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THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION

Third Edition

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THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION

THIRD EDITION

James D. Dinnage
MA (Cantab.) and Licence Spéciale en Droit Européen (Brussels)
Solicitor (England)
Attorney at Law (New York)
Special Legal Consultant (District of Columbia)

Jean-Luc Laffineur
Laffineur Law Firm
Avocat au Barreau de Bruxelles (Belgium)
LL.M. in International and European Business Law, University of London (England)
Maîtrise de Droit, Université de Paris II (France)

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Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
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DEDICATION

To Eleftheria, Orlando and Hector
Jean-Luc Laffineur, Brussels, September 2011

To Karen and Russell, and all of my family.
James Dinnage, Wilmington, DE, September 2011

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FOREWORD TO THE THIRD EDITION

Casebooks are not designed for judges. They know the law — that, at any event, is the fiction embraced by most European systems, including the Court of Justice of the EU. Nevertheless, this particular judge would have benefited significantly had he had this case book on his shelves when he was appointed and when he started drafting judgments. Similarly, I have no doubt that legal advisers — be they office-bound or advocates in court — would equally benefit. A danger to which all lawyers, whether judges or advisers, are subject is that of taking quotations out of context and applying them blindly. This book should prevent this by helping them to consider what has deliberately been unsaid in the judgments, what is said elsewhere, and the possible implication of applying words literally.

It starts by distilling much of EU law into a code (which it modestly describes as a Template) and follows this by 20 chapters that take an article of the Template and then set out the relevant law more fully. Each of these chapters starts with a brief elaboration of the proposition of the Template under examination and then continues with citations from the case law, legislative or administrative instruments from which the brief summary was drawn. Each of these citations is followed by an astute questionnaire on issues raised and not necessarily answered by the judgment or instrument under review.

One occasionally comes across advocates who embody the minimum amount of thought in the maximum amount of words. This book does the opposite. Adding my congratulations to those expressed by former Judge Bellamy in the previous forewords I commend it heartily.

Konrad Schiemann
Luxembourg
6th October, 2011

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FOREWORD TO THE SECOND EDITION

It is over 50 years since the Treaty establishing the European *Economic* Community (emphasis added) was signed in Rome on 25 March 1957, and longer still since the signature of its predecessor, the European Coal and Steel Treaty, on 18 April 1951. Since those now distant days, two trends have been particularly important. First, there has been a relatively constant process of adhesion of new Member States, from the original Six in the 1950s to 27 Member States today. The major accessions of 2004 and 2007, which brought a total of 12 Member States into what has now become the European Union, have been particularly significant. Secondly, the activities of the European Union have been progressively extended well beyond the economic aims of the original Treaties into fields never envisaged by the founding fathers — including a common foreign policy, justice and home affairs, asylum and immigration, citizenship, the protection of the environment, a single currency, at least among many Member States, and even, embryonically, defence. These changes are of course reflected in the adoption, in the 1993 Treaty of Maastricht, of the concept of the "European Union" as an umbrella term wider than, but including, the "European Community," from the title of which the word "Economic" was also dropped. If and when the Reform Treaty of 2007 is ratified, the "European Community" will itself pass into history and the whole complex structure will be subsumed under the single description "European Union."

These developments, among others, have created enormous pressures in the sphere with which this work is concerned, namely the Constitutional Law of the European Union. The Treaty of Rome is a cohesive and relatively simple document drafted in terms of general principles. In the clarity of its vision it is arguably one of the greatest documents produced in the second half of the twentieth century. However, the constitutional structure of the Union has become ever more complex. Among many changes we have had the Single European Act (1987), the Treaties of Maastricht (1993), Amsterdam (1997), and Nice (2003), numerous Treaties of Accession, the EEA Agreement of 1994, and a bewildering number of other Acts, Pacts, Charters, Decisions, Agreements and Conventions, accompanied by an array of pillars, opt-outs, protocols and procedures, re-enforced by an astonishing number of regulations and directives. An attempt to bring some kind of order into this diverse framework failed when the ill-fated and provocatively named Treaty Establishing a Constitution for Europe, signed in 2004, was rejected by the electorates of France and The Netherlands. The Reform Treaty of 2007, which revives some of the important elements of the failed 2004 Treaty, awaits ratification at the time of writing.

