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COMMERCIAL LAW OF THE EUROPEAN UNION

By Gabriël Moens and John Trone

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This splendid book performs the heroic task of introducing readers to the large canvas of the commercial law of the European Union (EU). The EU began as an economic community of six nations but has grown into 27 member states, sharing a significant political, social and legal cohesion and serving almost 500 million citizens. It generates approximately 30% of the nominal gross world product. The EU is a remarkable achievement of trans-national co-operation, given the history (including recent history) of national, racial, ethnic and religious hatred and conflict preceding its creation.

Although, as the book recounts, the institutions of the EU grew directly out of those of the European Economic Community, created in 1957 [1.20], the genesis of the EU can be traced to the sufferings of the second world war in half a century. And to the disclosure of the barbarous atrocities of the Holocaust. Out of the chaos and ruins of historical enmities and the shattered cities and peoples that survived those terrible events arose an astonishing pan-European Movement.

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At first, this movement was focused on a shared desire for a Charter of Human Rights for Europe, if not for the wider world[1]. In February 1949, the International Council of the European Movement approved a "Declaration of Principles of the European Union". Those principles observed that "no state should be admitted to the European Union which does not accept the fundamental principles of a Charter of Human Rights and which does not declare itself willing and bound to ensure their application"[2].

If the urgent challenge in Europe 60 years ago was to expiate events shocking to humanity, the ultimate objective was, as stated, to create a "European Union". Whilst economic progress was a pre-condition to healing the wounds of conflict, the founders of the European Movement recognised that something more than economic progress or even human rights institutions was required. The message of the "Congress of Europe" at The Hague in The Netherlands in May 1948 was addressed, over the heads of nation states, to the peoples of Europe. It recognised that intense practical, as well as moral, principles pointed toward a resolution of past history in the shape of a "European Union". Such a Union would be founded on economics; but it would be enlarged in popular imagination, by acceptance of friendship amongst the peoples of traditional enemies and by the creation of legal, economic, governmental, social and cultural links so that the cycle of war and inhumanity would be broken forever.

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[1] Hersch Lauterpact, *An International Bill of Rights of Man* (Columbia Uni Press, 1945); ibid, *International Law and Human Rights*, (2nd ed, 1950).

[2] Collected edition of the *Travaux Préparatoires*, vol.I, p.xxiii, introduction by A.H. Robertson. Cited Lord Lester of Herne Hill, Lord Pannick and Javan Herberg, *Human Rights Law & Practice* (3rd ed., LexisNexus, 2009), 6 [1.16].

One of the key actors in the earlier movement that brought together the federation of the British colonies of Australia in 1901 was Alfred Deakin. He declared that, to achieve the objective of a national constitution in Australia, a "series of miracles" was required[3]. Such were the rivalries between the isolated communities of settlers who had taken control of continental Australia from the indigenous peoples. A series of constitutional conventions of those settlers followed in the 1890s. At one stage, they even envisaged expansion of the new Commonwealth to embrace New Zealand as part of an Australasian nation. Although the New Zealand politicians eventually opted out, somehow, the waring Australian factions clung together. Presumably, every now and again, their disputes over free trade and protectionism and the carve-up of revenues and taxes were subjected to a reality check. In this way, a trans-continental antipodean nation was born.

If we compare the way the three English-speaking settler federations of the United States of America, Canada and Australia were created, it must be acknowledged that their paths to political union were infinitely simpler than those that confronted the founders of the EU. Although the USA was born in a rebellion against the British Crown, which had denied its settlers the rights that Englishmen enjoyed at home, and although all three federations continued to face conflicts (mainly with their indigenous peoples, and in the US, the Civil War over slavery and secession), the ties that bound the peoples in each of these nations were so much stronger than existed in Europe in 1945. The English language predominated both in official and domestic communications. Legal traditions of representative democracy, uncorrupted officials and

[3] A. Deakin quoted in D. Headon and J. Williams (eds) *Makers of Miracles*¸ Melbourne Uni Press, 2000, pp.v, xiii, 141.

independent courts afforded stable institutions on which to build national unity. Commonalities of religion and features of culture and history bound the several peoples of the USA, Canada and Australia together. These elements eventually helped to forge a strong national identity. Trade and commerce grew rapidly as an attribute of federal nationhood and flourished in an environment in which the law upheld contracts and protected competition.

