestel et al., *supra* n. 3, p. 1 at p. 17-18.

[26]The expression is borrowed from U. Šadl and H. Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts', 30(2) *Leiden Journal of International Law* (2015) p. 327 at p. 328.

[27]*See further* Arnull, *supra* n. 21, p. 415 at p. 417-419.

[28]Ibid., p. 415 at p. 428.

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audiences they address'.[29] Contributors to this edited volume have accepted the invitation to spell out the underpinnings of their respective approaches, explaining how their conceptual and methodological choices allow them to ask and answer specific research questions on actors and roles in EU law.[30] Although there is no claim here to them being representative,[31] the choices of our contributors overall concur to forcefully recall these authors' attachment to, as well as their perception of the added value of, legal doctrinal approaches to a variety of such research questions.[32] The importance of legal doctrinal scholarship may be particularly important to overcome the 'melting pot of currently 27 legal systems with a variety of languages and legal cultures'.[33] In this context, the positivist legal tradition allows for the use of the law as a common 'language'.[34] This is not to suggest that these approaches are exclusive though. They benefit from existing alongside and interacting with other disciplines and ought themselves to be reflexive about the parameters they set for the study.

Actors and roles in EU law

Indeed, responding to the calls for more explicitly setting out such parameters, this edited collection of essays brings together the contributions of recognised EU law scholars who agreed to reflect on the ways they conceive the study of actors and roles in their own research. The chosen approach permits the bridging of the gap between theoretical and methodological choices on the one hand, and the development of legal research on the other. It lays bare the implications of research design – choosing which question to ask and how to answer it – for

[29]M. Bartl et al., 'Introduction to The Politics of European Legal Research', in M. Bartl et al. (eds.), *The Politics of European Legal Research* (Edward Elgar 2022) p. 1 at p. 2-3 and 5.

[30]Examples naturally also exist elsewhere, *see* for instance: L. Clément-Wilz, 'Analyser juridiquement le rôle politique de la Cour de Justice de l'Union Européenne', in L. Clément-Wilz (ed.), *Le rôle politique de la Cour de justice de l'Union européenne* (Bruylant 2019) p. 14; A. Bailleux, 'Enjeux, jalons et esquisses d'une recherche sur les récits judiciaires de l'Europe', in A. Bailleux et al. (eds.), *Les récits judiciaires de l'Europe (I)* (Bruylant 2019) p. 1.

[31]For a recent and more complete overview *see* Bartl et al. (eds.), *supra* n. 29. Although they interestingly also note in their concluding chapter that they 'wanted to draw attention to one interesting alliance that emerged amonga cross-section of the scholars contributing to this volume .... That alliance seems to arise around the continued legitimacy and importance of doctrinal research.' ('Conclusion: an emergent alliance for "critical doctrine"', at p. 255.)

[32]In the same vein: G. Davies, 'Taming Law: The Risks of Making Doctrinal Analysis the Servant of Empirical Research', in Bartl et al (eds)., *supra* n. 29, p. 124.

[33]Van Gestel and Micklitz, *supra* n. 7, p. 292 at p. 294. Along similar lines, *see* Arnull, *supra* n. 21, p. 415 at p. 428.

[34]Paraphrasing B. de Witte in this Special Section. *See also* P. Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021).

our understanding of the EU constitutional order. Thus, critical reflection on inherited theoretical frameworks may lead legal researchers to tailor their concepts and methods to the attainment of the answers they seek, and change their perception of what can be researched on and known of actors and roles within the field of EU constitutional law – at the same time begging the question of the disciplinary boundaries of that field.

Actors and roles in the field of EU constitutional law

If one accepts that doctrinal research deals with the 'principles, rules and concepts governing a particular legal field or institution',[35] the boundaries of that 'particular field' or the choice of 'institutions' considered relevant for study can be challenged and redefined by researchers depending on the research questions they wish to answer. As shown by the present collection of articles, this means *inter alia* that the very identification of the 'principles, rules and concepts' pertaining to the field of EU constitutional and institutional law is not the starting point of the analysis: it is the result of a choice of theoretical framework.