Against this background, a new edition of this work, first published in 1996, is warmly to be welcomed. With 27 Member States to be accommodated, three EEA States, and further candidates for accession waiting in the wings (including currently Croatia, Serbia, and Turkey), it is more important than ever to explain, as clearly as possible, the underlying principles of the constitution and governance of this unique phenomenon, the European Union. That is what this work achieves through the tried and tested case book method. Whether it is the autonomous nature of the EU legal system, including the

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relationship between the Union and the Member States, the legislative competence of the EU, the complex process of EU Governance, or the relationship between the EU and the individual, including fundamental rights, this work covers every aspect of the subject.

In describing, through case law and materials, the constitutional structure of the Union, this book also charts much of the remarkable, in many ways inspiring, and certainly unique, story of the dynamic, and still continuing, process of European integration over the past 50 years. The Treaties and other instruments now provide, in effect, a supra-national constitutional framework for a territory stretching from the North of Finland to the Mediterranean, and from the Atlantic to the Black Sea, unparalled in history. We are all greatly indebted to the authors for this new edition of this comprehensive and authoritative work.

Christopher Bellamy
London
April 2008

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FOREWORD TO THE FIRST EDITION

The title itself reflects the innovative character of this magnificent new work. Not everyone would agree that the European Union, as such, was even a legal entity, let alone the proud possessor of "a constitution." But, as the authors point out, the absence of a single written document does not imply the absence of "constitutional" law. On the contrary, as this book demonstrates, the law of the European Union, and of the three Communities on which it is based, is a remarkable example of the dynamic development of constitutional principles for the governance of a unique form of political organization whose founding texts are often telegraphic to the point of obscurity.

However, because there is no one "constitutional" document, and because the legal system of the Union and its constituent parts has to be developed, as it goes along, drawing when necessary on the principles common to the member states, which themselves exhibit a rich legal, cultural and political diversity, it is also true that the constitutional law of the European Union is sometimes hard to find. It is the great merit of this work that the authors have assembled within a single corner and from a vast mosaic of different sources, a structured, articulate and comprehensive collection of the cases and materials needed for studying the constitutional aspects of the European Union unencumbered, so far as possible, by the details of the substantive law.

As the reader will also divine, it is not clear how "the process of creating an ever closer union among the peoples of Europe" (note: not among the "States" of Europe) will develop, constitutionally speaking, in the future, or how the Union will adapt itself to new challenges, notably to the East. Many constitutional issues concerning, for example, such basic matters as the respective powers of the executive and the legislature, and the relations between the Union, its constituent member states, and the citizens, are still being worked out on an almost daily basis (see for example the judgments of March 5, 1996 in joined cases C-46/and C-48/93 Brasserie du Pêcheur and Factortame, concerning State liability for legislative breach of Community Law). The Maastricht II Intergovernmental Conference, which opened in Turin on March 29, may mark a new phase in this development.

In these circumstances the present work is extremely opportune. Even if we cannot yet emulate Walter Bagehot who, writing in *The English Constitution* (1867), was able to distinguish between the *dignified* parts of the constitution ”which excite and preserve the reverence of the population" and the *efficient* parts "by which it, in fact, works and rules" it is nonetheless vitally important that the constitutional aspects of the *acquis communautaire* should be readily accessible and comprehensible.

This book addresses that need. In my view the authors are to be congratulated.

Christopher Bellamy
Luxembourg
1 April 1996

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We extend our thanks to the Publications Office of the European Union for its open policy in permitting reproduction of its publications, including case reports, legislation and other materials, which make up the bulk of the text in this book. Only European Union legislation printed in the paper edition of the *Official Journal of the European Union* is deemed authentic.