In the Australian case, the creation of a continental common market was guaranteed by the express inclusion in the 1901 constitution of section 92. In uncompromising language, this provision guaranteed that “trade, commerce and intercourse among the States ... shall be absolutely free”. Those words presented difficulties to the courts which tried to accommodate the unbending language to the felt necessities of governmental regulation to advance reasonable social objectives. In time, the constitutional words were given a clearer explanation by the Australian courts[4]. Interestingly, recent judicial elaborations have concerned local attempts to regulate online gambling[5], a subject that has also arisen in the EU [3.120].

However, the circumstances in which these homogenous settler communities came together in federal political and economic unions were easily distinguishable from the circumstances that occasioned, and accompanied, the evolution of the EU. In this respect, the EU’s development to its present economic strength and support in popular imagination, depended on larger miracles, more frequently manifesting themselves.

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4 *Cole v Whitfield* (1988) 165 CLR 360 at 408.

5 *Betfair Pty Ltd v. Western Australia* (2008) 234 CLR 418.

This book is a story of how the institutions of the EU emerged, changed, adapted and developed. If it does nothing else but to reveal the complexity of the EU's institutional, legal, social and regulatory arrangements, that achievement will itself be notable. Many experts in Europe spend their busy days making, interpreting, applying, publicising and criticising the laws that are described in this book. However, most ordinary citizens of the EU probably get by with almost as little knowledge of EU law as do citizens in the countries that enjoy the strongest trading links with EU. This work is principally addressed to readers outside the EU. Most especially to the practising lawyers, judges and regulators in advanced economies whose work brings them into contact with a question involving (directly or by analogy) EU law.

It is impossible, in any of those countries, for a busy practitioner to master the entire network of legal regulations that govern economic, political and social activities at home. But it is the fate of the present generation of legal practitioners to live and work in a profession that is increasingly required to know the laws of other places. In my youth, this was truly exceptional. Indeed, most lawyers and judges could survive with a knowledge of their own sub-national legislation, to which were added the broad principles of the common law and an occasional federal statute or two. Now, that is changing. Contemporary practitioners of law (and especially those who must deal with international trade and commerce) need to be aware of trans-national legal regimes and the growing body of international law itself.

This explosion in the law makes, at once, for a more demanding life in achieving familiarity with of legal systems that may be different in

important respects from one's own. Yet, the positive side of this development is that it opens up employment and other opportunities that did not exist in earlier generations. The internet has come just in time to afford access to the vast and growing body of EU law, whose basic rules many modern non-EU legal practitioners will need to familiarise themselves with.

This book has many merits. Amongst the chief of them is that:

- It allows a non-expert, from outside the EU, to see the broad contours of EU commercial law, and to understand its categories and taxonomies;
- It affords copious references (many of the online) to permit the reader to dig more deeply and to explore aspects of EU law that may be relevant or interesting for particular purposes;
- It presents the material in the English language and with a proper mixture of broad concepts and fastidious detail. It also affords convenient summaries and conclusions in every chapter; collects questions for discussion in academic classes; and presents the whole in a style that brings home to the reader the frequent similarities of the economic, social and other problems with which the EU is grappling at the same time as such issues are arising at home; and
- For a reader from within the EU, the book has a double merit. It affords those who use it the same broad overview as is provided to those looking from outside the EU into the engine room of its legal system. It also provides, to some extent, a perspective of EU law, involving the special advantage of being written from the outside, not specifically from inside the citadel. It was the Scottish poet Robbie Burns who prayed that we should all be given the gift "to

see ourselves as others see us"[6]. For the EU lawyer, this book has such a merit, even though both authors approach their task with intense knowledge derived from inside experience.

There is an occasional hint in this text of impatience, even possibly exasperation, at the detail of European law when it reaches down to the *minutiae* of tiny problems of great specificity:

* Is the Swedish ban on alcohol advertising compatible with the free trade objectives of the EU? [2.100]
* Is a prohibition in Mrs. Thatcher's UK on the importation of inflatable German love dolls based on a "morality" exception or is it really an impermissible burden on trade and competition? [2.100]
* Is the provision of abortion for patients a "service" protected by EU rules? [3.160]
* How may the UK's disapproval of Scientology impinge upon the free movement of persons within the EU? [3.55]
* May an Italian plumber set up a shingle in Germany? [3.90]
* Should a British national, like his French partner, be allowed to sue for the death of their child outside France, and can the restriction of recovery to nationals be justified? [3.300]

In every chapter the authors plunge with unflagging energy into the vast collection of case law that the EU has produced, based on the ever-expanding collection of EU Treaty provisions, Regulations, Directives and Decisions. The enormity of the regulations is borne out by nothing more than a glance at the table of legislation at the front of the book. Yet the authors are not distracted by the sheer detail. Far from it. On

[6] Robert Burns, *To a Haggis*.

every page, they illustrate their taxonomies with countless instances. They never let the detail get them down.