Due to the rich conceptual history of constitutional law and theory, theoretical frameworks may come ready for use – sometimes with adaptations. For instance, it has become accepted to employ notions such as the 'separation of powers'[36] and 'checks and balances'[37] to study the repartitions of roles in the EU constitutional order. Such notions come with theoretical assumptions regarding the types of actors one will expect to see fulfil a role: notably a judiciary, a legislator, an

[35]Smits, *supra.* n. 3.

[36]*See* in particular K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', 28 *CML Rev* (1991) p. 11; G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity', 8 *European Law Journal* (2008) p. 319; G. Conway, 'Recovering a Separation of Powers in the European Union', 17 *European Law Journal* (2011) p. 304; J. Sonnicksen, 'Democratising the Separation of Powers in EU Government : The Case for Presidentialism', 23 *European Law Journal* (2018) p. 509; E. Carolan and D. Curtin, 'In Search of a New Model of Checks and Balances for the EU: Beyond Separation of Powers', in J. Mendes and I. Venzke, *Allocating Authority: Who Should Do What in European and International Law?* (Hart Publishing 2018) p. 53. *See also* the ongoing research project led by C. Eckes in partnership with A. Wallerman and P. Leino-Sandberg, 'Separation of Powers for 21st century Europe', ⟨https://separope.ceepla.com/⟩, visited 13 November 2022.

[37]M. Höreth, 'The Least Dangerous Branch of European Governance? The European Court of Justice under the Checks and Balances Doctrine', in M. Dawson et al. (eds.), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013); Carolan and Curtin, *supra.* n. 36; Sonnicksen, *supra* n. 36.

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executive – while bearing in mind the specificities of the EU legal order.[38] The roles of pre-identified institutions can be described and analysed in light of how they fit with one another and with a certain idea of an order or 'system'.[39] Thus, the case law of the Court of Justice can be evaluated in light of the role of the institution as a judicial actor: should its performance appear to deviate from the script, questions may arise regarding a possible usurpation of the role of a legislator.[40] In such discussions, the description and analysis of a role and institution are structured around a specific idea of their place in a whole, determined by the chosen theoretical framework.

It is therefore useful to reflect on these ready-made frameworks and assess whether what they let us see and the types of questions they enable us to ask and answer are the most relevant. The reflections engaged in this collection of articles show that two such frameworks in particular warrant critical attention.

The first of these frameworks relies on a distinction between two different types of actors: the 'individual' and 'public authorities'. In her contribution, Joana Mendes questions the way legal scholars – and judges – have applied concepts drawn from the 'political-constitutional premises of liberalism'[41] to elaborate the nascent field of Community – then EU – administrative law. Using this conceptual framework meant that:

> the purpose of administrative law principles was to 'protect the freedom of the individual against the restrictions imposed by public authorities' and the 'sovereign (i.e. public-law) relationship between the administration and the citizen'.[42]

However, as Mendes notes, 'in the Community legal order, individuals were only seldom in direct interaction with the EC, which occurred mostly through the Member States' administrations that acted in a Community function'. This, she argues, 'changed the terms of the legal relationships, which were triangular and composite, more than bilateral'. The ready-made framework put to use was not capturing the complexity of the legal and institutional relationships at play.

[38] *See* e.g. D. Ritleng, 'L'identification de la fonction exécutive dans l'Union', in J. Dutheil de La Rochère (ed.), *L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux* (Bruylant 2009).

[39] Pescatore and Simon, *supra.* n. 2.

[40] *See inter alia* J.H.H. Weiler, 'The Court of Justice on Trial: A Review of Hjalte Rasmussen's *On Law and Policy in the European Court of Justice*', 24 *CML Rev* (1987) p. 555; T. Tridimas, 'The Court of Justice and Judicial Activism', 21 *European Law Review* (1996) p. 199; R. Herzog and L. Gerken, 'Stop the European Court of Justice', *EU Observer*, 10 September 2008; Dawson et al. (eds.), *supra* n. 37; T. Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018).