We wish also to thank the Incorporated Council of Law Reporting for kind permission to reproduce extracts from a number of English cases, specifically *Factortame v. Secretary of State for Transport, Thoburn et al. v. Sunderland City Council et al.* and *Maclaine Watson & Co. Ltd v. Department of Trade and Industry and Related Appeals*. Similarly, we thank Sweet & Maxwell for permission to reproduce extracts from the Common Market Law Reports translations of the following national court cases: *Administration des Douanes v. Société Cafés Jacques Vabre & J. Weigel et Cie Sàrl, Internationale Handelsgesellshaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I); Brunner v. European Union Treaty; Blackburn v. Attorney General; Boisdet; Mccarthy's Ltd v. Smith; and Acciaierie San Michele SpA (in liquidation) v. High Authority of the ECSC.*

Our acknowledgment of the efforts of others with respect to the prior edition of this work should be repeated here, particularly as much of their work has supported this edition also. We are extremely grateful to Karen Dinnage, Arlene Steigler, and Suzanna Pierrepont for their invaluable assistance and patience, to Julian Joshua of the Steptoe and Johnson law firm in Brussels for his most helpful comments and to Maud Grunchard, Clémentine Leroy, Aurélie Perrichet, and Claire Martin of Cabinet d'avocats Laffineur. Our heartfelt thanks go to the library staff of Villanova University Law School, particularly Amy Spare, Matthew McGovern, and Robert Hegadorn for responding so promptly to our research requests, and to Maureen Carver, Assistant Dean for Student Records and Registrar, for assisting us in determining the extent of interest in U.S. law schools in EU Law. We would be remiss not to mention also the Villanova EU Law classes of 2007 through 2010 for bearing with us as we worked our way through the materials and navigated the various iterations of what became the Treaty of Lisbon. Their contributions were invaluable in helping us figure out what worked and what didn't, and the book is again much improved as a result.

Shortly after his retirement as President of the European Court of Justice in 1988, Lord Mackenzie Stuart (now sadly departed this life) visited the United States as a Woodrow Wilson Fellow. John Murphy and I were honored to have the opportunity to host him on a visit to the various historic sites in Philadelphia, followed by a dinner and seminar at Villanova University Law School. He had become extremely interested in the parallels between the judicial decisions from the early days of the United States and those of the European Communities and was clearly intrigued by what he saw and heard in Philadelphia. At the seminar in the evening he was full of fascinating insights and also provided highly entertaining and colorful accounts of some of his judgments. He was a leading inspiration for our original project.

Two other European Court judges have honored us by contributing Forewords to the various editions of this work. Sir Christopher Bellamy, who served on the General Court from 1992 to 1999, contributed the Foreword to the first and second editions. Sir Konrad

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Schiemann, currently serving as a Judge at the Court of Justice, graciously agreed to provide the Foreword for this edition. We are indeed most grateful for their kind expressions of support and enthusiasm for our project.

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PREFACE

At the date of the first edition of this book, the European Union was "settling down", centered around a three-pillar structure: the European Community; the Common & Foreign Security policy and Justice Affairs and Home Affairs. The first pillar was based on the integration process among the Member States; the other two on cooperation between them. Integration and cooperation reflect the two ways the EU has always moved forward: the former being the area in which the Member States have abandoned most of their sovereignty, the latter being the area where they are the most reluctant to abandon it. There was general despondency that the new European Union had chosen the path of intergovernmental cooperation rather than integration.

How far we have come since then!

The Treaty of Amsterdam started the process of shifting TEU subject matter into the Community structure. After the subsequent rather disappointing Nice Treaty, the Member States took the more dramatic step of convening a process to rewrite the Treaties as a formalized Constitution, combining the Union and the Communities into one integrated structure, and indeed, a Constitution Treaty was signed. Although 18 Member States ratified it, the peoples of two of the six founding Member States rejected it in referenda. Was this, then, a rejection of the ideals of the Communities and the Union? Or was the Treaty a victim of other forces and worries that found a focal point for discontent? Would this turn of events set back the process of ever closer union for many years?