The plain fact is that regulating a large and ever-growing economic market for such a substantial portion of the world's population, was never going to be a broad-brush enterprise. Especially was this so because of the predominance within the EU of the civil law tradition. That tradition, from the time of Napoleon's codifiers, tended to favour detailed regulation on all manner of subjects on the footing that the discretion of judges and other decision-makers was a form of tyranny. The codifiers' tradition grew out of the mistrust of the judiciary in royal France. The English judiciary, chosen in their maturity from senior members of the independent Bar, had often, historically, stood up for the liberties of the people. The common law system was therefore more content to enhance judicial powers and to trust such decision-makers with large leeways for choice. As parliamentary legislation has lately come to predominate in the countries of the common law, we have perhaps moved more closely to the civilian approach, with its tendency to great detail. The object is always to reduce the decision-maker to the "mouth of the law", as Montesquieu expressed it.

To anyone who complains about the detail of EU law, as described in this work, the answer that the authors inferentially give is: consider the alternative. We are dealing, after all, with regulations that will govern, in various degrees of detail, huge populations, countless corporations, all concentrated in a relatively small portion of the world's surface and in 27 member states. If the EU did not exist, the result would be an enormous cacophony of inconsistent legal regimes applied throughout Europe, with 27 different ways of tackling the same issue. This book, accordingly,

portrays a most telling point. It may describe a complex network of laws for economic and social regulation. But, to a large extent, EU law in the areas examined, has replaced national regimes that previously existed. The book may be concerned with a broad outline of legal rules of great particularity. Yet, in another sense, the creation of a single legal regime has substantially reduced disparities and inconsistencies in the law. It has done so with the acceptance of the over-arching principles of the primacy of EU law; of the principle of subsidiarity; and of the rule of proportionality [1.140], [2.125], [4.30].

I realise that the issue of federalism is still a highly sensitive one in the EU. One can master the details collected in this book without ever allowing that fateful word to cross one's mind (or if it does, to cross one's tongue). Yet, standing back from the detail collected here and looking at it from the outside and from above, as it were, there can be little doubt that a federation of sorts is emerging within the EU. The difficulty of getting politicians and people to address that fact candidly cannot be denied. The rejection in some countries of the common currency (*Euro*) is an indication of the resistance that still exists in parts of Europe to the displacement of the "sovereignty" of nation states and their parliaments. Likewise, the much publicised rejection of popular referenda, held to approve the ill-fated European Constitution of 2004, [1.50] reflected the lingering anxiety that exists about handing more power over to Brussels, or for that matter, to the EU's principal judicial organ, the European Court of Justice in Luxembourg.

For all of these hesitations, the features of a kind of federation seem clear enough in these pages. They include shared institutions, reflecting the traditional branches of government. They extend to organs for

making EU-wide law, in a fields assigned to the Union. They are reflected in the common economic market that has been created. And, as well, there is a growing popular appreciation, in many EU countries, about the social advances that must come in the train of economic ones.

In every acknowledged federation, there are debates and conflicts in Europe over the powers that should be ceded to the centre and those that should be retained by the constituent parts. In keeping with most federations in the modern world, the tendency in Europe has been towards the accretion of more power to the centre[7]. Arguments of efficiency, economy and rationality are commonly advanced in favour of this centripetal movement. Yet there remain strong voices defending the merits, on some topics at least, of retaining local regulation of specific subjects about which local people feel most strongly. So it is in Europe.

Until the EU, its institutions and peoples, feel confident enough and sure enough of their Union to discuss the unmentionable "F" word, there will remain constitutional deficiencies in Europe that are hinted at throughout this book. The enormous detail of the EU regulations described here will then be recognised as far from the chief problem which the EU 'federation' presents to the peoples living within in borders. In the member states, there are regular elections. Periodically the electors throw out their national governments. They elect new leaders. They thereby impose the cleansing effect of democracy that reaches down into the civil service and keeps it on its toes.