[41] J. Mendes in this Special Section.

[42] Ibid., citing J. Schwartze.

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In her piece, Joana Mendes inscribes herself in a critical tradition in EU legal scholarship which has interrogated in different ways in which researchers should conceive such a figure of the individual facing public authorities. Two other holders of that tradition contributed orally to the conference which gave rise to the present Special Section, on the basis of prior work.

Reflecting on a paper she published in 2008,[43] Iyiola Solanke recalled how 'scant attention … has been paid to black and ethnic minority communities in the process of European integration, even though such communities already existed in some of the founding Member States when the Treaty of Rome was signed'.[44] Conversely, this suggests that the figure of the individual facing public authorities has tended to be associated by default with 'whiteness'. It also leads to questions as to what would have happened if EU law – and EU legal scholarship – had developed and been adjudicated on according to the specific concerns and worldview of people with lived experiences of racial discrimination.[45] In methodological terms, such an approach supposes one pays attention to the people sitting on benches and in offices rather than only to the institution they represent; and to note not only which rules and rights are provided for in EU law, but also which ones are missing – and by extension, who is 'omit[ted]' in EU constitutional thinking. Starting from different premises, Loïc Azoulai also interrogates in his work the figure of the individual facing public authorities by highlighting the 'complex set of interdependences and interconnections Europeans are embedded into', looking to 'pinpoint the many ways law operates within it'.[46] EU law's relationship with people's 'lives'[47] is not conceived primarily in the same terms as the old constitutional issue (linked to modern political theory) concerning the extent of and limits set to the power a public authority exercises on an individual. Rather, Azoulai invites legal scholars to enquire on what 'the institutions and laws of Europe' have to do with 'the kinds of lives people manage – or do not manage – to live'.[48]

The second ready-made theoretical framework deserving critical attention revolves around the neighbouring notions of 'decision-making' and 'law-making' in the EU. It is common to see textbooks and EU institutional law courses cluster

[43]I. Solanke, 'Diversity and Independence in the European Court of Justice', 15 *Columbia Journal of European Law* (2008) p. 89.

[44]Ibid., p. 117-118.

[45]Ibid., p. 113.

[46]L. Azoulai, 'Infrastructural Europe: EU Law and Human Life in Times of the Covid-19 Pandemic', 66 *Revista de Derecho Comunitario Europeo* (2020) p. 356.

[47]L. Azoulai, 'The Madness of Europe, Being Attached to It', 21 *German Law Journal* (2020) p. 103.

[48]Ibid., p. 103. *See also* L. Azoulai, *European Union Law and Forms of Life: Madness or Malaise?* (Hart Publishing 2022).

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together 'law-making' or 'decision-making'[49] institutions – sometimes also qualified as 'political institutions'[50] – all distinguished from institutions exercising other activities understood in light of decision or law-making. Certain institutions are seen to exercise 'control' over the decisions adopted (such as the Court, the Ombudsman, the European Court of Auditors), whereas other 'supporting' and 'implementing' institutions provide technical expertise for the elaboration, specification and execution of the decisions. Thus, legal scholars looking at the allocation of roles in the EU through the prism of such notions may aim to ascertain *inter alia* who participates in the adoption of decisions or legal acts in the EU constitutional order, and how – which often translates into 'through which procedures'.

Difficulties arise with the framework when other disciplines such as political science tell us that the processes of decision or law-making are different from what can be learnt from the formal procedures of adoption of decisions. In such cases, legal scholarship may become suspected of describing an allocation of roles which ignores parts of institutional reality. One option to overcome the difficulty is to espouse the complementarity between doctrinal and law-in-context approaches, as proposed by Bruno de Witte in this Special Section – what would amount to 'venturing outside the traditional boundaries of the legal system', as Antoine Bailleux puts it in his own paper. De Witte examines a range of institutional roles and 'practices' to show both how legal positivism remains essential to understanding the legal and institutional constraints bearing on law-making, and how a concern for the institutional practice of law-making and the use of other disciplinary perspectives is indispensable to understanding the legal process itself.