Whatever the reasons for rejection, the response of the Member States was relatively unequivocal. The process had to go to the next step if the Union were to be an effective force in dealing with the challenges of the twenty-first century and a membership that now stood at 27 states. Thus, in 2007, under the dedicated leadership of Germany as Chairman of the European Council, the practical and reforming elements of the Constitution Treaty were revived, shorn of the latter's more formal and controversial constitutional themes.

This effort resulted in the Treaty of Lisbon, which was eventually ratified by all Member States and came into effect on December 1, 2009. The creation of a single European Union based on the integrationist structure of the Community Treaties was achieved. With that came a remarkable degree of constitutional clarity, and this enabled us to create the constitutional template found in Chapter 1. The revisions to the organization of the book in this third edition reflect the structure of that template and at last enable an orderly, logical, and Treaty-based approach to the study of the Union's constitutional law.

Ironically, ever since the three-pillar structure was abandoned with the entry into force of the Lisbon Treaty, the EU's edifice has been shaking; threatened by the European sovereign debt crisis and the danger it is currently posing to the very existence of the Euro.

On September 28, 2011, the President of the European Commission, Mr. Barroso, said that the European governments could not be relied upon to lead deeper economic integration among Eurozone members and that "*For all this to work, we need more than ever the independent authority of the Commission.*" By this statement, Mr. Barroso not only attempted to reestablish his authority and that of the European Commission; he also

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expressed the wish of many Europeans for more integration in order to solve the economic and financial problems currently faced by the EU. There is no doubt that the development of the EU will continue to revolve around these two concepts of integration and cooperation. The question remains whether the balance will lean towards one more than to the other in the coming years. The likelihood seems to be that a "permanent" and enlarged European Financial Stability Facility will continue to be constituted outside the Union's structure, thus preserving the Member States' sovereignty over economic and fiscal policy. Were it to be otherwise, Europeans would finally have to confront the possibility of a fiscal union. Politically this is probably not feasible today. Yet, with the TEU history as a model, is it not likely that this instrument will eventually move into the Union structure and become a Union competence? This would be such a radical step that the citizens of Europe ought surely to be given their say: they would be asked, finally, whether they wish to be part of a "United States of Europe", and an entirely new chapter in European history would begin.

This is a fascinating, though tense, moment of history to live through. There is always the possibility that events will overpower the unity of the Euro, that it will unravel and along with it the Union as a whole. Yet the Communities and the Union have survived crises in the past only to emerge stronger. It is our belief that the internal momentum for unification and the external pressures compelling it will once again prevail.

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THE EUROPEAN UNION FROM THE PERSPECTIVE OF THE UNITED STATES: A MESSAGE TO AMERICAN READERS

Dear Readers,

Now more than ever the importance of a deep understanding of EU Constitutional Law to American legal students and practioners is critical. Having experienced over many years firsthand the vibrant business and economic relationship between the U.S. and Europe, I can resoundingly attest to the EU's predominant role as America's premier trade and investment partner.

Unparalleled in its depth and breadth, this bilateral partnership easily is described by superlatives: the largest, the most complex, the most profitable, the wealthiest, and the longest in duration. In fact, the transatlantic economic partnership is the key driver of global prosperity and does indeed represent the biggest, most integrated, and most enduring relationship in the world.

America and the European Union account for a solid 50 percent of the world's economy, generating $5 trillion in total commercial sales each year and employing nearly 15 million workers on both sides of the Atlantic. With 54 percent of the world's GDP in terms of value and 40 percent in terms of purchasing power, it is no exaggeration to reaffirm that the transatlantic business bonds are second to none.

Equally impressive, the U.S. and Europe are each other's primary source and destination for foreign direct investment and notwithstanding fiscal and financial challenges, rates of growth are showing solid increases: in the last 10 years, American companies placed about $1.3 trillion into European FDI locations, a figure that represents more than 60 percent of total U.S. FDI for that same period. In tandem, Europe's share of total U.S. FDI in 2010 was roughly 52 percent and that proportion is expected to continue with more than half of the top foreign investors by country into the U.S. coming from Europe. By contrast, value of EU investment assets in the U.S. is three times the amount of the combined value in the so-called BRIC countries (Brazil, Russia, India, and China).