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7 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 224 [611].

There are elections for the European Parliament. However, the larger a political unit becomes, the greater is the risk of a democratic deficit[8]. That risk is clearest of all in the context of the United Nations Organisation. Although the *Charter* of the UN is expressed to be made in the name of the "Peoples of the United Nations", in truth it is, as its name suggests, a collection of Nations. The democratic accountability of those who make its treaties and other laws is, at most, highly indirect.

The democratic checks and controls that exist in the EU are less developed than those that operate in the member states, however, imperfect these may be. In part, this deficit may have been tolerated until now because of the pretence that the EU was nothing more than a technical body, looking after the economy. However, when one reads this book, even an otherwise unfamiliar reader will come quickly to the conclusion that what began in economics now expands into many attributes of social regulation. To some extent, this expansion is overt, as in the adoption of rules against immaterial discrimination [10.55] [10.85]. In other cases, it is simply a consequence of the operation of economic facts upon notions of the way in which a contemporary and just society should operate [10.120].

The issues of the future of the emerging European federation may still be too sensitive for open popular and political debate in the diverse societies that constitute the EU. Still, the day will come when that debate will arrive. The ever-expanding detail of the EU regulations, described in this book, make that day inevitable. So does the growing role played by the EU in international affairs, not least in matters of world trade.

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[8] Alfred C. Aman Jr, *The Democracy Deficit*, NYU Press, New York, 2004, 162.

Eventually too, the present division between the functions of the European Court of Justice and of the European Court of Human Rights will require rationalisation. The Court of Justice has improved the persuasive force of its reasoning in recent decades by embracing the less "cryptic", conclusory style of explaining its opinions and by utilising the more rhetorical and discursive style familiar to the common law [11.20]. The logical extension of this reform is the provision to the judges of the Luxemburg court of the facility, enjoyed at Strasbourg, to publish dissenting opinions when this is considered relevant and appropriate. Transparency should be the watchword of modern governmental institutions, particularly in the courts. The civil law prohibition on this liberty is just one of the institutional changes needed to improve democratic accountability within the EU. Yet it may not come about until a substantial popular discussion is commenced concerning the democratic deficit and the ways in which the EU institutions can be made more immediately accountable to the people whom they govern in the detailed ways described in these pages.

These are large politico-philosophical questions. Perhaps prudently, the authors steer around them. Yet to anyone living in a federation, such questions are the stuff of daily political debates. To anyone living in a federation, the EU looks like one; but it is a federation that, as yet, dares not speak its name.

The authors are to be congratulated for assembling and organising this compilation of information on EU law. Their work will be precious to practitioners who take their first steps into the unknown territory of EU law. It will be useful to scholars and teachers, because younger lawyers

today are increasingly engaged with the world about them and they need to be instructed intensively in regional and international law. As this books shows, the EU has often been an important source of global stimulus to new perceptions of basic rights, as in the field of human sexuality [10.120] or in the growing debates over the protection of animal and plant life and biodiversity [2.100].

That so much has been achieved for the governance of so many, living in societies of so much historical animosity is remarkable. The fact that it has occurred in such a short time constitutes a mighty human achievement. That the EU has evolved with a high level of acceptance by the people, parliaments and societies of Europe is undoubtedly a kind of miracle, given the many languages that are spoken [11.74]; the differing stages of economic development reached; and the distinct religious, cultural and social traditions observed. By collecting the material; organising it so skilfully; presenting it so clearly; and summarising it so succinctly, the authors have also worked a kind of miracle. Their efforts will be appreciated by legal practitioners, judges, scholars and teachers within and outside the EU because they have made the essence of EU commercial law available in a single book.

It is my hope that this book will also enhance the utilisation of EU law in other countries and legal traditions, including my own. On every page, we have an explanation of how the EU tackles questions that are coming before the courts, officials and judges of other countries at the same time. As the authors show, there is much wisdom to be gleaned from the way the EU tackles such problems. We who are outside Europe should be more aware of that wisdom. This book provides a key to

unlock what has, until now, largely been unknown and unused save for a few experts in the field.

Sharing the wisdom of law from other places is itself a contribution to peace and justice in the world. Which I take to have been amongst the original objectives as a result of which the EU emerged from the ashes of war and the horrors of genocide. When law replaces war for such a large portion of humanity, we need to know it, to admire it and to learn from it.

Sydney
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