Another, possibly complementary option is to expand the scope of legal research – the 'field' of 'principles, rules and concepts' which are taken as the basis of doctrinal study. Looking in particular at 'the roles that lobbyists and lobbying play in EU law- and policy-making', Emilia Korkea-aho questions the absence of consideration for such actors in the field of EU constitutional law. Pointing to lobbying being the object of a 'quickly evolving, dynamic body of [EU] law', she invites us to include that body in mainstream legal scholarship – widening

[49]K. Lenaerts and P. Van Nuffel; T. Corthaut (ed.), *EU Constitutional Law* (Oxford University Press 2021) p. 529; P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, 7th edn. (Oxford University Press 2020) p. 155-193; D. Chalmers et al., *European Union Law: Text and Materials*, 4th edn. (Cambridge University Press 2019) p. 57-110; S. Roland, *Le triangle décisionnel communautaire à l'aune de la théorie de la séparation des pouvoirs : recherches sur la distribution des pouvoirs législatif et exécutif dans la Communauté* (Bruylant 2008).

[50]Lenaerts and Van Nuffel, *supra* n. 49, p. 391; S. Peers, 'The EU's Political Institutions', in C. Barnard and S. Peers (eds.), *European Union Law*, 3rd edn. (Oxford University Press 2020) p. 40-74; A. Dashwood et al., *Wyatt and Dashwood's European Union Law*, 6th edn. (Hart Publishing 2011) p. 41-42.

the principles and rules of our doctrinal analysis. She also advocates for the inclusion of lobbying in broader conceptual – and normative – EU constitutional discourse, notably to 'evaluat[e] the practices of lobbying from the perspective of a democratic commitment to equality and inclusion as well as participation and broader rule of law principles.'

Expanding further the scope of legal research, Anna Beckers questions in her contribution *what* should be understood as 'EU law' as well as *who* should be understood by legal scholars as making law. Investigating how private actors extend the reach of EU law through its incorporation in and export via privately generated norms and standards, Beckers dives into the conceptual, methodological and practical implications for research of a theoretical framework accepting private law-making as commensurate to EU law-making. Whereas Koreka-aho revealed the roles played in the spaces around formal procedures, Beckers relativises the importance of formal procedures themselves as the necessary point of focus of law-making for legal scholars.

On ruptures and continuity in the legal scholarship on actors and roles in EU law

Expanding the scope of study to include 'legal practice', 'lobbyists' or 'private actors' is not solely a matter of *adding* rules, principles and concepts to a pre-existing framework: more profound methodological implications come with the theoretical choices made by each contributor. For instance, the very definition of what an 'actor' can be for the purposes of research will vary as a matter of research design. Whereas de Witte keeps the focus essentially on EU institutions, 'non-institutional' actors take centre-stage in the contributions by Korkea-aho (lobbyists), Beckers (private actors) and Mendes (legal scholars). Some actors are constructed as the authors of historically situated deeds (EU legal academics in Mendes' account of the early years of European administrative legal doctrine). Some are conceived on the basis of their legal form as public bodies (de Witte's EU institutions), while others are defined by what they do (Korkea-aho's lobbyists) more than by form.

The choice to study certain types of actors or roles comes with constraints as regards the methods available to conduct research – leading some researchers to push their enquiries beyond habitually held limits of doctrinal legal study. As noted by Beckers, 'private regulation does not have the same character as official legal sources; it is hardly accessible in the same manner as official law' – making most of it invisible. Legal scholars, she argues, 'are … not very well-equipped to handle such invisibility', triggering a reflection on the tools and 'strategies' one should adopt to overcome this hurdle. A similar quest for adequate research tools and strategies for research transpires from Korkea-aho's call for 'the adoption of a multi-scalar approach' not limited to the study of how EU law regulates lobbying.