In terms of trade, the U.S. takes the number one position for EU exports of goods (well over 20 percent) and also is in the number one position of imports of EU services with about double that value, i.e., about 40 percent. Overall, America and the EU are each other's most important commercial partners when it comes to services trade and investment. The U.S. and European services economies have never been as interwoven as now in financial series, telecoms, utilities, insurance, advertising, computer services, and other related activities.

Moreover, even with recent past and current financial tribulations, American and EU financial markets continue to account for well over two-thirds of global banking assets, three-quarters of global financial services, 77 percent of all private and public debt securities, and almost 80 percent of all interest-rate derivatives.

These preeminent commercial, investment, financial, and trade connections require preeminent legal counsel and support to maintain their vibrancy. Europe is now and is expected for the next few years to remain the most profitable region to do business in the world for American firms. U.S. foreign affiliate income earned in Europe rose to an estimated $196 billion for the latest reporting period available — a record high.

Using this casebook as a reference, study of EU constitutional and other legal provisions, case

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law, precedents, and relevant regulations will add immeasurably to your effectiveness as an attorney. With globalization's ever-strengthening reach, there is high probability that your clients will overwhelmingly want to do business with European companies. They, therefore, need American attorneys with knowledge of the European legal framework to ensure their success.

The Continent is frequently viewed as emblematic of centuries-old established borders, traditions, and precepts. However, the U.S. as a nation is much older than many of the modern nation-states we think of as iconic European: Italy, Ireland, the Czech Republic, Slovakia, and Belgium, just to name a few. The European Union in its present form has only been in existence for about 20 years (as of the time of this writing) and the euro as the single monetary unit was introduced as a functioning currency in daily use just a scant decade ago. Scanning today's headlines, we can safely say the "Union" is sometimes still more observed in its exception. Member states continue to exert tremendous autonomy and the resulting influence and effect, not only within Europe, but including in the U.S. and even worldwide, is unprecedented.

However, it is the shared affirmation and belief in common and deeply held values that will continue to infuse the transatlantic relationship with longevity and prosperity. These intersections of values complement the deeply interdependent transatlantic economy and the trust and confidence that have been created through the many collaborative years of trade and investment. Both partners are committed to the rule of law, the democratic process, and a free and fair market economy — all of which require attorneys with relevant competencies and expertise.

There is no doubt that the business and economic ties between the U.S. and Europe are second to none, and we share a common historical context, social traditions, and philosophical orientation that are reflected in some similar legal concepts as framework. However, despite these many commonalities, expectations and manner of doing business in each location are surprisingly different. Unlike their American counterparts, European business people are for the most part risk-averse, extremely loyal to local preference and are not as mobile as the average American worker. From a legal perspective, an interesting anomaly, one among many, is the American priority of security versus the European preference to favor privacy relating to sharing of, for example airline passenger and financial data and the tensions that are created when combating terrorism.

Thus, there is ample legal work to be accomplished in the transatlantic arena. Attorney services to protect and expand research and development, intellectual property rights, mergers and acquisitions, joint ventures, and strategic commercial alignments, and standardization in all manner of manufacturing and regulatory frameworks are just a few of the practice areas where clients will seek your counsel as they pursue access to lucrative European markets.

In conclusion, I cannot overemphasize the value of this text to those seeking to best advise clients seeking to engage in the competitive world of international business. I commend James Dinnage and Jean-Luc Laffineur for this impressive work. Today's world is truly a seamless universe. Therefore, even for those who believe they will focus their careers on areas only related to more local matters, familiarity with the issues presented here will serve them well.

Camille E. Sailer, Esq.

President

Board of Trustees

European American Chamber of Commerce — New Jersey/

Former Regional Commercial Counselor

Embassy of the United States of America in Brussels

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