Her approach includes 'interviews, or more broadly ethnographic approaches, to document and understand the practices through which EU institutions, agencies and other bodies interact with lobbyists and permit them to influence law- and policy-making processes'.

At the same time, as signalled in the first part of this introduction, it is noteworthy that a number of contributors decided to highlight the continued relevance of the doctrinal legal method for the completion of their research aims. Remarkably, they further seek to elaborate on their approach to such method. Joana Mendes for instance critically looks back at the scholarly foundations of EU administrative law and to their legacy, 30 years on. She sharply interrogates the soundness of the methodological choices and initial normative objective of the process of legal doctrinal construction from which it results, and argues that different approaches departing from functional comparison of administrative laws of the member states are needed 'to rethink and open new paths for its legal-doctrinal construction'.

In a symmetrical fashion, looking forward to the development of a new field and paving the way for it, Anna Beckers offers an inventory of existing approaches to private regulation within legal scholarly traditions. She identifies the strengths of these approaches, noting that 'private regulation is researched extensively as a social practice and normatively assessed as to its underlying values and interests'. There is therefore 'significant knowledge about the private actors' practices in generating the rules and the values that purportedly underlie private rules'. She however also notes that very little is known 'about the private rules as norms', which leads her to 'develo[p] the contours of a doctrinal approach for researching private regulation'.

Whereas Korkea-aho's contribution also presents empirical methods as means to gain knowledge on lobbying, she clarifies that the 'socio-legal agenda' she puts forward

> seeks to 'borrow' some of the methodological tools traditionally used in political and social sciences to answer the questions that legally-oriented research (including also doctrinally positioned research) wants to ask about lobbying and its impact on EU legislative activity.

Concurringly, de Witte sees in 'law in context approaches'

> the possibility to rely on the findings of other disciplines (or, in its more ambitious form, the possibility to engage in interdisciplinary research oneself) in order to offer a better and richer understanding of legal questions.

These positions raise fundamental questions regarding what 'legal questions' can or should include – or as Bailleux puts it in his concluding reflections on this Special Section, 'what is relevant to legal analysis'. Thus, legal research can and must identify what 'amounts to a legal norm'[51] and what does not. For instance, while de Witte underlines the influence which the European Council's Conclusions of July 2020 had over 'the content of the Next Generation EU and the Multiannual Financial Framework', the author notes that such influence did not amount to formal participation in the legislative processes – which guaranteed to both the Council and the European Parliament a role in negotiating the package's legal contents. Acknowledging that the legal study of formal processes does not always offer a satisfactory picture of the repartition of roles between actors in the EU does not mean that such study becomes irrelevant.

The variety of research questions – and ensuing research designs – raised by our contributors invites the modification of the question from 'what is relevant to legal analysis', to 'what is relevant to EU lawyers'. To an extent, the two questions are linked, especially where legal scholarship develops in lockstep with 'the experience and needs of practitioners'.[52] There is, however, also a tradition in EU legal (constitutional) scholarship which takes an interest in different facets of the development of EU integration, also scrutinising evolutions in EU law in relation to notions of democracy,[53] inequality[54] or power (of public authorities vis-à-vis individuals;[55] of influential actors[56] over formal decision-making processes; of private actors in extending the reach of EU law[57]), or to the fabric of people's lives.[58] As success in this endeavour relies in no small part on the robustness of theoretical frameworks and methodologies chosen, we are grateful to our contributors for the care and thoroughness they brought to their reflections on the ways they approach the study of actors and roles in EU law in their own research.

[51] *See* A. Bailleux in this Special Section.
[52] Ibid.
[53] *See* E. Korkea-aho in this Special Section.
[54] *See* Solanke, *supra* n. 43.
[55] *See* J. Mendes in this Special Section.
[56] *See* B. de Witte and E. Korkea-aho in this Special Section.
[57] *See* A. Beckers in this Special Section.
[58] See Azoulai, *supra* n. 48.

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